



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



3 3433 07594424 3



V.2

1
ST

A TREATISE
ON THE
LAW OF MUNICIPAL CORPORATIONS

VOLUME TWO

COMMENTARIES
ON THE LAW OF
MUNICIPAL CORPORATIONS.

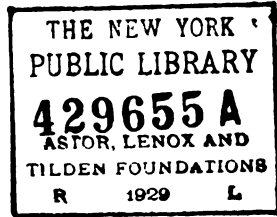
BY
JOHN F. DILLON, LL.D.,
AUTHOR OF "THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA"; PRESIDENT OF
THE AMERICAN BAR ASSOCIATION, 1891-1892; FORMERLY CIRCUIT JUDGE OF THE
UNITED STATES FOR THE EIGHTH JUDICIAL CIRCUIT; CHIEF JUSTICE
OF THE SUPREME COURT OF IOWA, AND PROFESSOR OF
LAW IN COLUMBIA UNIVERSITY.

FIFTH EDITION,
THOROUGHLY REVISED AND ENLARGED.

IN FIVE VOLUMES.

VOL. II.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1911.



Entered, according to Act of Congress, in the years 1872, 1873, 1881,

By JOHN F. DILLON,

In the Office of the Librarian of Congress, at Washington.

Copyright, 1890, 1900, 1911,

By JOHN F. DILLON.

NOV 1920
LIBRARY
YASSEL

Printed

S. J. PARKHILL & Co., BOSTON, U. S. A.

CONTENTS

[In designating the sections it has been found convenient to omit numbers at the end of each chapter.]

CHAPTER XII

§§ 460-489. AMOTION OR REMOVAL OF OFFICERS . Pages 779-823

§ 460. Amotion and Disfranchisement; the Two distinguished; English Decisions as to Disfranchisement inapplicable in this Country	779
§ 461. Disfranchisement; English Doctrine not applicable here	780
§ 462. Amotion; <i>Rex v. Richardson</i>	781
§ 463. Where Power of Amotion resided in Old English Corporation . . .	781
§§ 464, 465. Power of Amotion in this Country	782, 783
§ 466. Administrative Nature of Power to remove	784
§ 467. Nature of the Administrative Power to remove	785
§ 468. Power to amove to be strictly pursued	787
§ 469. Power of Expulsion for Specified Causes construed	788
§ 470. Power to expel construed and limited	789
§ 471. Re-election of Expelled Members of Council	790
§ 472. Instance of Implied Power of Removal for Cause by the Appointing Power	790
§ 473. Removal; when Notice and a Hearing are required	791
§ 474. Limitations of Power to remove not requiring a Hearing	793
§ 475. Incidental Power to remove for Cause; <i>Rex v. Richardson</i> . . .	796
§ 476. Scope of Implied Power of Removal	797
§ 477. What is Cause for Removal	798
§ 478. What constitutes a Removal under the Statutes	802
§ 479. Abolition of Office or Position is not a Removal	805
§ 480. Proceedings to amove	808
§ 481. Notice of Proceeding to amove	808
§ 482. The Charges must be formulated; Opportunity to defend	810
§ 483. Constitution of Trial Board; Disqualification of Removing Power	812
§ 484. Power of Courts to review Removal for Cause	815
§ 485. Effect of Valid Amotion; Vacancy	816
§ 486. <i>Mandamus</i> ; Discretionary Acts	816
§ 487. <i>Mandamus</i> ; Wrongful Removal	818
§ 488. <i>Certiorari</i>	821
§ 489. Actions by Taxpayers	822

CHAPTER XIII

§§ 500-541. CORPORATE MEETINGS Pages 824-875

§ 500. Common-Law Requisites of a Valid Corporate Meeting	824
§ 501. Corporate Meetings	825
§§ 502, 503. Requisites of a Valid Corporate Meeting of the Old English Municipal Corporations	826

	Page
§ 504. Notice of Corporate Meetings at Common Law, and under the English Municipal Corporations Act	827
§ 505. Requisites of Notice at Common Law; Time and Place; Waiver	828
§ 506. Notice under English Act	828
§ 507. New England Town Meetings; Notice and Adjournment	829
§ 508. Requisites of Notice of Town Meeting; Object of Meeting	830
§ 509. Specification of Object of Town Meeting	832
§ 510. Power to adjourn Town Meeting	832
§ 511. Constitution of Meetings of Councils or Select governing Bodies	833
§ 512. Mayor's Presence and Function	834
§§ 513, 514. Status of Mayor as Member of Council	834-838
§ 515. Constitution of Council	839
§ 516. Proper Corporate Body must act	840
§ 517. Injunction where two Conflicting Municipal Bodies are concurrently acting	840
§ 518. Acts of <i>de facto</i> Councils and Officers	841
§ 519. Appointment to Office by <i>de facto</i> Council or Board	844
§ 520. Action by Indefinite Body; Majority Present may act	844
§ 521. Quorum and Majority of Definite Body	845
§ 522. Extent of the Majority Principle	847
§§ 523-525. Illustrative Instances	849, 850
§ 526. Excessive Number of Votes	850
§ 527. Effect of Refusal to vote	851
§ 528. Effect of casting Blank Ballot	855
§ 529. Elections or Appointments to Office by Council	856
§ 530. Charter Provisions requiring Majority of Whole Body	860
§ 531. Application of Majority Principle to Joint Assemblies	863
§ 532. Stated and Special Meetings; Constructive Notice of Stated Meetings	864
§ 533. Notice of Special Meetings; how given	865
§ 534. Notice how given and how waived	866
§ 535. Adjournment of Meetings	867
§ 536. Mode of Proceeding when convened	869
§ 537. Committees of Council	869
§ 538. Presumption of Regularity	870
§ 539. Right to rescind Previous Acts	871
§ 540. Charter Requirement of Vote by Ayes and Nays	872
§ 541. Acts by less than Quorum Void	874

CHAPTER XIV

§§ 550-562. CORPORATE RECORDS AND DOCUMENTS —

CUSTODY — RIGHT OF INSPECTION Pages 876-890

§ 550. Power to appoint Clerk <i>pro tem.</i>	876
§§ 551, 552. Amendment of Record	877, 878
§ 553. Right of Clerk to amend Records <i>ex parte</i>	878
§ 554. When Record amended, and by whom	880
§§ 555, 556. When Parol Evidence Admissible, and when not	881, 882
§§ 557, 558. Proof of Omitted Facts by Parol	883-885
§ 559. <i>Mandamus</i> to enforce Delivery of Corporate Books and Records; Replevin	885
§ 560. Inspection of Records and Papers	886
§ 561. Records as Evidence for the Corporation	887
§ 562. Evidential Force of Committee's Report	889

CHAPTER XV

§§ 570-650. ORDINANCES AND BY-LAWS	Pages 891-992
§ 570. Definition	892
§ 571. Resolutions and Ordinances distinguished	893
§ 572. When an Ordinance is Necessary	896
§ 573. Authority delegated to Municipalities; Nature of Ordinances	901
§ 574. Authority of Boards of Health and other Administrative Boards to adopt Rules and Regulations	903
§ 575. Ordinances must be adopted by Proper Body and in the Prescribed Mode	904
§ 576. Mandatory Requirements as to Procedure	905
§ 577. "Only One Object which shall be expressed in the Title", ...	908
§ 578. Approval of Mayor	910
§ 579. Evidence of Adoption of Ordinances	913
§§ 580, 581. Motives for adopting Ordinances not Subject to Judicial Inquiry	914, 915
§ 582. Jurisdiction of Equity to enjoin Enactment of Invalid Ordinances	915
§ 583. Legislative Officers are not personally Liable for Adoption of Ordinances	918
§ 584. Duration and Repeal of Ordinances	919
§ 585. Mode of conferring the Power; Construction of Grants of Authority	921
§ 586. Special and General Grants of Authority	921
§ 587. Ordinances cannot enlarge or change the Charter or Statute	922
§ 588. Ordinance need not recite Authority to pass it	923
§§ 589, 590. Must be Reasonable and Lawful	924-927
§ 591. When Ordinance will be deemed Unreasonable	928
§ 592. Must not be Oppressive	929
§ 593. Must be Impartial, Fair, and General	930
§ 594. May regulate, but not restrain, Trade	931
§ 595. Customs in Restraint of Trade	932
§§ 596, 597. Must not contravene Common Right	933, 934
§ 598. Ordinances conferring Discretionary Powers on City Officers	934
§ 599. Validity is for the Court, and not the Jury, to determine	941
§ 600. Legislative Authority to adopt what would otherwise be Unreasonable Ordinances	943
§§ 601, 602. Must be Consistent with Public Legislative Policy	944
§ 603. When Publication is required	945
§ 604. Alternate Modes of Publication	946
§ 605. Time and Method of Publication	947
§ 606. Proof of Publication	948
§ 607. Signing and recording Ordinances	949
§ 608. Common-Law Principles adopted	950
§ 609. Statutory Regulation of Fines and Penalties under Ordinances	951
§ 610. Implied Power to annex Pecuniary Penalties	952
§§ 611, 612. Charter Mode governs	953, 954
§ 613. Penalty may be within fixed Limits	954
§ 614. Single Offence cannot be made Double	955
§§ 615, 616. Limitation of Amount of Penalties	955, 956
§ 617. Power of Forfeiture must be expressly conferred	956
§ 618. Power to fine does not include Power to Forfeit	957
§ 619. Judicial Procedure Necessary in Some Instances	958
§§ 620, 621. Forfeiture of Animals at Large; Notice; Legal Proceedings	958, 959
§§ 622, 623. Same Subject; Notice	959, 960

	Page
§ 624. Equity will not ordinarily relieve against Valid Forfeiture	961
§ 625. Power to enforce by Imprisonment must be expressly given	961
§ 626. Power to impose Costs as Part of Penalty	962
§§ 627, 628. Who bound	963
§ 629. Notice	964
§§ 630, 631. Distinction between Laws and By-Laws; Concurrent Prohibitions, &c.	965, 966
§ 632. Author's Conclusions	967
§ 633. Ordinances denouncing Statutory Offences	970
§§ 634, 635. In England; Civil Actions and Complaints	973, 974
§ 636. Same Subject; In America	975
§ 637. Nature of Proceeding, Civil or Criminal	976
§ 638. Same Subject; In Massachusetts	978
§ 639. Mode of pleading Ordinances	979
§§ 640, 641. Requisites of Complaints	981, 982
§ 642. Action in Corporate Name; Prescribed Method to be strictly followed; Demand; Notice	982
§ 643. Mode of Procedure, Defences, Evidence, &c.	983
§ 644. Corporate Existence not to be questioned in such Actions	984
§ 645. Ratification of Illegal Ordinances by Legislature	984
§ 646. Ordinances to be construed reasonably	984
§ 647. Ordinances Void in Part	986
§ 648. Proof of Ordinances	988
§ 649. Presumption of Validity	989
§ 650. Injunction against Enforcement of Ordinances	989

CHAPTER XVI

§§ 660-731. ORDINANCES EXERCISING THE POLICE POWER

Pages 993-1114

§ 660. Subject outlined	994
§ 661. Nature of License Power	994
§§ 662-664. Same Subject; Regulation of Occupations	997-1000
§ 665. Scope of Power to regulate	1000
§ 666. Scope of Power to regulate Occupations	1005
§ 667. Right must be plainly conferred	1009
§ 668. Monopolies Invalid	1010
§ 669. Intoxicating Liquors	1011
§ 670. Effect of General Laws respecting the Liquor Trade	1012
§ 671. Power to license Sale of Liquor under the General Welfare Clause .	1013
§ 672. Regulation of Saloons, &c., under General Welfare Clause	1015
§ 673. Intoxicating Liquors; Power to prohibit Sale	1015
§ 674. Same Subject; Power to regulate	1017
§ 675. Same Subject; Qualifications of Dealers	1020
§ 676. Same Subject; License Fees	1021
§ 677. Health Ordinances	1022
§ 678. Removal and Disposal of Garbage and Refuse Matter	1023
§ 679. Removal and Disposal of Carcasses of Animals	1029
§ 680. Quarantine Regulations	1030
§ 681. Hospitals	1031
§§ 682, 683. Cemeteries and Burials	1032-1034
§ 684. Nuisances, and of the Power to prevent and abate	1034
§ 685. General Power over Nuisances	1039
§ 686. Suppression of Houses of Ill-fame	1041

CONTENTS

ix

	Page
§ 687. Nuisances upon Rivers within City Limits	1042
§ 688. Power to demolish; Indictment	1042
§ 689. Extent of Authority over Nuisances	1043
§ 690. Scope of Power to abate Nuisances	1044
§ 691. Slaughter-Houses	1048
§ 692. Stables	1049
§ 693. Keeping Hogs and Swine	1050
§ 694. Suppression of the Smoke Nuisance	1051
§ 695. Regulation of the Use and Control of Private Property	1056
§ 696. Regulation of Height of Buildings	1062
§ 697. Regulation of Signs and Bill Boards	1064
§ 698. Regulation of Tenement Houses	1069
§§ 699-704. Markets; Power to establish and regulate	1072-1075
§ 705. Construction of Special Powers in Relation to Markets	1076
§ 706. Market Stands in Streets	1078
§ 707. Power to tax Marketmen must be plainly conferred	1079
§ 708. Power to regulate Markets is a Police Power	1080
§ 709. Inspection Ordinances	1080
§§ 710, 711. Weighing	1082
§ 712. Police Regulations respecting the Public Peace and Safety; Use of Streets	1083
§ 713. Same Subject; Salutory By-laws	1085
§ 714. Use of Streets; Regulation of Automobiles	1086
§ 715. Use of Streets for removing Buildings	1089
§ 716. Ordinances regulating the Speed of Trains	1090
§ 717. Regulation of Operation of Railroads	1092
§ 718. Ordinances under Police Power and General Welfare Clause	1094
§ 719. Observance of the Sabbath	1095
§ 720. Limitation of Power under the General Welfare Clause	1096
§ 721. Shade Trees in Streets	1096
§ 722. Vagrants; Powers under Authority to regulate the Police	1099
§ 723. Strays	1100
§ 724. Regulation of Dogs	1100
§ 725. Power under Authority to preserve Good Order, &c.	1103
§ 726. Storage of Gunpowder	1103
§ 727. Public Safety; Fire Limits	1103
§ 728. Same Subject; Hoistways	1108
§ 729. Preservation of Order	1109
§ 730. Gaming and Gambling Houses	1109
§ 731. Billiards and Pool Tables; Bowling Alleys	1113

CHAPTER XVII

§§ 740-758. MUNICIPAL COURTS	Pages 1115-1136
§ 740. At Common Law	1115
§ 741. Jurisdiction; Parties; Jurors	1115
§ 742. Existing Borough Courts	1116
§ 743. Introductory Observations	1116
§ 744. Creation, Jurisdiction, and Powers	1117
§ 745. Summary Trials for Violations of Ordinances	1121
§ 746. How and in what Name prosecuted	1121
§ 747. Constitutional Limitations on Jurisdiction; Powers	1122
§ 748. Municipal Judges, Jurors, and Witnesses	1123
§ 749. Summary Procedure; Jury Trial	1125

	Page
§ 750. Magna Charta; The Fourteenth Amendment	1126
§§ 751-755. Criminal Charges; Jury Trial	1130-1132
§ 756. Where the Right of a Jury Trial is given by Appeal	1132
§§ 757, 758. Revisory Power of the Superior Courts; Review of Proceed- ings by Superior Tribunals	1134-1136

CHAPTER XVIII

§§ 770-832. CONTRACTS	Pages 1137-1282
§ 770. Subject outlined	1137
§ 771. Extent of Power to make Contracts, and how conferred	1138
§ 772. Contracts with Municipal Officers; Fiduciary Relations	1140
§ 773. Same Subject; Disqualifying Interest; Resulting Invalidity	1143
§ 774. Contracts to influence the Deliberations and Determinations of Public Bodies and Officers	1150
§ 775. Powers of Public Agents and Officers to make Contracts	1153
§ 776. Contracts in Respect of Drainage	1153
§ 777. Implied and Incidental Powers; Market Powers; All Persons bound to take Notice of Extent of Corporate Powers	1154
§ 778. Fraud in the making of the Contract	1156
§ 779. Fraud — Taking Advantage of Ignorance or Carelessness of Municipal Officers	1160
§ 780. Fraud and Mistake; Misrepresentations by Municipal Officers	1162
§ 781. Combinations among Bidders	1165
§ 782. Scope of Power to contract	1168
§ 783. Mode of exercising the Power	1169
§ 784. Seal not Necessary; How concluded	1172
§ 785. Contracts made by Agents; Mode of Execution	1173
§§ 786, 787. Same Subject; Illustrations	1175
§ 788. Action must be Corporate, not Individual	1176
§ 789. Specialty Contracts	1177
§ 790. Statutory Requirement of a Previous Appropriation	1177
§ 791. Contracts in Excess of Corporate Power; <i>Ultra Vires</i> as Defence	1178
§ 792. Contracts <i>Ultra Vires</i> or Invalid	1182
§§ 793-795. Implied Contracts	1184-1187
§ 796. Contracts; <i>Ultra Vires</i> ; Assumpsit	1189
§ 797. Ratification of Unauthorized Contract	1190
§§ 798, 799. Assent and Ratification	1193, 1194
§ 800. Estoppel to plead Unconstitutionality of Statute; Ohio Cases	1195
§ 801. Letting to the Lowest Bidder	1197
§ 802. When Competition is Impossible or Unavailing	1199
§ 803. Patented Inventions	1204
§§ 804, 805. Proprietary Articles; Monopolies	1208-1210
§ 806. Lowest Bidder; Exclusive Right	1210
§ 807. Necessity for and Sufficiency of Specifications	1211
§ 808. Stipulations as to Hours of Labor, Wages, and the Employment of Union Labor	1215
§ 809. Necessity and Sufficiency of Advertisement	1219
§ 810. Opening Bids; Awarding the Contract	1220
§ 811. Acceptance and Rejection of Bids	1222
§ 812. When Contract completed	1225
§ 813. Extra Work	1225
§ 814. Contracts of Suretyship	1232
§ 815. Authorized Contracts; Rights and Liabilities	1233

CONTENTS

xi

	Page
§§ 816-819. Power to contract illustrated	1234, 1235
§ 820. Modification of Contracts	1235
§ 821. Settlement of Disputed Claims, &c.	1238
§ 822. Power to arbitrate Claims	1240
§ 823. Performance of Work to Satisfaction of Engineer	1241
§ 824. Contracts with Attorneys	1243
§ 825. Contracts for Local Improvements	1247
§ 826. Consent of Property-owners	1249
§ 827. Liability of City if Contract Price is payable from Assessment	1250
§ 828. Corporate Control by Stipulation	1259
§ 829. Stipulations by Contractor to maintain Pavements in Repair	1260
§ 830. Bonds of Contractors — Statutory and Common Law	1263
§ 831. Claims of Subcontractors, Laborers, and Materialmen — Statutory Liens	1271
§ 832. Assignment of Contract	1276

CHAPTER XIX

§§ 850-867. WARRANTS ON MUNICIPAL TREASURY Pages 1283-1322

§ 850. Defined	1283
§ 851. Power to issue	1284
§ 852. Statutory Requirements as to Form	1287
§ 853. Payment and Cancellation of Warrants	1289
§ 854. Right of Action on Warrants	1290
§ 855. Presumption of Validity and Liability	1294
§ 856. Negotiability; Rights of <i>Bona Fide</i> Holders	1294
§ 857. Defences; Estoppel	1296
§ 858. Transfer and Assignment; Equities between Successive Holders	1298
§ 859. Order of Payment	1302
§ 860. Warrants Payable out of a Particular Fund	1304
§ 861. Power to call in Warrants for Examination, Cancellation, and Reissue	1308
§ 862. Subrogation of Holder of Void Warrants to Debt	1308
§ 863. Statutory Provisions making Warrants Receivable for Municipal Taxes and Debts	1309
§ 864. Liability of Municipal Officers for Misfeasance	1310
§ 865. Limitation of Actions on Warrants	1311
§ 866. <i>Mandamus</i> to issue Warrants	1314
§ 867. Interest on Corporate Indebtedness	1317

CHAPTER XX

§§ 870-961. MUNICIPAL BONDS Pages 1323-1552

§ 870. Evidences of Indebtedness; Negotiable Bonds	1324
§ 871. Municipal Bonds	1324
§ 872. Implied Power to borrow Money and issue Commercial or Nego- tiable Paper considered	1325
§ 873. Incidental Power to give Acknowledgment of Debt	1327
§ 874. Implied Power to issue Negotiable Securities; Decisions of United States Supreme Court	1330
§ 875. Decisions of State Courts denying General Implied Power to issue Negotiable Bonds	1336

	Page
§ 876. Implied Power to issue Negotiable Securities; Indiana	1344
§ 877. Power to make Negotiable Paper implied from Power to borrow, &c.	1345
§ 878. Same Subject; the Author's Conclusions	1348
§ 879. Such Bonds are Negotiable Securities	1350
§ 880. Negotiability; Form of Bond; Condition	1352
§ 881. Different Classes of Bonds; Implied and Express Power to issue	1353
§ 882. Power to issue Bonds includes the Power to make them Negotiable	1356
§ 883. Construction of Express Power to issue Bonds	1357
§ 884. Taxation limited to Public Purposes; What are such?	1363
§ 885. Bridges as Works of Internal Improvements; Validity of Bonds issued therefor	1365
§ 886. Law of Municipal Bonds in Federal Courts	1367
§ 887. Issues of Bonds by Corporations and Officers <i>de facto</i>	1368
§ 888. Statutory Requirements as to Execution, Authentication, and Delivery of Bonds	1370
§ 889. Compliance with Statutory Requirements Essential	1375
§ 890. Statutory Requirements; Statement of Purpose of Issue	1379
§ 891. Statutory Requirement of Popular Vote	1380
§ 892. Form; Medium of Payment	1386
§ 893. Improvement Bonds Payable from Assessment only	1387
§ 894. Coupons	1396
§ 895. Sale and Disposal of Bonds	1398
§ 896. <i>Lis pendens</i> not Applicable	1402
§ 897. Course of Decision in the Supreme Court of the United States	1402
§ 898. Decisions of State Courts as Precedents in Federal Courts	1404
§ 899. Rule in Federal Courts when Decisions of State Courts are con- flicting	1408
§ 900. Railway Aid Bonds	1412
§ 901. Iowa Municipal Bond Cases	1413
§ 902. When Bonds are deemed to be "issued"	1413
§ 903. General Results stated	1414
§ 904. Conditions Precedent to Exercise of Power; Popular Vote; Recital	1415
§ 905. Estoppel by Recital to show Non-compliance with Conditions Pre- cedent; <i>Knox County v. Aspinwall</i>	1416
§ 906. <i>Knox County v. Aspinwall</i> considered	1417
§ 907. Comments on <i>Knox County v. Aspinwall</i>	1418
§ 908. Author's Statement of Rule	1421
§ 909. Qualification of Last Section by Supreme Court	1422
§ 910. Estoppel by Recital; Failure to give Notice of Election	1424
§ 911. Condition Precedent; <i>Onus probandi</i> ; Estoppel by Recital	1427
§§ 912-914. Estoppel by Recital to set up Defence of Over-issue	1429-1433
§ 915. Estoppel by Recital of Matter of Fact; <i>e. g.</i> , Date of Subscription	1434
§ 916. <i>Rationale</i> of Estoppel	1435
§§ 917-921. Estoppel by Recitals; Illustration	1437-1441
§ 922. Constitutional Limitations of Indebtedness; When Estoppel will not be implied	1442
§ 923. Constitutional Limitations of Indebtedness; Circumstances under which Estoppel will be implied	1448
§ 924. Constitutional Limitations of Indebtedness; Result of the Deci- sions	1453
§ 925. Estoppel by Recitals; Constitutional Requirement of Levy of Tax to pay interest and Principal	1458
§ 926. Result of Federal Decisions as to Recitals	1460
§ 927. When Officer will be deemed to have Authority to make Recital	1464

CONTENTS

xiii

	Page
§ 928. Sufficiency of Recital to import Compliance with the Law . . .	1469
§ 929. Of Recital as Essential to Estoppel	1472
§ 930. Estoppel by Recital Available only to <i>Bona Fide</i> Purchaser . . .	1473
§ 931. Who are <i>Bona Fide</i> Holders?	1474
§ 932. Estoppel; Genuineness of Official Signature	1477
§ 933. Lack of Power may be shown notwithstanding Recitals	1479
§ 934. <i>Bona Fide</i> Holders are not affected by Illegal Disposition of Con- sideration for Issue	1481
§ 935. How far <i>Bona Fide</i> Holder is Chargeable with Notice of Terms of Recited Ordinances	1483
§ 936. Recital of Wrong Statute	1485
§ 937. Estoppel to deny Compliance with Conditions to be performed subsequent to making but before Delivery	1486
§ 938. Judgment or Determination as to Right to issue Bonds	1491
§ 939. Refunding Bonds	1492
§ 940. Refunding Bonds; Estoppel to deny Validity of Original Debt .	1499
§ 941. Other Grounds of Estoppel	1507
§ 942. What constitutes Completed Subscription or Contract to subscribe	1508
§ 943. Same Subject; Annulment of Power by Constitutional Provision	1509
§ 944. Same Subject; Mode of Subscription; When Subscription Com- plete	1511
§ 945. Same Subject; Completed Subscription; Effect of Consolidation of Railway Companies	1514
§ 946. Valid Legislative Act Necessary	1516
§ 947. Registration of Bonds	1519
§ 948. Retrospective Statutes validating Railway Subscriptions and Bonds	1524
§ 949. Want of Power always a Defence	1528
§§ 950, 951. Laches; Acquiescence; Payment of Interest, &c.	1529
§ 952. General Summary of Doctrine of Supreme Court as to Estoppel by Recitals	1531
§ 953. State Court Decisions; Power to issue Bonds; Conditions Pre- cedent	1533
§§ 954, 955. State Court Decisions; Conditions Precedent	1535, 1536
§ 956. Estoppel by Recitals; Rule in New York	1537
§ 957. Estoppel by Recitals; Rule in Missouri	1542
§ 958. General Results stated	1543
§ 959. Defences; Waiver of Irregularities	1544
§ 960. Where Lost or Stolen	1545
§ 961. Void Bonds; Actions to recover Consideration	1547

THE LAW OF MUNICIPAL CORPORATIONS

CHAPTER XII

AMOTION OR REMOVAL OF OFFICERS

	Section		Section
Amotion and Disfranchisement; the Two distinguished; English Decisions as to Disfranchisement inapplicable in this Country	460	Removal; when Notice and a Hearing are required	473
Disfranchisement; English Doctrine not applicable here	461	Limitations of Power to remove not requiring a Hearing	474
Amotion; <i>Rex v. Richardson</i>	462	Incidental Power to remove for Cause; <i>Rex v. Richardson</i>	475
Where Power of Amotion resided in Old English Corporation	463	Scope of Implied Power of Removal	476
Power of Amotion in this Country	464, 465	What is Cause for Removal	477
Administrative Nature of Power to remove	466	What Constitutes a Removal under the Statutes	478
Nature of the Administrative Power to remove	467	Abolition of Office or Position is not a Removal	479
Power to amove to be strictly pursued	468	Proceedings to amove	480
Power of Expulsion for Specified Causes construed	469	Notice of Proceeding to amove	481
Power to expel construed and limited	470	The Charges must be formulated; Opportunity to defend	482
Re-election of Expelled Members of Council	471	Constitution of Trial Board; Disqualification of Removing Power	483
Instance of Implied Power of Removal for Cause by the Appointing Power	472	Power of Courts to review Removal for Cause	484
		Effect of Valid Amotion; Vacancy	485
		<i>Mandamus</i> ; Discretionary Acts	486
		<i>Mandamus</i> ; Wrongful Removal	487
		Certiorari	488
		Actions by Taxpayers	489

§ 460 (238). **Amotion and Disfranchisement; the Two distinguished; English Decisions as to Disfranchisement inapplicable in this Country.**—The elementary works treat of Amotion and Disfranchisement together: indeed, formerly, the important distinction between the two was not observed. Amotion relates alone to *officers*; disfranchisement, to *corporators or members* of the corporation. Amotion, therefore, is the removal of an officer in a corporation from his office, but it leaves him still a member of the corporation. Disfranchisement is to destroy or take away the franchise or right of being any longer a *member* of the corporation.¹ American municipal

¹ 2 Kyd, 50-94; Willc. 245-276; 250, 263. And see 2 Kent Com. 278, Glover, chap. xvi. pp. 327, 328; Grant, 297, where amotion and disfranchise-

corporations are, in many respects, essentially different in their constitution from the old English municipal corporations, under which most of the cases on the subject of amotion and disfranchisement usually cited in the books arose. These cases, especially those relating to disfranchisement, are, in general, inapplicable here, and should, it is believed by the author, be followed by our courts as precedents with unusual caution, and only when they rest upon or declare principles general in their nature, and which embrace in their operations municipal institutions possessing the distinctive characteristics of ours. Here the inhabitants of the municipality are, by legislative enactment, the corporators; certain of those inhabitants (usually all of the adult male residents) have the constitutional or statutory right to elect the legislative or governing body, and also, frequently, the other more important officers of the corporation. It would seem to the author that the English doctrine of *disfranchisement* of a corporator or member has no application to our municipal corporations, whether the corporator be considered the "inhabitant" or the "voter."

§ 461 (239). **Disfranchisement; English Doctrine not applicable here.**—Whether the power of disfranchisement be *incidental* to the corporation, or must be *expressly conferred*, respecting which there is in England some contrariety of view,¹ we need not inquire, for here (were there no constitutional obstacles) the legislature never bestows upon the council, or governing body which represents the corporation, the right to disfranchise the citizen or corporator; and it is clear that such a formidable and extraordinary authority does not exist, and cannot be exercised by the council, as an incidental or implied right. To burn or destroy the charters of the corporation, or wilfully to falsify its books, were in England considered such breaches of duty on the part of a corporator as would work a

ment are used as convertible terms; express words of the charter, or by Angell & Ames, Corp. chap. xii., where the earlier cases are quite fully collected and the doctrine of the English decisions satisfactorily presented. *Richards v. Clarksburg*, 30 W. Va. 491, citing the text.

¹ Grant, 263. "This right [of disfranchisement] has been but sparingly exercised, though it is undoubtedly an *incident* to every corporation, with, perhaps, some exceptions in cases of trading and monetary bodies." *Ib.* Willcock (271, pl. 709) denies that it is an incidental right, and claims that the rule laid down in the second resolution (*Bragg's Case*) on this point, — that "no freeman of any corporation can be disfranchised by the corporation, unless they have authority to do so by the express words of the charter, or by prescription," — is the law. Mr. Glover simply adopts Mr. Willcock's language. Glover, 335. Mr. Kyd's exposition of the second resolution in *Bagg's Case*, 2 Kyd, 52. And see leading case of *Rex v. Richardson*, 1 Burr. 517, which was a case of amotion, but has been often taken as asserting an incidental power to disfranchise for cause as well as to amove. Angell & Ames, §§ 408, 409. See, generally, *Commonwealth v. St. Patrick's Society*, 2 Binn. (Pa.) 441; *Evans v. Philadelphia Club*, 50 Pa. St. 107; *Hopkinson v. Marquis of Exeter*, Law Rep. 5 Eq. 63; *State v. Georgia Med. Soc.*, 38 Ga. 608; s. c. 8 Am. Law Reg. (n. s.) 533, Mr. (now Chief Justice) *Mitchell's* note.

forfeiture of the corporate character,¹ there being, according to Lord Coke, "a tacit condition annexed to the franchise, which, if he break, he may be disfranchised."² Surely, there is here no such tacit condition annexed to the constitutional or statutable right of a resident of a municipality to be and remain a corporator, though there may be a similar condition annexed to municipal offices. Wilfully to destroy or falsify the charter or books of a municipal corporation is an act which is punishable by the criminal codes of the different States; and if the offender is convicted and imprisoned, it may result as an incident of such conviction that he will cease, for the time, to be a resident, and hence will cease to be a member of the corporation; but the corporation itself has no power to disfranchise him, that is, to deprive him of the privileges and rights, without absolving him from the liabilities of other citizens, while he remains within the limits of the municipality.

§ 462 (240). **Amotion; Rex v. Richardson.** — The power to *amove a corporate officer* from his office, for reasonable and just cause, is one of the common-law incidents of all corporations.³ This doctrine, though declared before,⁴ has been considered as settled ever since Lord Mansfield's judgment in the well-known case of *King v. Richardson*.⁵ It is there denied that there can be no power of amotion unless given by charter or prescription; and the contrary doctrine is asserted, — that from the reason of the thing, from the nature of corporations, and for the sake of order and government, the power is incidental.⁶

§ 463 (241). **Where Power of Amotion resided in Old English Corporation.** — But the power to amove, like every other *incidental*

¹ *Wigon v. Pilkinton*, 1 Keb. 597; 240; *Angell & Ames*, chap. xii.; 2 *Rex v. Chalke*, 5 Mod. 257; 1 Lord Raym. 226; *Grant, Corp.* 265.

² 13 Coke, 98a.

³ *Rex v. Richardson*, 1 Burr. 517; *Rex v. Liverpool*, 2 Burr. 723; *Rex v. Doncaster*, 2 Burr. 738; *Jay's Case*, 1 Vent. 302; *Lord Bruce's Case*, 2 Stra. 819; *Rex v. Ponsonby*, 1 Ves. Jr. 1; *Rex v. Lyme Regis*, Doug. 153; *Rex v. Tidderley*, 1 Sid. 14, *per Hale*, C. B.; *Rex v. Taylor*, 3 Salk. 231; 1 Roll. Rep. 409; s. c. 3 Bulst. 189; *Rex v. Chalke*, 1 Lord Raym. 225; *Rex v. Heaven*, 2 Term R. 772; *Reg. v. Newbury*, 1 Queen's Bench, 751; 2 Kyd, 50-94, where the old cases are digested; *Glover*, chap. xvi.; *Wille*. 246; *Grant*, 240; *Angell & Ames*, chap. xii.; 2 *Rex v. Chalke*, 5 Mod. 257; 1 Lord Raym. 226; *Grant, Corp.* 265.

⁴ *Ellison v. Raleigh*, 89 N. Car. 125; *ante*, § 392, note; *Peters v. Bell*, 51 La. An. 1621; *Davis v. Filler*, 47 W. Va. 413.

⁵ *Lord Bruce's Case*, 2 Stra. 819, 820; *Tidderley's Case*, 1 Sid. 14, *per Hale*, C. B.

⁶ *Rex v. Richardson*, 1 Burr. 517, noted *infra*, § 475. "It is necessary to the good order and government of corporate bodies that there should be such power [amotion], as much as the power of making by-laws." *Ib.*

⁷ *Peters v. Bell*, 51 La. An. 1621, citing text.

power, is incident to the corporation *at large*, and not to any select body or particular part of it, and unless delegated to a select body or part, it must be exercised by the *whole corporation*, and at a *corporate assembly* regularly and *duly convened*.¹ The power to hold such an assembly is, however, implied in the power of amotion.²

§ 464 (242). **Power of Amotion in this Country.** — By the *corporation at large*, as used in the preceding section, is meant the different ranks and orders which compose it, including the definite and indefinite bodies. The essentials in such a corporation of a valid corporate assembly have previously been described. Our American corporations, however, have no ranks, orders, or integral parts corresponding to the constitution of an old English corporation. Here the common council, or the elective governing body (whatever name be given to it), exercises in general all of the powers of the incorporated place. Has the council, as the representative of the corporation, the incidental powers of a corporation, such as the power to amove, or the power to ordain by-laws? Or is the council in the nature of a select body, possessing no right to exercise any of the ordinary incidental powers of the corporation, unless expressly authorized by charter or legislative grant? The question not being judicially settled as to our municipal corporations, the opinion is ventured that, in the absence of an express grant or statute conferring or limiting the power, the common council of one of our municipal corporations as ordinarily constituted, does possess, in the absence of any express or implied restriction in the charter or other statute, the incidental power, not only to make by-laws, but, *for cause, to expel its members, and, for cause, to remove or provide by ordinance for the removal for just cause of corporate officers*, whether elected by it or by the people.³

¹ Lord Bruce's Case, 2 Stra. 819; Rex v. Lyme Regis, Doug. 153; Rex v. Richardson, 1 Burr. 517; Rex v. Doncaster, Say. 38; Rex v. Taylor, 3 Salk. 231; Rex v. Faversham Fishermen's Co., 8 T. R. 356; Fane's Case, Doug. 153; Willc. 246, pl. 629; Grant, 240, 241; 2 Kyd, 56; Glover, 329; State v. Jersey City, 25 N. J. L. 536. Even if the right to elect an officer be in a particular person or select class, the power to amove is not incidental to it, but, unless expressly changed or limited by charter, it belongs to the corporation at large. Lord Mansfield seemed to be of opinion that it was competent to transfer this power from the whole body to a select body by an ordinance or by-law. Bagg's Case, 11 Co. 93; Rex v. Richardson, 1 Burr. 517. But this question seems not to have been directly determined. Willc. 247, pl. 634; *Ib.* 248, pl. 635; State v. Jersey City, 25 N. J. L. 536. Under the Constitution of Pennsylvania municipal officers who hold their offices by appointment *may be removed* at the pleasure of the power appointing them. Houseman v. Commonwealth, 100 Pa. St. 222.

² Fane's Case, Doug. 153; Rex v. Lyme Regis, *Ib.* 153.

³ In *Michigan*, it is held that the *common council*, the governing body of

§ 465 (243). **Same Subject.** — Whatever necessity or reason exists for the right of amotion at common law, with respect to the corporation at large, would, in the absence of any controlling legislative provision, seem to exist here not only as to the doctrine itself, but also *with respect to that authorized body* by which alone the corporation acts, and which exercises all the corporate powers and functions. All of the inhabitants cannot meet and act in their primary capacity, except in organizations like the *towns* in the New England States; and if an implied or incidental right of amotion exists at all, it must be exercised by the council or governing body of the corporation. If it does not exist in the council, it cannot be *delegated* to it by an ordinance or by any act of the corporation, though if the right does exist, its exercise may, of course, be regulated by ordinance or by-law.¹ And the right may doubtless, we think,

a city, derives its powers from express legislative enactments, and has *no inherent power* to remove for cause a statutory officer appointed by the mayor for a fixed term. *Speed v. Common Council of Detroit*, 98 Mich. 360. In *Missouri*, it has been held that under the *general welfare clause* of a city charter, the council may pass an ordinance prescribing removal of an appointed officer by the mayor as a penalty for misconduct in office. *State v. Walbridge*, 119 Mo. 383. In *Tennessee*, the opinion has been expressed that a municipal corporation has the *incidental or inherent power* to make by-laws for the removal of one of its officers for just cause, although the decision of the point was not necessary to the judgment as express authority to remove existed. *Hayden v. Memphis*, 100 Tenn. 582. In *West Virginia*, it has been held that the power to remove a corporate officer from his office for cause is one of the *common-law incidents* of all corporations; and the common council of a city, being the representative of the corporate body at large, may exercise this power and possesses the power to remove the mayor from office for good cause. *Richards v. Clarksburg*, 30 W. Va. 491. See also *Davis v. Filler*, 47 W. Va. 413, 416. Mayor held to be removable by common council under a statute conferring on the latter the power to remove "every officer elected or appointed to any office." *State v. Common Council of Superior*, 90 Wis. 612. See also *Riggins v. Richards*, 97 Tex. 229.

¹ See, generally, *Willard's Appeal*,

4 R. I. 597; *State v. Trustees of Vincennes University*, 5 Ind. 77; *State v. Bryce*, 7 Ohio, 414; *Commonwealth v. St. Patrick's Society*, 2 Binn. (Pa.) 441; *Commonwealth v. Bussier*, 5 Serg. & Rawle (Pa.), 451; *Commonwealth v. Guardians of Poor*, 6 Serg. & Rawle (Pa.), 469; *Commonwealth v. Sutherland*, 3 Serg. & Rawle (Pa.), 145; *Johns v. Nicholls*, 2 Dall. 184; 1 Yeates, 80; *People v. Comptroller, &c.*, 20 Wend. (N. Y.) 595; *State v. Lingo*, 26 Mo. 496; *Fawcett v. Charles*, 13 Wend. (N. Y.) 473; *Hoboken v. Gear*, 27 N. J. L. 265; *People v. Board of Trade*, 45 Ill. 112; *Neall v. Hill*, 16 Cal. 145; *State v. Chamber of Commerce*, 20 Wis. 63; *People v. Medical Society*, 24 Barb. (N. Y.) 570; *Evans v. Philadelphia Club*, 50 Pa. St. 107; *State v. Georgia Medical Society*, 38 Ga. 608; *Smith v. Smith*, 3 Desaus. (S. Car.) 557.

But see *State v. Jersey City*, 25 N. J. L. 536, in which the power to expel a member of the council was expressly conferred, but where Mr. Justice *Potts*, delivering the opinion of the court, says: "The rule is well settled that a corporation has, at common law, an inherent jurisdiction to expel a member for sufficient cause." After noticing the offences which will justify expulsion, he adds: "But the jurisdiction in this case is not derived from the common law. The common council is not the corporation, and, whatever powers a municipal corporation may have to amove or expel a member at common law, it is clear that the corporation itself has not, by

be inferred from the express power to make needful or reasonable by-laws, if there is nothing in the charter or legislation to rebut the inference.

§ 466 (244). **Administrative Nature of Power to remove.**—The exercise of the *power to remove an officer is essentially administrative* in its nature. Even when the city council or other removing power sits to hear charges against an officer as a cause for removal, it is an administrative body exercising administrative functions. It does not constitute a court, although the proceedings before it may take a *quasi* judicial form. Notwithstanding the *quasi* judicial procedure it is engaged in the exercise of an administrative function for the purpose of maintaining discipline and good order and furthering the management of the business of the city. Even in those cases where, either by express provision of the statute or by implication of law, the removing power is obliged to give its procedure the essential elements of a trial, the removing power does not, in considering charges, hearing testimony, and reaching a determination, exercise judicial functions within the principle of constitutional requirements which confine judicial functions to the courts.¹

any by-law, delegated any of them to the common council, and that body, therefore, cannot avail itself of the common law jurisdiction, vested as an inherent right in the corporation itself, to expel a member of their own body. 2 Bac. Abr. 21, title *Corporations*; Willc. on Corp. 629. The council derives its jurisdiction from the charter of the corporation." This case rules that where, in express terms, the right of the council to *expel a member for certain causes* is given, it cannot exercise the power for any other cause. And it would seem to be the opinion of the court, or at least of the judge delivering the opinion, that the common law power of expulsion belonging to a corporation could not be exercised by the common council, that body not being the corporation in which the power is vested. *Infra*, §§ 468, note, 525. Same principle as to private corporations. *State v. Chamber of Commerce*, 20 Wis. 63. Compare *People v. Board of Trade*, 45 Ill. 112. Delegation to city engineer of *power to appoint carries with it power of removal*, where appointment not made for a special term. *Peters v. Bell*, 51 La. An. 1621.

¹ *Croly v. Sacramento*, 119 Cal. 229; *State v. Johnson*, 30 Fla. 433, 471; *Territory v. Cox*, 6 Dak. 501; *Donahue v. County of Will*, 100 Ill. 94, 105; *Stern v. People*, 102 Ill. 540, 550; *People v. Kipley*, 171 Ill. 44, 71; *Lynch v. Chase*, 55 Kan. 367, 373; *McMaster v. Herald*, 56 Kan. 231; *State v. Ramos*, 10 La. An. 420; *State v. Hay*, 45 Neb. 321; *People v. Board of Police Com'rs*, 93 N. Y. 97; *People v. McClave*, 123 N. Y. 512; *People v. Partridge*, 180 N. Y. 237, 240; *People v. Bearfield*, 35 Barb. (N. Y.) 254; *State v. Hawkins*, 44 Ohio St. 98; *Cameron v. Parker*, 2 Okla. 277; *Donahue v. Cumberland*, 25 R. I. 79; *Riggins v. Richards*, 97 Tex. 229; *State v. Common Council of Superior*, 90 Wis. 612; *Nehrling v. State*, 112 Wis. 637, 643. See also *Meffert v. Medical Board*, 66 Kan. 710; *State v. Peterson*, 50 Minn. 239; *State v. Common Council of Duluth*, 53 Minn. 238.

In *Riggins v. Richards*, 97 Tex. 229, 237, where the court had before it an exercise of statutory power to remove for cause, *Brown, J.*, said: "The council, when sitting for the purpose of trying the accused, *did not constitute a court*, but was an administrative body, and the power to remove officers was administrative power to be used for

§ 467. **Nature of the Administrative Power to remove.** — In discussing the nature and character of an exercise of the power to remove an officer for cause, the Supreme Court of Connecticut has attempted to draw a *distinction between the removal of an officer on conviction of an offence which forfeits his office, and a removal pursuant to statutory authority to remove for cause after notice and a hearing.* It has said that when a statute or a city charter confers authority on the mayor, or other executive officer to remove heads

the purpose of maintaining discipline and good order in the management of the business of the city. It is true that by the terms of the law the proceeding was required to be conducted in a manner judicial in character, but this does not necessarily constitute the body a judicial body, either in its procedure or as regards the qualification of its members.¹⁷ Even if the statutes conferring this power of removal provide for an appeal to the court from the determination of the removing power, the proceeding does not assume a judicial rather than an executive character. *Avery v. Studley*, 74 Conn. 272. On such appeal, the court, of necessity, cannot review the exercise of executive discretion. It can only determine whether any essential formality has been omitted and, perhaps, whether the removing power has acted so arbitrarily as to prove that he did not act honestly in the public interest, but for personal or political reasons. *Avery v. Studley*, 74 Conn. 272; *Pierce's Appeal*, 78 Conn. 666. On such appeal, the removed officer cannot obtain a re-trial of the question of fact involved in the truth or falsity of the charges preferred. In the absence of arbitrary and oppressive action by the removing power, its determination of that question is final. *Avery v. Studley*, 74 Conn. 272; *State v. Kennelly*, 75 Conn. 704; *Pierce's Appeal*, 78 Conn. 666.

In *Michigan*, there are statements in the earlier decisions, to the effect that the exercise of the power of removal for cause, i. e., upon notice and a hearing, involves the assumption of judicial functions. *Dullam v. Willson*, 53 Mich. 392; *People v. Stuart*, 74 Mich. 411. But later decisions clearly lay down the rule that a removal for cause is administrative, although it may involve acts of a judicial nature. *Fuller v. Attorney-General*, 98 Mich. 96.

See also *Trainor v. Board of Auditors*, 89 Mich. 162; *Attorney-General v. Jochim*, 99 Mich. 358.

In *Christy v. Kingfisher*, 13 Okla. 585, the Supreme Court of the Territory expresses the opinion, that, in that territory, the removal of an officer, either elective or appointive, under the territorial laws, may call for judicial action, or for the exercise of executive or administrative power; and that it is not the character of the power delegated by the legislature for the removal of officers which determines to which branch of the territorial government it belongs, but the manner in which the power shall be exercised. For instance, the legislature might authorize any executive or administrative officer, or legislative body, to remove arbitrarily certain officers in his or its discretion. But if the law authorizes removal for specified causes alone, then the officer is entitled to be heard and to introduce evidence in his defence; and the officer or body trying the matter must weigh the evidence and pronounce judgment thereon; and the hearing of evidence, weighing the same, and arriving at a conclusion therefrom, and announcing it is judicial action; and under the organic act of the Territory, the judicial power of the Territory is vested in the courts, and the legislature has not the authority to confer judicial authority on any other court, body, or tribunal. Similar views are expressed by the Supreme Court of Appeals of *West Virginia*, in *Arkle v. Board of Com'rs*, 41 W. Va. 471. The appointment of a superintendent of the streets of a city being a purely municipal matter, his removal is also municipal in its nature and may be provided for in a "freeholders' charter" adopted under the Constitution of California. *Croly v. Sacramento*, 119 Cal. 229; Index, *Freeholders' Charters*.

of departments and subordinates therein for cause after notice of the misconduct charged and a hearing, this mode of removal is rather a mode of exercising the power of removal incident to executive appointment, than a *quasi* judicial power to hear and determine official offences, punishable by a forfeiture of office. The removal of an officer upon conviction of an offence which forfeits his right to hold the office is an act mainly judicial, and perhaps administrative only as connected with the exercise of the police power. The removal of an officer as incident to the executive power of appointment, is not judicial, and, even where such removal is restricted by the establishment of certain precedent formalities, it is not judicial in the same sense as a removal made wholly as a punishment for an offence.¹ The distinction referred to undoubtedly exists as between a proceeding before the courts of the State by way of indictment for official misconduct, (upon which forfeiture of office results, either by the express terms of the judgment, or because conviction of the offence renders the guilty officer incapable of continuing in office,) on the one hand, and a removal for cause after a hearing by the council or executive officers of the city, on the other hand.² But the author's examination of the authorities does not show that any distinction, founded on the source of the authority to remove, exists in the exercise of the administrative power of the council, or other removing power, to remove an officer for cause after notice and a hearing, whether such authority be found by implication in the inherent powers of the corporation, or in an express statutory enactment, or in the so-called civil service laws.³ In whatever way it may originate, *the administrative power to remove* is, in the opinion

¹ *Avery v. Studley*, 74 Conn. 272; 123 N. Y. 173, 180, *fixity of tenure* also seems to be regarded as one of the objects sought to be achieved by the enactment of the civil service law. *State v. Kennelly*, 75 Conn. 704; *Pierce's Appeal*, 78 Conn. 666.

² A statutory provision for trial before the appointing power and removal thereby does not preclude the indictment of the officer for official misconduct and removal thereon upon a verdict of guilty pursuant to another statute. The remedies are concurrent. *Coffey v. Superior Court*, 147 Cal. 525; *Roberts v. Superior Court*, 147 Cal. 568.

³ In *Hope v. New Orleans*, 106 La. 345, it is said that a *civil service law* properly embraces within its scope rules of conduct for those employed, and what may or may not work a forfeiture of their positions, or be cause for removal or dismissal. In *Rogers v. Common Council of Buffalo*, 123 N. Y. 173, 180, *fixity of tenure* also seems to be regarded as one of the objects sought to be achieved by the enactment of the civil service law. But in *People v. Scannell*, 62 N. Y. App. Div. 249, 256, *Laughlin, J.*, says: "The trend of judicial authority in this State, as shown by the cases cited and other decisions, and in the Federal Courts under somewhat similar Federal statutes and civil service rules, is in the direction of holding that the purpose of the civil service laws is to regulate appointments to, and not removals from, office, and that the power of appointment confers the power of removal, which can only be restricted by legislative authority." Citing *Carr v. Gordon*, 82 Fed. Rep. 373; *Fleming v. Stahl*, 83 Fed. Rep. 940; *Morgan v. Nunn*, 84 Fed. Rep. 551.

of the author, the same in all the essential aspects of its nature, and any differences in the incidents and formalities attending its exercise are to be regarded as resulting from the requirements of the law, either express or implied, rather than in distinctions deduced from its inherent nature or origin. Power to remove *for cause, conferred by statute on a civil service commission*, does not differ, either in its nature or the essential incidents of its exercise, from a similar power conferred upon the council of a city, or upon executive officers; and it is impossible, in a treatise of this nature, to consider the statutory powers of removal of civil service commissioners or limitations on the power of removal vested in appointing powers which result from the application of the civil service laws, separately and apart from the exercise of similar statutory powers by other local officers.¹

§ 468 (245). **Power to remove to be strictly pursued.** — When the terms under which the power of removal is to be exercised are prescribed, they *must be pursued with strictness*.² Whether, if the

¹ In *Illinois*, the civil service commission is authorized to investigate and decide charges preferred as a ground for the removal of an officer. *People v. Kipley*, 171 Ill. 44; s. c. 170 U. S. 182. In *New York*, the civil service commissions of cities have not been given any power or jurisdiction over either the removal of municipal officers or employees, or the trial and determination of charges as a preliminary thereto. In *Washington*, the civil service commission has no power of removal on its own initiative, but, by statute, the removed officer may appeal to the commission from the decision of the head of department or other removing power, and the commission is thereupon authorized either to approve the removal or reinstate the officer. *Easson v. Seattle*, 32 Wash. 405.

² *State v. Lingo*, 26 Mo. 496; *State v. Vincennes University*, 5 Ind. 77, 89; *State v. Bryce*, 7 Ohio, 414; *State v. Chamber of Commerce*, 20 Wis. 63; *Regina v. Sutton*, 10 Mod. 76; *Paston v. Urber*, Hutt. 103; *Regina v. Ricketts* 7 Ad. & El. 966; *Rex v. Oxford*, 6 Ad. & El. 349 *Commonwealth v. Sutherland*, 3 Serg. & Rawle (Pa.), 145; *Commonwealth v. Shaver*, 3 Watts & S. (Pa.) 338; *Murphy v. Webster*, 131 Mass. 482; *Hosford v. Kennedy*, 69 Conn. 220; *Gorley v. Louisville*, 104 Ky. 372; *Bakely v. Nowrey*, 68 N. J. L. 95, aff'd 68 N. J. L. 732; *San Antonio v. Serna*, 45 Tex. Civ. App. 341; 99 S. W. Rep. 875.

In *Queen v. Sutton*, 10 Mod. 76, *supra*, so strictly was a clause in a charter conferring the right of removal construed, that it was held that where acts were to be done by a *majority*, that word was to be understood as a majority of the whole corporation, and that if the officer whose removal was proposed was a member it could be effected only by a majority of all the members, including himself, and that his personal interest did not exclude him from voting as a member upon the question. See also *State v. Jersey City*, 25 N. J. L. 536; *Madison v. Korbly*, 32 Ind. 74; *State v. McGarry*, 21 Wis. 496, where "other cause" for removal was held to mean "other like cause." The *Circuit Court of the United States* has no jurisdiction to restrain the mayor or city authorities from removing a city officer, upon charges of malfeasance in office. An injunction issued in such a case and proceedings in contempt for disobedience of the writ, held void. *Re Sawyer*, 124 U. S. 200; *supra*, § 379, note; more fully, *post*, chap. xxxi.

"Where the power to remove at will is given, the law does not contemplate that the officer may be put to the expense of a trial for cause, and have charges of official misconduct placed before the public." *Speed v.*

power to expel or remove be given for certain causes, this excludes the right to exercise the power in any other case, will depend upon the intent of the legislature to be gathered from a consideration of the whole charter or statute. Power to appoint "subject to removal only for," &c., clearly limits the power of removal to the specified causes.¹ Express power of expulsion or removal for specified reasons has in some cases been considered to exclude any implied power, and to limit the right to the enumerated causes.²

§ 469 (246). **Power of Expulsion for Specified Causes construed.** — A charter of a municipal corporation gave to the common council express power to "*expel a member for disorderly conduct*," and one of the aldermen, being guilty of official corruption in receiving bribes, was, after a hearing, expelled from the council. The court was of opinion that the question as to the right to expel for

Common Council of Detroit, 98 Mich. 360, citing text. When power of removal is given to council and mayor, the council cannot remove the mayor, and the latter may by injunction prevent his removal. *Stahlhut v. Bauer*, 51 Neb. 64. A city charter provided that "the mayor and aldermen of the city shall constitute the common council thereof" and the common council "shall be judge of the election and qualifications of its own members." By other provisions of the charter, the mayor had only the power to preside at meetings, to give a casting vote in the case of a tie, and to submit propositions to the common council for its consideration. It was held that the mayor was not a member of the council within the meaning of the provision making it judge of the election and qualification of its members. *Garside v. Cohoes*, 12 N. Y. Supp. 192; to the same effect, *Winter v. Thistlewood*, 101 Ill. 450. Under the Massachusetts statute while the power of appointment of officers is in the mayor (*Attorney-General v. Varnum*, 167 Mass. 477), the power of removal is in the city council, which may remove officers without the consent of the mayor. *Attorney-General v. Cahill*, 169 Mass. 18.

¹ *People v. Higgins*, 15 Ill. 110. See *supra*, § 465, note.

² *State v. Jersey City*, 25 N. J. L. 536; *Macon v. Shaw*, 14 Ga. 162; 16 Ga. 280; 19 Ga. 468; 21 Ga. 280; 25 Ga. 590; *Miles v. Stevenson*, 80 Md. 358; *Clary v. Trenton*, 50 N. J. L. 331; *Clark v. Cape May*, 50 N. J. L. 558.

But see *Commonwealth v. St. Patrick's Society*, 2 Binn. (Pa.) 441; 4 Binn. (Pa.) 448; *Angell & Ames*, § 415. Under the *Illinois* statute, it is held that the county authorities do not possess general powers of removal, and that they cannot remove a treasurer elected by the people, except for causes specified in the statute; but it may be observed that a county treasurer is a public and not a corporate officer. *Clark v. People*, 15 Ill. 213. So a power of removal conferred upon the mayor and common council cannot be exercised by the council alone. *Charles v. Hoboken*, 27 N. J. L. 203. Power to remove school teachers "for gross misconduct, insubordination, neglect of duty, or general inefficiency" construed to be exclusive, and to preclude the board of education from adopting a by-law providing that the marriage of a female teacher should vacate her position. *People v. Maxwell*, 177 N. Y. 494, rev'g 87 N. Y. App. Div. 131.

The Supreme Court of the United States has held that the principle stated in the text is not applicable to removals of Federal officers by the President. In making removals from office, the President acts with reference to his constitutional duty to see that the laws are faithfully executed, his discretionary power of removal can only be taken away by express language, and a statute providing that a removal may be made for specified causes does not limit the discretionary power he possesses. *Shurtleff v. United States*, 189 U. S. 311, 317.

the conduct charged, depended upon the construction of the words "disorderly conduct;" and it held that receiving bribes for his official influence and votes was *disorderly conduct*, within the meaning of the charter.¹ In another case, the charter authorized the council "to dismiss the marshal for malpractice in office, or neglect of duty;" and it was held that the council could not remove this officer for the crime of gambling, as this was neither malpractice in office nor official neglect, within the meaning of the charter.²

§ 470 (247). **Power to expel construed and limited.** — The power to *expel a member of the council* does not authorize a resolu-

¹ *State v. Jersey City*, 25 N. J. L. 536.
² *Macon v. Shaw*, 14 Ga. 162; 16 Ga. 280. Relator was removed from the office of policeman of the city of New York, by the board of police, under the charge of "conduct unbecoming an officer," this being one of the offences for which, under the statute, a policeman can be removed. The specifications were that he was appointed policeman contrary to law when he was more than thirty years of age, and that he had been appointed after having resigned from the force without a vote by yeas and nays, contrary to the requirements of law. It was held that these specifications only had reference to relator's title to the office, and not to his conduct while an officer, and did not authorize the removal. *People v. Board of Police*, 72 N. Y. 415; reported below, 5 Hun, 457.

Power to punish for contempt. Whether the council possesses the power to *punish for contempt* depends upon the provisions of the charter. The power must, as the author conceives, be conferred either expressly or as incidental to some power which is conferred, or it will not exist. In *Doyle v. Falconer*, 1 Privy Council Appeals, 329, it was held that the colonial parliament of Dominica had not the inherent privilege of parliament as a court, and could not therefore punish for contempt; but in the later case of *Speaker v. Glass*, 3 Privy Council Appeals, 560, it was decided that the delegation of legislative authority to the Victoria parliament was broad enough to include this power. These cases afford very interesting illustrations of the nature of the power to punish for contempt.

Power of courts of the United States

to *punish for contempt* *Burr's Trial*, 355; *United States v. Hudson*, 7 Cranch, 32; *Kearney, In re*, 7 Wheat. 38. *Power of Congress*. 11 U. S. Stats. at Large, 155; 12 U. S. Stats. at Large, 333. The Constitution of the United States vests no general power in either house of Congress to *punish for contempt*. Either house may punish its own members for disorderly conduct, or for failure to attend its sessions, and may impeach officers of the government, and may, where an examination of witnesses is necessary in the performance of these duties, fine or imprison a contumacious witness; but neither house can commit a witness for contempt for refusing to answer questions concerning the private affairs of citizens; for example, "the real estate pool" in the District of Columbia, such an investigation being judicial, not legislative, and the sergeant-at-arms cannot justify in an action for false imprisonment under such an order. *Kilbourne v. Thompson*, 103 U. S. 168.

Where the General Incorporation Act authorized the *removal of the mayor*, among other things, for "wilful violation of any of the ordinances of such town or city," and provided for trial before the board of aldermen, who were empowered to enter judgment of removal against him upon finding that the charges were "a sufficient cause for removal from office," it was held that the aldermen were not invested with unlimited discretion, without regard to whether he was guilty of an offence in law or not; and that a violation of an ordinance which was void for being unreasonable and in contravention of common right, did not furnish proper ground for removal. *Milliken v. Weatherford*, 54 Tex. 388.

tion by it that "the president of the council be directed not to appoint a certain member on any committee, nor call his name, nor allow him to take part in the action of the board," since this would create no vacancy which could be supplied, but would leave the seat occupied, while it silenced the occupant, and left his constituents unrepresented.¹

§ 471 (248). **Re-election of Expelled Member of Council.** — The expulsion of a member of the common council does *not disqualify* him from being *re-elected* to the same office, unless it is expressly so provided by the charter; for where the law annexes a disqualification to an offence, it does so in terms. Hence, if a member, having been expelled even for bribery, be re-elected, he cannot be expelled a second time for the same identical act for which he had before been expelled.²

§ 472 (249). **Instance of Implied Power of Removal for Cause by the Appointing Power.** — It was held in a case in Rhode Island that a clerk of a school committee — an officer created by the school law, and necessary to the organization and legal action of the committee — may, after an election by the committee, be removed from office by the committee, but only for cause, as the statute gives no express power to remove, and after due

¹ *State v. Jersey City*, 25 N. J. L. 536. See *State v. Chamber of Commerce*, 20 Wis. 63. *Power to suspend.* Whether, pending proceedings to expel, a member can be suspended from his duties, was a question not determined in the case; but in *State v. Lingo*, 26 Mo. 496, it was held that the power to provide for removing from office corporate officers gives the power to suspend from office during the investigation of the charges for which the suspension was made. The court say: "The power to remove necessarily includes the minor power to suspend." *Ib.* 499.

The charter of a city empowered the mayor and aldermen for sufficient cause to remove constables and police officers. By a vote of the mayor and aldermen, the plaintiff, a constable and police officer, was "suspended from duty on the police," and from that time was not permitted to perform the duties of the office, although he was ready and offered to do so, until he was afterwards reinstated. It was held

that he could not recover for services during the period of his suspension. *Ladd, J.*, says: "It does not seem to require argument to show that the power to remove must include the power to suspend." *Shannon v. Portsmouth*, 54 N. H. 483; *Westberg v. Kansas City*, 64 Mo. 493; *Wayne Co. v. Benoit*, 20 Mich. 176; *Attorney-General v. Davis*, 44 Mo. 131; *Primm v. Carondelet*, 23 Mo. 22; *infra*, § 471, *note*.

² *State v. Jersey City*, 25 N. J. L. 536. If the common council, without authority, suspend a member from the duties of his office, *mandamus* is a proper remedy to restore him to the exercise of his legal rights. *Ib.*; *supra*, § 470, *note*; *Willc. on Municipal Corporations*, 368, pl. 74, 75; *Ib.* 377, pl. 96; 3 Black. Com. 110; *Rex v. Barker*, 3 Burr. 1265; *Angell & Ames on Corporations*, §§ 702, 706. Title to office, either *de jure* or *de facto*, must be clear before writ of *mandamus* will be granted. *Ward v. Cook*, 78 Ill. App. 111.

notice and opportunity given him to defend himself upon the charges presented.¹

§ 473 (250). **Removal — When Notice and a Hearing are required.** — With respect to the tenure or duration of a public employment, the general rule is that where the power of appointment is conferred in general terms and without restriction, *the power of removal, in the discretion and at the will of the appointing power and without notice or a hearing, is implied and always exists*, unless restrained and limited by some other provision of law, or by appointment for a fixed term.² Where an officer is *appointed during pleasure*, or where *the power of removal is discretionary*, the power to remove may be exercised *without notice or hearing*.³ But where

¹ Willard's Appeal, 4 R. I. 597, *per Ames*, C. J., who says, "Such a power with regard to such an officer, unless expressly forbidden by law, is incidental to the committee, as necessary to enable it duly to perform its functions." *Ib.* p. 601. It is sufficient cause for the removal of such a clerk *that he refuses to produce papers* which belong to the body which elected him, and of which he is simply the custodian, or refuses to keep or amend the records when duly ordered to do so. *Ib.*

² *Ex parte Hennen*, 13 Pet. (U. S.) 230, 259; *Blake v. United States*, 103 U. S. 227; *Shurtleff v. United States*, 189 U. S. 311; *State v. Chatfield*, 71 Conn. 104; *Greene v. Freeholders of Hudson*, 44 N. J. L. 388; *Adams v. Haines*, 48 N. J. L. 25; *People v. Fire Com'rs*, 73 N. Y. 437, 441; *People v. Robb*, 126 N. Y. 180; *People v. Lathrop*, 142 N. Y. 113; *People v. Morton*, 148 N. Y. 156; *People v. Dalton*, 158 N. Y. 204, *aff'd* 34 N. Y. App. Div. 6; *Armatage v. Fisher*, 74 Hun (N. Y.), 167, 175; *People v. Drake*, 43 N. Y. App. Div. 325, *aff'd* 161 N. Y. 642; *People v. Sing Sing*, 54 N. Y. App. Div. 555; *People v. Simonson*, 66 N. Y. App. Div. 18; *Easson v. Seattle*, 32 Wash. 405; *Price v. Seattle*, 39 Wash. 376; *Davis v. Filler*, 47 W. Va. 413.

If the exercise of the power of appointment is *subject to the approval* of another officer or board, this does not invest the officer or board whose approval is required, with the power to appoint or make him or it responsible for the acts of the appointee, and such officer or board, by virtue of the re-

quirement of its approval of appointment, is not vested with any power to remove. *People v. Dalton*, 158 N. Y. 204, 214; *aff'd* 34 N. Y. App. Div. 6. But in *People v. Hyde*, 89 N. Y. 11, it was held that where the appointment of a principal of a school by the superintendent of public instruction required the concurrence of the local board, the teacher could only be discharged by the authority in whom the power to appoint or employ is vested, *i. e.*, by the concurrent action of the local board and the superintendent of public instruction. The provision of the *Kentucky Constitution* that the legislature "shall prescribe the qualifications of all officers of towns and cities, the manner in and causes for which they may be removed from office," does not preclude the legislature from enacting that officers of a city may be removed at the pleasure of the city council. *London v. Franklin*, 118 Ky. 105.

³ *People v. Henry*, 47 N. Y. App. Div. 133; *People v. Conway*, 59 N. Y. App. Div. 329; *People v. Guilfoyle*, 65 N. Y. App. Div. 498. When an office is created by statute, and it is provided that the incumbent shall hold the same for a *fixed term*, *unless sooner removed by the appointing power*, such general power to remove carries with it the right to remove an incumbent before the expiration of his term without notice and without charges of misconduct. *Townsend v. Kurtz*, 83 Md. 331. An officer appointed for a *fixed and definite term of office* cannot be summarily removed without cause, unless there is some express provision

the appointment is *during good behavior*, or where the removal can only be for certain *specified causes*, the power of removal cannot, as will presently be shown, be exercised, unless there be a formulated charge against the officer, *notice* to him of the accusation, and a *hearing* of the evidence in support of the charge, and an opportunity given to the party of making defence.¹

of law authorizing such a removal during the term. *Townsend v. Kurtz*, 83 Md. 342; *Field v. Malster*, 88 Md. 691. Although the legislature may have required charges, notice and a hearing as a prerequisite to the exercise of the power of removal, it may also declare that the *decision of the removing power shall be final and conclusive* and not subject to review by any court, and in that event the office is determinable whenever, in the judgment of the removing power, the incumbent is guilty of the charges preferred. *People v. Ham*, 59 N. Y. App. Div. 314; *People v. Peck*, 73 N. Y. App. Div. 89. The fact that the removing power has given notice of the cause of the proposed removal and a hearing to an officer *who can be removed at pleasure* does not enlarge his rights. He is not entitled to *certiorari* to review the action of the removing power. *People v. Guilfoyle*, 65 N. Y. App. Div. 498.

¹ *Reagan v. United States*, 182 U. S. 419, 425; *Shurtleff v. United States*, 189 U. S. 311, 314; *Denver v. Barrow*, 13 Colo. 460; *State v. Johnson*, 30 Fla. 433, 483; *Coleman v. Glenn*, 103 Ga. 458; *Madison v. Korbly*, 32 Ind. 74; *Board of Com'rs of Knox County v. Johnson*, 124 Ind. 145; *Lease v. Freeborn*, 52 Kan. 750; *Lynch v. Chase*, 55 Kan. 367, 370; *Page v. Hardin*, 8 B. Mon. (Ky.) 648, 672; *Todd v. Dunlap*, 99 Ky. 449; *Gorley v. Louisville*, 104 Ky. 372; *State v. New Orleans*, 107 La. 632, citing text; *State v. Donovan*, 89 Me. 448; *Andrews v. Biddeford Police Board*, 94 Me. 68; *Miles v. Stevenson*, 80 Md. 358; *Townsend v. Kurtz*, 83 Md. 331, 344; *Hooper v. Farnen*, 85 Md. 587; *Hagerstown Street Com'rs v. Williams*, 96 Md. 232; *Ham v. Boston*, 142 Mass. 90; *Stadler v. Detroit*, 13 Mich. 346; *Dullam v. Wilson*, 53 Mich. 392, 401; *People v. Stuart*, 74 Mich. 411; *Metevier v. Therrien*, 80 Mich. 187; *Hallgren v. Campbell*, 82 Mich. 255; *State v. St. Louis*, 90 Mo. 19; *State v. Walbridge*, 119 Mo. 383; *State v. Maroney*, 191 Mo. 531,

549; *State v. Walker*, 68 Mo. App. 110; *State v. Smith*, 35 Neb. 13, 33; *Gibbs v. Manchester*, 73 N. H. 265; *Haight v. Love*, 39 N. J. L. 14; *Ayers v. Newark*, 49 N. J. L. 170; *Markley v. Cape May Point*, 55 N. J. L. 104; *Krueger v. Chesilhurst*, 64 N. J. L. 523; *People v. Whitlock*, 92 N. Y. 191, 198; *State v. Hawkins*, 44 Ohio St. 98, 114; *State v. Sullivan*, 58 Ohio St. 504; *State v. Hoglean*, 64 Ohio St. 532; *Christy v. Kingfisher*, 13 Okla. 585; *Biggs v. McBride*, 17 Oreg. 640, 651; *Commonwealth v. Slifer*, 25 Pa. St. 23; *Field v. Commonwealth*, 32 Pa. St. 478; *Brower v. Kantner*, 190 Pa. St. 182, 183; *Willard's Appeal*, 4 R. I. 597; *Hayden v. Memphis*, 100 Tenn. 582; *People v. McAllister*, 10 Utah, 357; *Pratt v. Board of Police & Fire Com'rs*, 15 Utah, 1; *Heath v. Salt Lake City*, 16 Utah, 374; *Pratt v. Swan*, 16 Utah, 483; *Silvey v. Boyle*, 20 Utah, 205; *Ramshay, In re*, 8 Q. B. 173; *Hennen, In re*, 13 Pet. (U. S.) 230; *Queen v. Governors of Darlington Grammar School*, 6 Q. B. 682, 715; *Bagg's Case*, 11 Coke, 93 (b); *Rex v. Coventry*, 1 Ld. Raym. 391; *Dr. Gaskin's Case*, 8 T. R. 209; *Rex v. Oxford*, 2 Salk. 428; *Rex v. Mayor of Stratford*, 1 Lev. 291; 2 Kyd, 58, 59; *Willc. 253, 254*; *Grant*, 244; *Rex v. Andover*, 1 Ld. Raym. 710.

But in some States, the rule stated in the text is not accepted, and it is held that if a statute authorizes the removal of an officer "for cause" and is silent as to notice and a hearing, neither notice nor a hearing is required. *California*. *Matter of Carter*, 141 Cal. 316; *French v. Senate*, 146 Cal. 604, 610. *Illinois*. *People v. Higgins*, 15 Ill. 110; *Wilcox v. People*, 90 Ill. 186, 205; *People v. Mays*, 117 Ill. 257; *People v. Welty*, 75 Ill. App. 514, 523. *West Virginia*. *Hartigan v. Board of Regents*, 49 W. Va. 14, 25. In *New York*, a statute gave a preference in public employments to honorably discharged veterans, and made the appointees irremovable except "for incompetency and conduct inconsistent with" the positions held

§ 474. **Limitations of Power to remove not requiring a Hearing.** — A *distinction* must be drawn, founded upon the terms of the statutes conferring the power to remove, between a *removal for cause after notice and a hearing, and statutory limitations*, which, while restraining to some extent power of removal and affording in some degree a measure of protection to the officer against summary removal, do *not require that charges* be preferred and a hearing given before the power be exercised. Thus, under a statute which has been in force for many years in the State of New York, it has been provided that certain officers shall not be removed until they have been allowed an opportunity of making an explanation, and in case of a removal the grounds thereof must be entered on the records of the department.¹ Under a statute so framed the officer is merely

by them. It was held, upon a construction of this statute, that it left it to the removing power to determine whether the facts existed which authorized a removal subject to responsibility for any wilful or perverse action; and *that no notice or opportunity to be heard* was required to be given to the person whose removal was contemplated before the power could be exercised. *People v. Morton*, 148 N. Y. 156. See also *People v. Brookfield*, 2 N. Y. App. Div. 299.

Charter power of removal, without cause, at any time, of a police patrol appointed for a year, see *Chicago v. Edwards*, 58 Ill. 252. As to the removal, by the appointing power, of officers, the duration of whose term is not fixed, see *People v. Comptroller, &c.*, 20 Wend. (N. Y.) 595; *Commonwealth v. Sutherland*, 3 Serg. & Rawle (Pa.), 145; *Field v. Girard College*, 54 Pa. St. 233; *State v. Doherty*, 25 La. An. 119; *State v. St. Louis*, 90 Mo. 19; *People v. Nichols*, 79 N. Y. 582. A resolution to "*dispense with the services*" of an officer, passed by a council having power to remove him at its pleasure, was held to be a removal in *State v. Sohn*, 97 Ind. 101. Where *express power* is given by statute to the mayor to remove an officer at his pleasure, it seems to be clear that the mayor is the exclusive judge of the propriety of exercising the power. *People v. New York*, 82 N. Y. 491. The mayor of a city held to have no power to suspend the fire-engineer duly appointed by the mayor with the advice and consent of the council, and declare vacancy, and appoint another person in his place.

State v. Bryson, 44 Ohio St. 457; *State v. Hudson*, 44 Ohio St. 137. Power to remove officers under a special statute and charter provision, see *Ham v. Police Board*, 142 Mass. 90; *New Brunswick v. Fitzgerald*, 48 N. J. L. 457.

It is the law in England, as applied to the old corporations, that causes which *disqualify* the person to be an officer will not authorize the corporation to amove him, but he must be ousted by *quo warranto*. The reason given is that one so disqualified is not, in law, a corporate officer, and hence cannot be amoved as such by the corporation. *Rex v. Doncaster*, Say. 38; *Buller N. P.* 203; *Rex v. Lyme Regis*, Doug. 85; *Symmers v. Regem*, Cowp. 502; *Wille*, 259, pl. 669; *Wille*, 281, pl. 728. And see *Fawcett v. Charles*, 13 Wend. 473. It has elsewhere been shown (*ante*, §§ 377 *et seq.*) that with us the councils of municipal corporations are often made judges of the qualifications of their members and officers, and this may modify or change the rule above mentioned, which seems to rest on narrow and technical grounds.

¹ By the Charter of New York City (Laws of 1901, chap. 466, § 1543), it is provided: "But no regular clerk or head of a bureau, or person holding a position in the classified municipal civil service subject to competitive examination, shall be removed until he has been allowed an opportunity of making an explanation; and in every case of a removal, the true grounds thereof shall be forthwith entered upon the records of the department or board or borough president,

to be informed of the cause of removal and permitted, not to have a hearing or trial, but only an opportunity to make an explanation in reference to the charges preferred.¹ But a statute which requires that the officer proposed to be removed be informed of the cause of

and a copy filed with the municipal civil service." This is a re-enactment, with modifications of a minor nature, of Laws of 1873, chap. 335, § 28; Laws of 1882, chap. 410, § 48; and Laws of 1897, chap. 378, § 1543.

¹ See *People v. Thompson*, 94 N. Y. 451, 465, where the distinction between the procedure under this statute and the procedure under a statute requiring a hearing is pointed out.

In other States, substantially the same result has been reached under statutes similar in terms.

California. A statute provided that the mayor might remove "for cause" any person appointed by him "and in case of such removal shall give written notice thereof, stating the cause, to the person removed, and shall immediately notify the common council of his action and the reasons therefor." It was held that the person removed was not entitled either to previous notice or a hearing; that the action of the mayor was final so long as he followed the prescribed method, and that the removed officer could not have *certiorari* to review the action of the mayor, as his removal did not involve the exercise of a judicial function. *Matter of Carter*, 141 Cal. 316.

Colorado. The charter of Denver provided for certain appointments to be made by the governor of the State, "and all appointments by the governor shall be made with power of suspension or removal at any time for cause, to be stated in writing, but not for political reasons." It was held that the removed officer was not entitled to a hearing; that the governor might satisfy himself as to the existence of the cause in any manner satisfactory to himself; and that the action of the governor was not subject to review by the courts. *Trimble v. People*, 19 Colo. 187; *People v. Martin*, 19 Colo. 565.

Illinois. A statute provided that the mayor might remove any of his appointees "on any formal charge, whenever he shall be of the opinion that the interests of the city demand

such removal, but he shall report the reasons for such removal to the council" within a specified time, and if the mayor failed to file his reasons with the city clerk, or if the council disapproved such removal, the officer was directed to be restored. It was held that a removal took effect at once, notwithstanding the requirement that the reasons therefor be subsequently filed and the council take action thereon. *Heffran v. Hutchins*, 160 Ill. 550.

Massachusetts. Under a statute providing for removals "for such cause as they may deem sufficient and shall assign in their order for removal," the removing powers may remove subordinates, without a hearing, upon assigning the cause thereof in the order of removal. *O'Dowd v. Boston*, 149 Mass. 443. See also *Attorney-General v. Donahue*, 169 Mass. 18, 22; *Ayers v. Hatch*, 175 Mass. 489.

Washington. A charter provision authorized the appointing power to remove upon filing a statement in writing of the reasons therefor, and provided for a hearing before the civil service commissioners, who were empowered to approve the removal or reinstate the employee. It was held that a removal so effected is final, and cannot be reviewed by the courts. The fact that power is conferred upon the head of department to remove only upon filing with the civil service commissioner of a statement of the reasons therefor, and a right of appeal to the civil service commission is conferred on the removed officer, which can either approve the removal or reinstate him, does not alter the discretionary and final character of the removal. *Price v. Seattle*, 39 Wash. 376.

Wisconsin. Authority to remove "for incompetency, improper conduct, or other cause satisfactory to the board," the cause to be assigned in writing and entered on the minutes of the board, requires that the cause be one affecting the qualifications of the officer, and his fitness for the performance of the duties. Under this statute the officer is not entitled to a hearing. *State v. McGarry*, 21 Wis. 496.

the proposed removal, and given an opportunity of making an explanation, *is intended as a substantial limitation upon the general power of removal* conferred upon the respective departments of the city government, and to secure the continuance in office of the persons employed until a reasonable cause, other than the pleasure of the heads of the department, or a change in the political character of the majority, should exist for their removal. Although the statute may not specifically provide that removals shall only be for cause and may not define what shall be a sufficient cause, the removal must be for cause, and the process of removal prescribed by the statute must be pursued. The party against whom the proceeding is taken must be informed of the cause of the proposed removal, and this necessarily implies that the cause shall be some dereliction or general neglect of duty, or incapacity to perform the duties or some delinquency affecting his general character and his fitness for the office.¹ Removal without stating the reasons for removing in writing and giving the person removed an opportunity to make an explanation as required by the statute, is without warrant and unlawful.² The officer or employee proposed to be removed cannot be simply called before the head of his department and required to show cause why he should not be removed. A removal founded on any such procedure does not comply with the statute.³ But *this statutory enactment* does not make any provision for a formal trial; it does not require that witnesses shall be produced by the commissioner or head of the department, and that the officer shall be permitted to cross-examine them, or that he shall be allowed to produce witnesses for himself to be heard as upon a trial, but simply and alone, leaves him to make explanation, and then leaves the matter of removal in the discretion of the removing power. It is enough that the removing power assigns a sufficient cause for removal and furnishes an opportunity to the officer to explain.⁴ The power of removal may be exercised for neglect or omission of duty, within the knowl-

¹ *People v. Board of Fire Com'rs*, 72 N. Y. 445; *People v. Fire Com'rs*, 73 N. Y. 437; *People v. Campbell*, 82 N. Y. 247; *People v. Thompson*, 94 N. Y. 451; *People v. Constable*, 27 N. Y. App. Div. 74; *People v. Brady*, 43 N. Y. App. Div. 60. See also *Ayers v. Hatch*, 175 Mass. 489; *State v. McGarry*, 21 Wis. 496.

² *People v. Dalton*, 158 N. Y. 175; rev'g 34 N. Y. App. Div. 627.

³ *People v. Board of Fire Com'rs*, 72 N. Y. 445.

⁴ *People v. Thompson*, 94 N. Y. 451; *People v. Brady*, 166 N. Y. 44, 48; rev'g 53 N. Y. App. Div. 279; *People v. Cruger*, 17 N. Y. App. Div. 483, aff'd 155 N. Y. 701; *People v. Brady*, 58 N. Y. App. Div. 219; *People v. Woodbury*, 88 N. Y. App. Div. 593, aff'd 179 N. Y. 525; *People v. Woodbury*, 114 N. Y. App. Div. 188. The fact that the removed officer has been given a trial does not enlarge his rights. *People v. Hynes*, 101 N. Y. App. Div. 453.

edge of the removing power, without the necessity of taking testimony in respect thereto.¹ But the discretionary power of removal conferred by this statute is not unlimited and can only be exercised for some reasonable cause.² The reasons assigned for the removal must appear upon their face sufficient to justify the action; in other words, they must be substantial and not frivolous, but when they appear to be sufficient to justify the determination, *the courts have no power to interfere* on the ground that the reasons, though good in themselves, had no existence as matter of fact, or that the explanation given by the subordinate should have satisfied the removing power.³

§ 475 (251). **Incidental Power to remove for Cause; *Rex v. Richardson*.** — In the *leading case of King v. Richardson*, the point was decided, as above mentioned, that a corporation, in the absence of an express grant of authority, had the *incidental power* to make a by-law to remove officers for *just cause*. Lord Mansfield in that case classified the offences which would justify the exercise of the power; and his judgment therein has been followed both in England and in this country, in cases arising in private corporations not of a pecuniary character. According to Lord Mansfield, there are three sorts of offences for which an officer or corporator may be discharged: 1. Such as have *no immediate relation to his office*, but are themselves of so *infamous* a nature as to render the offender unfit to execute any public franchise. 2. Such as are only against his oath and *the duty of his office as a corporator*, and amount to breaches of the tacit condition annexed to his franchise or office. 3. Offences of a *mixed nature*, — as being an offence not only against the duty of his office, but also a matter indictable at the common law.⁴ In

¹ *People v. Thompson*, 94 N. Y. 451; *wealth v. Guardians of Poor*, 6 Serg. & *People v. Brady*, 166 N. Y. 44, 48, rev'g 53 N. Y. App. Div. 279; *People v. La Grange*, 2 N. Y. App. Div. 444; *People v. Cruger*, 17 N. Y. App. Div. 483, aff'd 155 N. Y. 701.

² *People v. Fire Com'rs*, 73 N. Y. 440; *People v. Thompson*, 94 N. Y. 451, 462; *People v. Constable*, 27 N. Y. App. Div. 74.

³ *People v. Brady*, 166 N. Y. 44, 48; *People v. Cruger*, 17 N. Y. App. Div. 483, aff'd 155 N. Y. 701.

⁴ *Rex v. Richardson*, 1 Burr. 517; followed, *Rex v. Liverpool*, 2 Burr. 723; *supra*, § 462. So, also, in *Commonwealth v. St. Patrick's (Benevolent Society)*, 2 Binn. (Pa.) 441; *Common-*

wealth v. Guardians of Poor, 6 Serg. & Rawle (Pa.), 469. These cases adopt Lord Mansfield's classification, and assert the inherent power of corporations to expel for offences falling within any of the three classes. See also *Butch. Benef. Assoc.*, 35 Pa. St. 151; *38 Pa. St. 298*; *Evans v. Philadelphia Club*, 50 Pa. St. 107; *Society for Visitation v. Commonwealth*, 52 Pa. St. 125.

The courts in a proper case may, by *mandamus*, compel a corporation to amove an officer; and the result of the English cases on this point is considered to be that where the offence of the officer is such that the corporation has the *power* to amove, the court will

offences of the *first* class the removal can only be made *after* there has been a previous conviction in a court of law; and an amotion will not be sustained by a subsequent conviction.¹ In offences of the *second* class the corporation may *try*, and if the charge is established, remove, without any previous or other proceeding in the courts.² In offences of the *third* class the English judges have differed on the point whether the officer may or may not be removed before a conviction in a court of justice. The principal cases and the result on this point are briefly stated in the note.³

§ 476 (252). **Scope of Implied Power of Removal.** — Principle and sound policy require that the *implied power of removal* for offences against the corporation be restricted to acts of a serious nature directly affecting the rights and interests of the corporation.⁴ Causes

only compel it to do so where some one is injured by the omission to remove; but where it is *required* to amove, or the office is declared by the charter or statute to be void if such an act be done or omitted, there the court will compel it to amove, though no one be shown to have been aggrieved. *Rex v. Truro*, 3 Barn. & Ald. 592; *Rex v. West Looe*, 5 Dowl. & R. 416; *Rex v. Totness*, 5 Dowl. & R. 483; *Grant on Corp.* 243, and note.

¹ *Rex v. Richardson*, 1 Burr. 517, and cases cited in last note.

² *Rex v. Richardson*, 1 Burr. 517; *Commonwealth v. St. Patrick's Society*, 2 Binn. (Pa.) 441, and cases cited in last note but one.

³ *Rex v. Carlisle*, Fortesc. 200; s. c. 11 Mod. 379. In this case the corporation, before conviction, amoved a capital citizen for giving a bribe to a freeman, and offering him another to influence his vote at the election for a mayor. The court's judgment was in favor of the right to amove. Although there might have been a previous conviction, yet this being a great offence against the *duty of his office*, the corporation might amove without a conviction. In *Rex v. Derby*, Cas. temp. Hardw. 155, Lord *Hardwicke* mistook the above case on this point, and inclined to think there ought to be a previous conviction. And such seemed also to be the inclination of *Holt*, C. J., in *Rex v. Chalke*, Comb. 397, where the removal was before conviction, for criminally razing entries in the corporation books which were at first proper, but the point was not decided.

In *Haddock's Case*, T. Raym. 439, the amotion was for riotously assembling and assaulting several corporators, thereby impeding the business of the corporation. It was considered that the offence was two-fold — one against the duty of his office as a corporator, the other (wholly disconnected) of a riot. And as he might be guilty of one and yet be acquitted of the other, the corporation might amove without conviction; and the case is said to be different from that of *Chalke* (*supra*), for there the officer could not have been guilty of the offence at law without at the same time having been guilty of a breach of his duty. The cases decided are considered to favor this view, viz., if the act is criminal and single in its nature, so that a conviction or acquittal in the courts of law will necessarily determine the guilt or innocence of the party, there must be a conviction, but otherwise there may be a removal without, or independent of, a conviction. *Buller's N. P.* 206; *Willc.* 249-252; *Glover*, 331, 338; *Grant*, 240; 2 *Kyd*, 88-94, where the prior cases are digested and stated. Lord *Mansfield*, in *Rex v. Richardson*, 1 Burr. 517, leaves the point untouched. A removal for a riot in the council-chamber, without a previous conviction, is said to have been held good. *Rex v. Yates*, *Stiles*, cited 8 Mod. 101. See, further, *Earle's Case*, Carth. 173; *Rex v. Wells*, 4 Burr. 1999; *Regina v. Newberry*, 1 Q. B. 751; 2 *Bac. Abr.* (Bouv. ed.) 476, and cases cited.

⁴ *Evans v. Philadelphia Club*, 50 Pa. St. 107; *Butch. B. Assoc.*, 35 Pa. St.

for removal have, in some instances, been held sufficient in England which would not probably be so regarded in this country. The principal English cases are given in the note. The sufficiency and reasonableness of the cause of removal are questions for the courts.¹

§ 477. **What is Cause for Removal.** — When it is provided by *statute* that an officer can only *be removed for cause*, without specify-

151; 38 Pa. St. 298; *Society for Visitation v. Commonwealth* 52 Pa. St. 125; *Commonwealth v. Philanthropic Society*, 5 Binn. (Pa.) 486; *State v. Watertown Common Council*, 9 Wis. 254; *Indianapolis v. Geisel*, 19 Ind. 344; *Indianapolis v. Wright*, 19 Ind. 346.

¹ *Rex v. Andover*, 3 Salk. 229; *State v. New Orleans*, 107 La. 632 quoting text. *Poverty of alderman*, so that he could not *pay taxes*, sufficient cause for removing him. *Rex v. Andover*, 3 Salk. 229. But not applicable here. But *bankruptcy* insufficient cause of amotion of councilman. *Rex v. Liverpool*, 2 Burr. 723; see *Rex v. Chitty*, 5 Ad. & E. 609. *Total desertion of duties of office* sufficient cause. *Buller's N. P.* 206; *Rex v. Richardson*, 1 Burr. 517. *When absence and non-attendance upon meetings, and neglect of duty*, will be sufficient cause. See *Rex v. Richardson*, 1 Burr. 517; *Rex v. Wells*, 4 Burr. 1999; 1 Hawk. P. C. chap. lxvi. § 1, as to official neglect of duty; approved by Lord Mansfield, in case last cited; *Lord Bruce's Case*, 2 Stra. 819, and notes; *Reg. v. Ipswich Bailiffs*, 2 Ld. Raym. 1232; s. c. Salk. 443; *Buller's N. P.* 206, 207; *Lord Hawley's Case*, 1 Vent. 143; *Rex v. Harris*, 1 Barn. & Ad. 936; *Queen v. Mayor, &c. of Pomfret*, 10 Mod. 107; 2 Kyd, 65 *et seq.*, where the older cases are stated; Willc. 255-264; Angell & Ames, § 427, giving summary of English cases. Much depends upon the cause of the neglect, and whether the effect is to obstruct or hinder the business of the corporation or officer from being done.

Habitual drunkenness, disqualifying from the performance of duty, is a sufficient cause to remove an alderman or officer charged with magisterial functions. *Rex v. Taylor*, 3 Salk. 231; 1 Rolle, 409; 3 Bulst. 190. But *casual intoxication*, or being drunk by accident, is not a sufficient cause, for the reason (charitably allowed) that this is likely to happen to the best. *Rex v. Taylor*, 3 Salk. 231, A. D. 1616. *Old*

age is insufficient. *Bac. Abr. Corp. E.* 9; *Hazard's Case*, 2 Rolle, 11.

Mere threats or attempts, no injury resulting, not sufficient. *Bagg's Case*, 11 Coke, 93. *Insulting language, or libel upon mayor or officers*, held insufficient, on the ground that personal offences are to be punished by law, and not by the corporation. *Rex v. Oxford*, Palm. 455; *Bagg's Case*, 11 Coke, 93, 96, 97, 98, 99; *Clerk's Case*, 2 Cro. 506; *Buller's N. P.* 203; *Reg. v. Lane*, Fortesc. 275; s. c. 11 Mod. 270; *Earle's Case*, Carth. 173; Willc. 261, pl. 680. See *Regina v. Rogers*, 2 Ld. Raym. 777; *Innes v. Wylie*, 1 Carr. & K. 257; *Regina v. Treasury Com'rs*, 10 Ad. & E. 374; 2 Perr. & D. 498.

Official misconduct, amounting to misdemeanor, has been before mentioned, and the cases cited. The misconduct must, it seems, specially relate to the execution of the office. *Rex v. Wells*, 4 Burr. 1999; see *Regina v. Newbury*, 1 Q. B. 751. If the same person hold *two offices*, misconduct with respect to one will authorize removal from that one, but not from both; but if the offence is against the duties of both, the removal may be from both. *Rex v. Chalke*, 1 Ld. Raym. 225; s. c. 5 Mod. 257; *Rex v. Doncaster*, 2 Ld. Raym. 1564, 1566; s. c. 1 Barnard. 265; *Rex v. Wells*, 4 Burr. 1999; *Rex v. Harris*, 1 B. & Ad. 936. Misemployment of corporate funds in his custody is not sufficient cause of amotion, though generally it is good cause of suspension from a financial office; for the court will not grant a *mandamus* to restore until the accounts are made up and submitted to the corporation. *Rex v. Chalke*, 1 Ld. Raym. 225; s. c. 5 Mod. 259; *Rex v. London*, 2 Term R. 182; Willc. 262, pl. 685; Angell & Ames, § 428. On principle, it may be suggested that if an implied power of amotion exists at all, it should extend to a case where the financial officer of a corporation is misemploying its funds entrusted to his safe keeping.

ing the nature of the cause, it is necessarily implied that the cause shall be some dereliction, or general neglect of duty or incapacity to perform the duties of, or some delinquency affecting his general character and his fitness for, the office. The cause must be personal to the office, and implying an unfitness for the place.¹ It means some substantial shortcoming which renders continuance in office or employment in some way detrimental to the discipline and efficiency of the service, and something which the law and a sound public opinion will recognize as a good cause for his no longer occupying the place.² The misconduct for which an officer may be removed must, in general, be found in his acts and conduct in the office from which his removal is sought.³ But to treat misconduct or incompetency in the performance of official duties as the only ground of removal is to give too *rigid* and narrow an application to the principles governing the subject. A cause for removal may exist for acts and conduct of a public officer at a time when he is not acting in the performance of a public duty, if these acts and conduct are such as to fairly show that he is unfit for the place.⁴ It has

¹ Rockford v. Compton, 115 Ill. App. 406, 409; Todd v. Dunlap, 99 Ky. 449; Andrews v. Biddeford Police Board, 94 Me. 68; Ayers v. Hatch, 175 Mass. 489; Hagerstown Street Com'rs v. Williams, 96 Md. 232; Speed v. Common Council of Detroit, 98 Mich. 360; State v. Common Council of Duluth, 53 Minn. 238; Townsend v. Common Council of Sauk Centre, 71 Minn. 379; State v. Sheppard, 192 Mo. 497; State v. Walker, 68 Mo. App. 110; People v. Fire Commissioners, 72 N. Y. 445; People v. Fire Commissioners, 73 N. Y. 437, 440; People v. Campbell, 82 N. Y. 247; People v. Diehl, 53 N. Y. App. Div. 645; Matter of Adam, 113 N. Y. App. Div. 534, 545; State v. Hawkins, 44 Ohio St. 98, 115; State v. McGarry, 21 Wis. 496; State v. Kuehn, 34 Wis. 229.

² Chicago v. Gillen, 124 Ill. App. 210.

³ A statute authorizing the removal or suspension of an officer "for misconduct in office," does not authorize his suspension pending the trial of an indictment on charge of an unlawful act or offence not connected with his official duties. State v. Sheppard, 192 Mo. 497. See also Coit v. State, 28 Ark. 417. The removing power may investigate a charge and try an officer thereon, *although the misconduct charged is an indictable offence*. Skillman v.

Trenton Police Com'rs, 64 N. J. L. 489; People v. French, 32 Hun (N. Y.), 112; People v. Mayor, &c. of New York, 52 Hun (N. Y.), 483. Failure to pay a civil debt within a reasonable time does not constitute ground for removal, in the absence of fraud or dishonesty. Chicago v. Gillen, 124 Ill. App. 210. *Insubordination* held not to be established by terms of letter written by member of police force to association of which he was a member, explaining reasons for his transfer from one position to another. People v. Bingham, 189 N. Y. 104.

⁴ Joyce v. Chicago, 216 Ill. 466, aff'g 120 Ill. App. 398. Taking part as a notary in the preparation of a false and fraudulent expense account of a patrolman and sergeant, held ground for removing lieutenant of police. Joyce v. Chicago, 216 Ill. 466, aff'g 120 Ill. App. 398. *Police commissioners* should take notice of the conduct of members of the police force as well when off as when on duty, and should dismiss an officer who is guilty of criminal or immoral conduct *when off duty* as an unfit person to be a member of the force. People v. Police Com'rs, 11 Hun (N. Y.), 403. See also People v. French, 32 Hun (N. Y.), 112. Police officer held to be properly dismissed for an unprovoked assault upon a citizen *while the officer was off duty*,

also been held that misconduct justifying the removal of an officer cannot, as a general rule, be found in acts or conduct *previous* to his election or appointment.¹ Any misconduct in office — a term which includes any wilful malfeasance, misfeasance, or non-feasance in office² — is sufficient ground for removal; as are also negligence and incompetency on the part of an officer in regard to some particular work which it has been his duty to do or to supervise.³ The fact that the officer is vested with discretion and judgment in the performance of the acts complained of does not prevent his removal because of them.⁴ Substantial breaches of the rules and regula-

the rules of the department providing that policemen should at all times be subject thereto. *People v. Carroll*, 42 Hun (N. Y.), 438. Interrupting testimony of superior officer during trial by saying "You lie," was held to be sufficient cause for removal of police officer. *People v. Moss*, 50 N. Y. App. Div. 308, aff'd 165 N. Y. 606. Diseased and filthy condition of person and clothing of policeman rendering him an improper person to be upon the force, and to associate with other officers thereon or to serve the public, was held to be a sufficient cause for removal. *People v. Diehl*, 50 N. Y. App. Div. 58, aff'd 167 N. Y. 619. Entering a saloon and committing an assault therein, was held to be sufficient cause for removal of an inspector of buildings of New York City. *People v. Brady*, 48 N. Y. App. Div. 128.

¹ *Speed v. Common Council of Detroit*, 98 Mich. 360; *State v. Jersey City*, 25 N. J. L. 536; *Campbell v. Newark Police Com'rs*, 71 N. J. L. 98; *Commonwealth v. Shaver*, 3 Watts & S. (Pa.) 338. *Contra*; *Tibbs v. Atlanta*, 125 Ga. 18. But to make this ruling an absolute canon governing the action of the removing power is to unduly limit his administrative authority. If acts or conduct *previous to election or appointment* are of such a character as to disclose disqualification and unfitness for the office or employment, and if they were not known at the time of election or appointment, they should be regarded as sufficient cause for removal.

² *Coffey v. Superior Court*, 147 Cal. 525, 529; *State v. Slover*, 113 Mo. 202, 208. See also *Savannah v. Grayson*, 104 Ga. 105.

³ *Heaney v. Chicago*, 117 Ill. App. 405. A police sergeant assigned to duty

as a police captain, and acting as such, may be dismissed from the force for failure to adequately perform the duties of a captain. *People v. Greene*, 104 N. Y. App. Div. 496, aff'd 183 N. Y. 573. If an officer is irregularly and improperly assigned by his chief to perform duties belonging to others and accepts the assignment without objection, he is, while acting under such assignment required to obey the rules and regulations of the department relating to these duties, and may be punished for a breach thereof. *People v. Greene*, 91 N. Y. App. Div. 58, aff'd 178 N. Y. 617.

Failure of the head of a bureau for the collection of arrears of taxes and assessments to take steps to adopt checks to prevent defalcation by a subordinate, was held to be sufficient cause for removal. *People v. Coler*, 78 N. Y. App. Div. 248, aff'd 175 N. Y. 510. Inability to read or write was held to justify removal for "incompetency or inefficiency." *Steinbach v. Galveston* (Tex. Civ. App.), 41 S. W. Rep. 822. Inability of inspector in bureau for the collection of city revenues and markets to balance his account book, was held sufficient ground for removal for cause. *People v. Coler*, 40 N. Y. App. Div. 65; aff'd 159 N. Y. 569. Failure of clerk to furnish accurate information as to the duties he was in the habit of performing under a former head of department, was held to furnish a reasonable inference of dereliction and neglect of duty and to give substantial cause for removal. *People v. Brady*, 43 N. Y. App. Div. 60. Neglect of police officer to serve warrant, held to be breach of duty justifying imposition of fine. *People v. McAdoo*, 98 N. Y. App. Div. 190.

⁴ *Avery v. Studley*, 74 Conn. 272.

tions formulated by the city authorities or by the civil service commission pursuant to statutory authority are sufficient cause for removal.¹ But not if the violations of the rules are unintentional, unsubstantial, and technical.² Although rules have been formulated and causes of removal have been specified therein, these causes are not the exclusive grounds of removal, and the officer or employee may be removed by the removing power for other sufficient cause.³

¹ *People v. Ham*, 59 N. Y. App. Div. 314.

Power to appoint and remove, and to prescribe rules and regulations for the good and discipline of the department, authorizes the head of the department to adopt a rule that any member of the department neglecting to pay a debt may be punished by fine or dismissal. *Cleu v. San Francisco Police Com'rs*, 3 Cal. App. 174; 84 Pac. Rep. 672; *State v. Hyman*, 22 Ohio Cir. Ct. 213. Under such rule the removing power is not obliged to wait until a court has passed on the question of the member's indebtedness before acting on the charge. *Cleu v. San Francisco Police Com'rs*, 3 Cal. App. 174; 84 Pac. Rep. 672.

A rule that no member of the police force of a city shall be a delegate to or member of any political or partisan convention or caucus, or take part in any political canvass, is a reasonable exercise of power conferred by the charter to make rules for the government of the police force. A violation thereof is sufficient cause for dismissal from office. *Brownell v. Russell*, 76 Vt. 326. Absence without leave for six days, held to be sufficient cause for removal under a rule of a police department that "unexplained absence without leave of any member of the force for five days shall, at the option of the board, be deemed and held to be a resignation by such member." *People v. Diehl*, 50 N. Y. App. Div. 58; aff'd 167 N. Y. 619.

Intoxication. A violation of a rule prohibiting intoxication is recognized as sufficient ground for dismissal. *People v. French*, 110 N. Y. 494; *People v. French*, 52 Hun (N. Y.), 90; *People v. Martin*, 28 N. Y. App. Div. 73. But before a police officer can be dismissed from the force for intoxication it must be shown that the intoxication was of such a character as to be an offence against the rule; that it was conscious, voluntary, blamable,

and in some way due to his fault. *People v. French*, 119 N. Y. 502. In the absence of any other proof or of any explanation, the mere fact of intoxication might establish the offence, because it would have to be assumed that the officer voluntarily brought himself into that condition. *People v. French*, 119 N. Y. 502; *People v. French*, 110 N. Y. 494. But, if it should appear that the officer was by force compelled to drink intoxicating liquor or that he had taken it when it was so disguised that he did not know its character, or in good faith when it was prescribed by a physician for some bodily ailment, and that thus he became intoxicated, he would not be guilty of a violation of the rules. *People v. French*, 119 N. Y. 502; *People v. French*, 119 N. Y. 493. Drunkenness of an election commissioner on two occasions while engaged in the performance of his duties was held to justify his removal by the mayor a year and a half later under a special statute. *Hogan v. Collins*, 183 Mass. 43.

² *People v. Greene*, 89 N. Y. App. Div. 296; *People v. McAdoo*, 117 N. Y. App. Div. 438. The sufficiency of a plea of ignorance of the rules is for the determination of the removing power. *People v. Greene*, 91 N. Y. App. Div. 58, aff'd 178 N. Y. 617.

³ *Joyce v. Chicago*, 216 Ill. 466; aff'd 120 Ill. App. 398; *Kammann v. Chicago*, 222 Ill. 63. See also *Oesterreich v. Fowle*, 132 Mich. 9. A rule of the civil service commission that employees in the classified service absenting themselves without leave for ten days shall be considered as discharged is intended to provide for abandonment of positions, and does not prevent the commission from trying and discharging an employee who has been absent without leave for three days. *Kammann v. Chicago*, 222 Ill. 63.

But the mere fact that some other person is better fitted to fill the office or is more congenial to the appointing or removing power is not a cause of removal within the statutes.¹

§ 478. **What constitutes a Removal under the Statutes.**—The applicability and operation of a statute prohibiting the summary removal of an officer *is dependent upon title* to the office. When the statute forbids summary removal of a person holding an office or position in the service of the State or one of its political divisions, it means only a lawful as contrasted with a *de facto* title to the position or office, and it does not cover a person who has been appointed to office in violation of the provisions of the civil service law, or any other statute. It is the duty of the appointing power upon learning the facts as to the illegality of the appointment of a person, to dispen-
 se with his services, and the person holding the appointing power is not required to prefer charges and give a hearing, nor is the appointing power limited in the removal to the statutory causes prescribed in the case of persons lawfully holding office, *e. g.*, incompetency, or misconduct.² Similarly, the fact that the title of the officer to the office has come to an end of the expiration of the term for which he was appointed, destroys the right of the officer to notice and a hearing under the statute; his term having expired, he no longer has any right to the office, except possibly as a hold-

¹ *People v. Board of Fire Com'rs*, 72 N. Y. 445. "For the good of the service" held not to be a sufficient cause for removal within the meaning of a statute requiring the removing power to state the reasons therefor. *People v. Dalton*, 44 N. Y. App. Div. 556. See, *contra*, *Ayers v. Hatch*, 175 Mass. 489.

² *Stott v. Chicago*, 205 Ill. 281; *McNeill v. Chicago*, 212 Ill. 481; *Kenneally v. Chicago*, 220 Ill. 485; *Moon v. Champaign*, 116 Ill. App. 403; *Lyons v. Gloucester City*, 49 N. J. L. 177; *Loper v. Millville*, 53 N. J. L. 362; *People v. Martin*, 91 Hun (N. Y.), 425; *People v. French*, 102 N. Y. 583; *People v. Board of Health*, 153 N. Y. 513, rev'g 15 N. Y. App. Div. 272 (rev'g also, *People v. Grady*, 18 N. Y. App. Div. 332); *People v. McAdoo*, 113 N. Y. App. Div. 770; *Matter of Meehan v. Flaherty*, 119 N. Y. App. Div. 128; *Flatan v. State*, 56 Tex. 93, 101.

But if the accused has been in office for a number of years, and has

been tried as if he were an officer *de jure*, but the proceedings do not comply with the statute or the requirements of the law, his removal under these proceedings cannot, on *certiorari* to review them, be justified on the ground that he was illegally appointed in the first instance without complying with the requirements of the civil service law. *People v. Hannan*, 56 Hun (N. Y.), 469, aff'd 125 N. Y. 691. A similar ruling has been made in the case of an incumbent whose term of office has expired, but who held over at the time when proceedings to remove him were begun. *People v. Hoffman*, 98 N. Y. App. Div. 4. See also *People v. Wright*, 150 N. Y. 444, 447.

Where a statute prohibits the appointment of any person who has been convicted of crime, an investigation by the head of the department to determine whether an appointee has been convicted of a crime is not within a statutory provision prohibiting the removal of a member until written

over at the will of the appointing power.¹ So, also, retirement on a pension for physical disability, pursuant to statutory authority conferred upon the head of the department, is not a removal from office within the meaning of a statute conferring upon the officer the right to a hearing upon due notice.² The right to hold office until removal for cause upon notice and a hearing is of course only granted to those persons who may come within the language of the statutes.³ If, under the civil service laws, a person is transferred

charges shall have been made or preferred against him. When it comes to the knowledge of the head of the department that a member has been convicted of a crime, and so is ineligible, the head of the department has the right summarily to vacate his appointment, discharge him from his position and refuse longer to recognize him as an officer. *People v. French*, 102 N. Y. 583.

Under a charge of "conduct unbecoming an officer" the removing authority cannot investigate the eligibility of a policeman to appointment and proceed to remove him on the ground that he acted as such without legal authority, being ineligible at the time of appointment. *People v. Board of Police*, 72 N. Y. 415. Police officer procuring appointment by having another personate him for the purpose of passing the requisite civil service examination, held to be subject to summary dismissal. *People v. Martin*, 91 Hun (N. Y.), 425. A person appointed to office under an ordinance providing that he shall hold *during the pleasure* of the board of aldermen cannot, on removal without a hearing, seek reinstatement by *mandamus* on the ground that the provisions of the ordinance are contrary to the charter, for if the ordinance was invalid his appointment was illegal. *Cunningham v. Cambridge*, 188 Mass. 556.

¹ *Rodrigue v. Rogers*, 4 Cal. App. 257; 87 Pac. Rep. 563; *Smith v. Mayor of Haverhill*, 187 Mass. 323, 325; *Lahar v. Eldridge*, 190 Mass. 504; *Matter of Tiffany*, 179 N. Y. 455, aff'g 88 N. Y. App. Div. 620; *People v. Albion*, 61 N. Y. App. Div. 71.

Where by statute, it is provided that "absence without leave of any member of the police force for five consecutive days shall be deemed and be held to be a resignation, and the member so absent shall at the expiration

of said period cease to be a member of the police force and be dismissed therefrom without notice," an officer who has been absent for more than five days ceases to be a member of the force, and he is not entitled to a trial or hearing upon charges. *People v. York*, 49 N. Y. App. Div. 173, aff'd 163 N. Y. 551; *People v. York*, 51 N. Y. App. Div. 502; *People v. McAdoo*, 141 N. Y. App. Div. 100. But under this statute the absence that will deprive the officer of his place must be voluntary and intentional to effect a resignation and justify the commissioners in acting without notice to the officer. Hence, if the absence of the officer was not his conscious act, but the result of temporary mental aberration, he should not be dismissed. *People v. Martin*, 143 N. Y. 407. Similarly, he cannot be dismissed if his absence is caused by his unjustifiable arrest and detention on a charge of having committed a felony. *People v. Police Commissioners*, 114 N. Y. 245.

² *People v. Bryant*, 28 N. Y. App. Div. 480; *People v. Scannell*, 53 N. Y. App. Div. 161, aff'g 164 N. Y. 572.

³ It has been said that when the civil service commission has, at the request of the municipal authority, placed a position in the competitive class, and a person has been appointed to it after examination, the city cannot claim as against the incumbent that the position was placed in the competitive class without authority, and that therefore the incumbent is not entitled to the benefit of a provision protecting the holders of competitive positions from removal without a hearing. *Craigie v. New York*, 114 N. Y. App. Div. 880. Under the provision of the *Illinois* civil service law, that "No officer or employee in the classified service of any city, who shall have been appointed under said rules and after said examination, shall be removed or discharged, except for cause,

by the civil service commissioners from the competitive class (which is protected by the statute from summary removal) to the non-competitive class (which is subject to removal at will), he is not thereafter entitled to the benefit of a statutory provision requiring notice and hearing before he is discharged.¹ But, with these and possibly a few exceptions of a similar nature, it may be laid down as a general rule that any *dismissal* from office or employment, or *change* in position which results in reducing the grade and decreasing the compensation of the officer, *is a removal* within the provisions of statutes requiring the removal to be for cause and after notice and a hearing. Thus, under these statutes, it has been held that the transfer of an officer or employee to a lower grade or position in the same department with a decreased pay is a removal from office which can only be effected by complying with the statutory requirements.² But a simple reduction in the salary of an officer or employee, within the limits prescribed by statute or by rule for the grade to which he belongs, made under statutory authority to fix and regulate salaries is not a removal within the meaning of these statutes, if the grade and standing of the incumbent are not otherwise affected.³ It has also been held that suspension from office without pay is a removal *pro tanto* within the statute.⁴ But

upon written charges, and after an opportunity to be heard in his own defence," only officers and employees who were appointed under the provisions of the act and after examination are entitled to its benefits; it does not apply to other appointees. *Kenneally v. Chicago*, 220 Ill. 485; *McNeill v. Chicago*, 212 Ill. 481. A statute prohibiting the drawing of any warrant or the paying of any salary to any person in the classified service of a city for which civil service rules have been prescribed, pursuant to the statute, unless the pay roll is certified by the civil service commissioners, is not applicable to appointments made in pursuance of prior statutes and prior rules, but only to appointments pursuant to the statute and civil service rules prescribed thereunder. *People v. Knox*, 45 N. Y. App. Div. 537.

¹ *People v. Keller*, 157 N. Y. 90; aff'g 31 N. Y. App. Div. 248; *People v. Keller*, 158 N. Y. 187; aff'g 35 N. Y. App. Div. 493.

² *Michaelis v. Jersey City*, 49 N. J. L. 154; *Douglas v. Jersey City*, 53 N. J. L. 118; *Leary v. Orange*, 59 N. J. L. 350; *People v. Board of Education*, 174 N. Y.

169; aff'g 78 N. Y. App. Div. 501; *Matter of Shepard v. Oakley*, 181 N. Y. 339. A division into a number of grades of subordinate officers who have hitherto been in the same grade and received a uniform compensation, and the assignment of one of these officers to the lowest grade at a smaller salary is a *reduction* of that officer within the meaning of a statute prohibiting reduction without a statement of the reasons. *People v. Feitner*, 49 N. Y. App. Div. 101.

³ *People v. Dalton*, 85 N. Y. App. Div. 110; *Buckbee v. Board of Education*, 115 N. Y. App. Div. 366, aff'd 187 N. Y. 544. But see *Waters v. New York*, 101 N. Y. App. Div. 196, where it was held that a *reduction of salary* from \$2400 to \$1500 was a "reduction" of the incumbent, which could only be made by complying with the provisions of the statute.

⁴ *Carey v. Plainfield*, 53 N. J. L. 311. But if he is *suspended pending trial* for misconduct, he remains an officer until tried and dismissed, and is entitled to a trial of the charges on which he is suspended. *Taylor v. Bayonne*, 56 N. J. L. 265.

a mere assignment or detail to perform special duty for which additional compensation may or may not be paid, is not an exercise of the power of appointment so far as the special duty or detail is concerned; and the power to make or withdraw the detail is not affected by statutes prohibiting removal from a position or appointment except for cause and after a hearing had.¹

§ 479. **Abolition of Office or Position is not a Removal.** — The purpose of the civil service statutes and of other laws prohibiting the discharge of employees without cause assigned, notice, and a hearing, is to insure the continuance in public employment of those officers who prove faithful and competent, regardless of their political affiliations. These statutes are not intended to affect or control the power of the city council or the executive officers of the city to abolish offices when they are no longer necessary or for reasons of economy. They are not intended to furnish an assurance to the officer or employee that he will be retained in the service of the city after the time when his services are required. They do not prevent his discharge in good faith without a trial and without notice, *when the office or position is abolished* as unnecessary or for reasons of economy.² But although the operation of these statutes

¹ *People v. Roosevelt*, 5 N. Y. App. Div. 168; *McManus v. Newark*, 49 N. J. L. 175. See also *Stone v. New York Civil Service Com'rs*, 63 N. Y. App. Div. 273; *People v. Cahill*, 188 N. Y. 489, 498, rev'g 116 N. Y. App. Div. 885. Even if a detail of a police officer to special duty — e. g. to the sanitary squad — can only be made with the consent of the civil service commission, the fact that it has been made without such consent does not affect the right of the officer to his salary as such, or justify the civil service commission in refusing to certify the payroll containing the salary of the officer irregularly assigned. *Stone v. New York Civil Service Com'rs*, 63 N. Y. App. Div. 273.

² *Fitzsimmons v. O'Neill*, 214 Ill. 294; aff'g 114 Ill. App. 168; *Chicago v. People*, 114 Ill. App. 145; *Downey v. State*, 160 Ind. 578; *Newark v. Lyon*, 53 N. J. L. 632, rev'g 53 N. J. L. 92; *Boylan v. Newark*, 58 N. J. L. 133; *Phillips v. Mayor, &c. of New York*, 88 N. Y. 245; *Langdon v. Mayor, &c. of New York*, 92 N. Y. 427; *Lethbridge v. Mayor, &c. of New York*, 133 N. Y. 232; *People v. Mayor, &c. of Brooklyn*, 149 N. Y. 215; *McNamara v. Mayor, &c. of New York*, 125 N. Y. 228; *Matter of Cusack v. Board of Education*, 174 N. Y. 136; rev'g 78 N. Y. App. Div. 470; *Matter of O'Leary v. Board of Education*, 174 N. Y. 511, rev'g 78 N. Y. App. Div. 475; *People v. Simis*, 18 N. Y. App. Div. 199; *People v. Ennis*, 18 N. Y. App. Div. 412; *People v. York*, 43 N. Y. App. Div. 444; *People v. Shea*, 51 N. Y. App. Div. 227, aff'd 164 N. Y. 573; *Matter of Kenny*, 52 N. Y. App. Div. 385; *Matter of Lazenby v. Elmira Board of Police*, 76 N. Y. App. Div. 171; *People v. Wells*, 78 N. Y. App. Div. 373, 374; *People v. Department of Health*, 86 N. Y. App. Div. 521, aff'd 176 N. Y. 602; *People v. Woodbury*, 102 N. Y. App. Div. 462; *People v. Board of Education*, 114 N. Y. App. Div. 1, aff'd 187 N. Y. 535; *Heath v. Salt Lake City*, 16 Utah. 374. See also *State v. Kansas City Police Com'rs*, 184 Mo. 109.

Veterans. The same principle applies to positions occupied by veterans. If a position occupied by a veteran is abolished in good faith as unnecessary or for reasons of economy, his dis-

does not prevent the abolition of an office in good faith, the local authorities have no power to discharge an officer or employee of the city *upon the pretence* that his office is abolished and immediately thereafter assign another person to do the same work which has been done by the discharged employee.¹ When the statute de-

charge, in consequence thereof, does not violate the statutory preferment of veterans in employment. *Evans v. Freeholders of Hudson*, 53 N. J. L. 585; *Beirne v. Jersey City*, 60 N. J. L. 109; *Sutherland v. Jersey City*, 61 N. J. L. 436; *Caulfield v. Jersey City*, 63 N. J. L. 148; *People v. Mayor, &c. of Brooklyn*, 149 N. Y. 215; *People v. Waring*, 7 N. Y. App. Div. 204; *People v. Squier*, 10 N. Y. App. Div. 415, 416; *People v. King*, 13 N. Y. App. Div. 400; *Matter of Kelly*, 42 N. Y. App. Div. 283; *People v. Scannell*, 48 N. Y. App. Div. 445, aff'd 163 N. Y. 599; *People v. Keating*, 49 N. Y. App. Div. 123; *People v. York*, 53 N. Y. App. Div. 429; *People v. Feitner*, 58 N. Y. App. Div. 594; *Eckerson v. New York*, 80 N. Y. App. Div. 12, aff'd 176 N. Y. 609; *Matter of Jones v. Willcox*, 80 N. Y. App. Div. 167.

Where the appointment of an employee of a city is accompanied by a statement that his *compensation is payable from a specific appropriation*, and it is provided by the city charter that the aggregate salaries of the city employees shall not exceed the total amount duly appropriated to the respective departments for such purposes, the appropriation of a sum insufficient to pay an employee's salary justifies a notice from the head of the department that the employee is suspended in consequence of insufficient appropriation and a necessary reduction of force, and a statute giving him a hearing and an opportunity to make explanation has no application. *Lethbridge v. Mayor, &c. of New York*, 133 N. Y. 232. If the amount of an appropriation for salaries is not sufficient to pay the existing salaries of the persons holding offices or positions, the head of the department need not scale down the salaries of the entire force, but may, in his discretion, dismiss a portion of it. *People v. Department of Health*, 86 N. Y. App. Div. 521, aff'd 176 N. Y. 602. If the city council, in good faith, for the purpose of reducing expenses, fails to make an appropriation for the salary of an officer and directs that his

duties be added to those of another office without additional compensation, there is an abolition of the office terminating the employment of the appointee, and the fact that he is not given a hearing before discharge, does not violate the provisions of the Illinois civil service law. *Fitzsimmons v. O'Neill*, 214 Ill. 494. By virtue of its power to abolish an office, as unnecessary or for purposes of economy, the board may, upon abolition, transfer the incumbent to another position at a smaller salary without notice or a hearing. *People v. Board of Education*, 114 App. N. Y. Div. 1, aff'd 187 N. Y. 535.

Suspension. Notice that an officer or employee is suspended owing to a lack of work without pay until such time as his services may be required is equivalent to a discharge because it shows an intention to dismiss. *McNamara v. Mayor, &c. of New York*, 152 N. Y. 228; *Wardlaw v. Mayor, &c. of New York*, 137 N. Y. 194, 197; *Lethbridge v. Mayor, &c. of New York*, 133 N. Y. 232, 236.

¹ *Womsley v. Jersey City*, 61 N. J. L. 499; *Ingram v. Jersey City Water Com'rs*, 63 N. J. L. 542; *People v. LaGrange*, 7 N. Y. App. Div. 311; *People v. Scannell*, 48 N. Y. App. Div. 69. A dismissal made because of the insufficiency of the appropriation for salaries is not shown to have been made in bad faith merely by the fact that the appropriation was not exhausted at the end of the year. *People v. Department of Health*, 86 N. Y. App. Div. 521, aff'd 176 N. Y. 602.

Whilst a person holding an office or appointment within the protection of the civil service law does not acquire any right to be continued in service upon the abolition of the office or upon its becoming unnecessary, the appointing power cannot discharge the incumbent of the office or the employee in mere anticipation of a consolidation of the office held by him with another. The removal or discharge can only be effected upon the consolidation being actually made. *People v. Brookfield*, 1 N. Y. App. Div. 68. When a re-

clares that the incumbent of an abolished office shall be deemed suspended without pay, and shall be entitled to reinstatement in the same or any corresponding office if within one year thereafter there is need for his services, the power to determine the necessity for his services is vested in the head of the department or appointing power, and cannot be controlled or reviewed by the courts.¹ Similarly, when the statute directs that if the duties of a newly created position are similar to those of an abolished position, the civil service commission shall certify the incumbent of the abolished position

removal is occasioned by an abolition of the office or position, a claim that the abolition is colorable only raises a question of fact which must be determined by the court before it can grant a writ of peremptory mandamus directing his reinstatement. *People v. Palmer*, 3 N. Y. App. Div. 389. Sufficiency of allegations that abolition of position was colorable only, see *People v. Coleman*, 99 N. Y. App. Div. 88. But in *Indiana*, it has been held, in a case where the office was abolished and shortly afterward re-established, that an ordinance abolishing the office of city attorney (who, by statute, could only be removed for cause) is an exercise of legislative power, and that the courts would not institute any inquiry into the motives of the legislative department of the municipal corporation in so abolishing the office. *Downey v. State*, 160 Ind. 578.

¹ *Matter of O'Toole v. Stewart*, 75 N. Y. App. Div. 497; *Matter of Jones v. Willcox*, 80 N. Y. App. Div. 167. Under this statute, a removal, instead of a mere suspension, is an irregular exercise of the power conferred, which may be corrected by mandamus. *People v. Wells*, 78 N. Y. App. Div. 373. The fact that the incumbent of the abolished position was notified that he was discharged does not constitute any ground for relief, if his rights were in fact preserved by certifying the abolition of the office, and his consequent suspension, to the civil service commission which placed him upon the list of those eligible to reinstatement. *People v. Monroe*, 99 N. Y. App. Div. 290.

When by statute it is provided that if an office or position is abolished or made unnecessary, the person holding the same shall be deemed suspended without pay and shall be entitled to reinstatement in the same or any

corresponding office or position, if within one year thereafter there is need of his services, and after the abolition of an office and the consequent suspension of the incumbent, a different office or position involving similar duties has been created and the appointing power takes no action to fill the newly created office, the incumbent of the abolished office is not entitled to mandamus requiring the appointing officer to appoint him to the office. Need for the services of the removed officer only arises within the meaning of the statute when the appointing officer takes steps to fill the newly created office. *Matter of Morrison v. Cantor*, 75 N. Y. App. Div. 480, aff'd 173 N. Y. 646. When the statute declares that upon the abolition of a position held by an employee protected by its provisions, the person or persons legally holding such office or filling the position or employment thus abolished or made unnecessary shall be deemed to be suspended without pay and shall be entitled to reinstatement in the same office, position, or employment or in any corresponding or similar office or employment, if within one year thereafter there is need for his or her services, the operation of this provision is not limited merely to excepting a person holding an abolished position from civil service examination upon reappointment; he remains during the period of suspension without pay an officer or employee of the city entitled to all the other benefits accruing from the office and which are not suspended or annulled by the provisions of the act, — *e. g.*, his widow is entitled to a death benefit from a department life insurance fund, if he dies during the statutory period of employment. *Reidy v. City of New York*, 185 N. Y. 141, rev'g 103 N. Y. App. Div. 361.

for appointment to the newly created position, the determination by the commission of the question whether the duties are similar involves judgment and discretion and cannot be controlled by the courts.¹

§ 480 (253). *Proceedings to amove.* — Respecting the *proceedings to amove*, it has already been observed that they must be had by and before the *authorized body duly assembled*, in conformity with the rules on that subject, which are elsewhere stated.² The proceeding in all cases *where the amotion is for cause is adversary or judicial in its character*; and if the organic law of the corporation is silent as to the mode of procedure, the substantial principles of the common law as to proceedings affecting private rights must be observed.³

§ 481 (254). *Notice of Proceeding to amove.* — And *first*, the officer is entitled to a *personal notice* of the proceeding against him, and of the time when the trial body will meet. It is not necessary that the notice, citation, or summons set out the charges in detail, but it should contain the substantial fact that a proceeding to amove is intended.⁴ The analogies of the ordinary procedure in the courts

¹ *Matter of Donovan v. Cantor*, 89 N. Y. App. Div. 50; s. c. 179 N. Y. 527.

² *Rex v. Taylor*, 3 Salk. 231; *Rex v. Sandys*, 2 Barnard. 302; *Taylor v. Gloucester*, 1 Roll. 409; s. c. 3 Bulst. 190; *Rex v. Chalke*, 1 Ld. Raym. 225; 2 Kyd, 57; *Grant*, 245, 275; *Willc.* 264, pl. 691; *Willc.* 266, pl. 698. Necessity for vote or corporate act, declaring the removal or expulsion. *Commonwealth v. Pennsylvania, &c. Institute*, 2 Serg. & Rawle (Pa.), 141; *Commonwealth v. German Society*, 15 Pa. St. 251; *Stadler v. Detroit*, 13 Mich. 346. Where the ordinance creating an office expressly reserves to the city council the power to remove the incumbent at pleasure, the repeal of the ordinance and notice to him of the repeal operate as a removal. *Chandler v. Lawrence*, 138 Mass. 213.

³ *Gillett Town Trustees v. People*, 13 Colo. App. 553, citing text; *State v. Vincennes University*, 5 Ind. 77; *Andrews v. King*, 77 Me. 224; *State v. Donovan*, 89 Me. 448; *Murdock v. Phillips Academy*, 12 Pick. (Mass.) 244; *Ham v. Boston Board of Police*, 142 Mass. 90; *Gibbs v. Manchester*,

73 N. H. 267; *State v. Bryce*, 7 Ohio, 414, 416; *Christy v. Kingfisher*, 13 Okla. 585.

"This proceeding" (amoval of a trustee of the university) "is essentially adversary; the justice of the common law permits no investigation of facts which may be followed by a loss of a right or by the infliction of a penalty, to be conducted *ex parte*." *Per Lane, J.*, in *State v. Bryce*, 7 Ohio, part ii, (92), 414, 416. Charter mode, if prescribed, must be pursued. *State v. Vincennes University*, 5 Ind. 77; *Bacher's Case*, 20 Pa. St. 425. See *People v. Bearfield*, 35 Barb. (N. Y.) 254; *State v. Watertown Common Council*, 9 Wis. 254; *Madison v. Korbly*, 32 Ind. 74; *Tompert v. Lithgow*, 1 Bush (Ky.), 176.

⁴ *Queen v. Saddlers' Co.*, 10 House of Lords Cases, 404; *State v. Bryce*, 7 Ohio, 414; *Rex v. Richardson*, 1 Burr. 517; *Rex v. Doncaster*, 2 Burr. 738. See 1 B. & Ad. 942; *Rex v. Liverpool*, 2 Burr. 723; *Bagg's Case*, 11 Rep. 93; *Rex v. Wilton*, 5 Mod. 259; *Exeter v. Glyde*, 4 Mod. 37; *Reg. v. Ipswich*, 2 Ld. Raym. 1232; *Willc.* 264, 265; *Innes v. Wylie*, 1 C. & K.

of the State (in the absence of statute or by-law) may be followed, respecting such details as the notice or summons, mode of service, &c. *Notice may be dispensed with:* 1. By appearance and answer to the charges.¹ 2. By a total desertion of the place,² so that it is not practicable to give the notice; as where the officer has permanently, not temporarily, left the municipality and resides constantly elsewhere with his family. Though he may have been absent or left the borough, yet if he return and be in the place at the time of the amotion, he is entitled to notice.³ If the amotion be for good cause, such as conviction of an infamous crime,⁴ or the repeated declaration of the officer that he would not discharge the duties of his office,⁵ while it would be more regular to give the notice, yet its omission will not entitle him to a *mandamus* to be restored; for if restored he could be amoved again, and the courts will not order

257; *South P. R. Co., In re* 5 Ind. 165; *People v. St. Francis Benevolent Society*, 24 How. Pr. (N. Y.) 216; *Delacey v. Neuse River Nav. Co.*, 1 Hawks (N. Car.), 274; *Commonwealth v. Pennsylvania Benef. Institute*, 2 Serg. & Rawle (Pa.), 141; *Society v. Vandyke*, 2 Whart. (Pa.) 309; *Nichols, In re*, 6 Abb. New Cas. (N. Y.) 474; s. c. 57 How. Pr. 95; *People v. Commissioners, &c., of Brooklyn*, 106 N. Y. 64; *Rockford v. Compton*, 115 Ill. App. 406; *Chicago v. People*, 210 Ill. 84, rev'g 111 Ill. App. 594; *Powell v. Bullis*, 221 Ill. 379; *Todd v. Dunlap*, 99 Ky. 449; *State v. Dunovan*, 89 Me. 448; *State v. Walker*, 68 Mo. App. 110; *Gibbs v. Manchester*, 73 N. H. 265; *Devault v. Camden*, 48 N. J. L. 433; *Ayers v. Newark*, 49 N. J. L. 170; *Loper v. Millville*, 53 N. J. L. 362; *Markley v. Cape May Point*, 55 N. J. L. 104, 107; *Duerr v. Newark*, 55 N. J. L. 272; *People v. Nichols*, 79 N. Y. 582; rev'g 18 Hun (N. Y.), 539; *People v. Wright*, 7 N. Y. App. Div. 185; aff'd 150 N. Y. 444; *Christy v. Kingfisher*, 13 Okla. 585, quoting text.

Where the power of removal is vested in the mayor for cause, he acts judicially, and a writ of prohibition will lie against him, if he exceeds his jurisdiction. *People v. Cooper*, 57 How. Pr. (N. Y.) 416. If the incumbent of an office uses the office as a means of wrong-doing, this is a good cause of removal, though the acts in question are not of an official nature. *Ib.* Where power is given to remove for cause, a specification of the charges, notice, and an opportunity to be heard, are

essential, though the charter be silent as to the procedure to be adopted in such a case. *State v. St. Louis*, 90 Mo. 19.

¹ Willc. 264; *Rex v. Wilton*, 2 Salk. 428; *Reg. v. Ipswich*, 2 Ld. Raym. 1232; *Rex v. Faversham Fishermen's Co.*, 8 Term R. 356; *Rex v. Carmathen*, 1 Maule & Sel. 697; s. p. *Commonwealth v. Pennsylvania Benef. Institute*, 2 Serg. & Rawle, 141; *Hayden v. Memphis*, 100 Tenn. 582.

Participation in the trial without objection to the regularity or sufficiency of the notice, or the regularity or sufficiency of the procedure adopted is a waiver of all technical defects. *Joyce v. Chicago*, 216 Ill. 466, aff'g 120 Ill. App. 398; *Hill v. Mayor of Boston*, 193 Mass. 569; *Streeter v. Worcester*, 177 Mass. 29; *Oesterreich v. Fowle*, 132 Mich. 9; *People v. Board of Police Com'rs*, 93 N. Y. 97; *People v. French*, 102 N. Y. 583; *People v. Brookfield*, 6 N. Y. App. Div. 445; aff'd 151 N. Y. 674; *People v. Scannell*, 80 N. Y. App. Div. 320; *State v. Kirkwood*, 15 Wash. 298.

² Willc. 265, 266; *Grant*, 245; *Rex v. Harris*, 1 B. & Ad. 936; *Rex v. Shrewsbury*, Cases temp. Hardw. 147; 7 Mod. 202; *Reg. v. Trueboy*, 2 Ld. Raym. 1275; 11 Mod. 75; *Rex v. Grimes*, 5 Burr. 2601; *Rex v. Leicester*, 4 Burr. 2089.

³ *Rex v. Leicester*, 4 Burr. 2089.

⁴ *Angell & Ames Corp.* § 422, where this opinion is expressed; *Grant*, 265; *Rex v. Chalke*, 1 Ld. Raym. 225.

⁵ *Rex v. Axbridge*, 2 Cowp. 523; see 2 Term R. 182; *Grant Corp.* 245.

a restoration where they can see that there is good ground of removal, and that the order to restore would be without practical and useful effect.¹ With these exceptions, the party is entitled to notice of the intention to remove, so that he may have full and fair opportunity to be heard in his defence.

§ 482 (255). **The Charges must be formulated: Opportunity to defend.** — There must be a *charge*, or charges, against him, *specifically stated*, with substantial certainty; yet the technical nicety required in indictments is not necessary.² And *reasonable time and opportunity must be given to answer* the charges and to produce his testimony; and he is also entitled to be heard and defended by counsel, and to cross-examine the witnesses, and to except to the proofs against him.³ If the charge be not denied, still it must, if not

¹ *Rex v. Griffiths*, 5 B. & Ald. 735; see *Blagrave's Case*, 2 Sid. 6, 49, 72; *Rex v. Rowe*, 1 Show. 188; s. c. Carth. 199; *State v. New Orleans*, 107 La. 632, quoting text; *Grant, Corp.* 245. If one irregularly removed for good cause be restored by *mandamus*, he may be again removed by regular proceedings *de novo*. *Taylor v. Gloucester*, 3 Bulst. 190; *Reg. v. Ipswich*, 2 Ld. Raym. 1232. In such case the office is vacated from the time of the second removal; the proceedings do not relate back to the former irregular removal. Willc. 269, pl. 707.

² *Tompert v. Lithgow*, 1 Bush (Ky.), 176; *Rex v. Lyme Regis*, Doug. 177; *Bagg's Case*, 11 Coke, 93; s. c. 1 Roll. 225; *Glover*, 334; Willc. 267; *Croly v. Sacramento*, 119 Cal. 229; *Denver v. Darrow*, 13 Colo. 460; *Gillett Town Trustees v. People*, 13 Colo. App. 553; *Rockford v. Compton*, 115 Ill. App. 406, 415; *Andrews v. King*, 77 Me. 224, 234; *Hallgren v. Campbell*, 82 Mich. 255; *State v. Walker*, 68 Mo. App. 110; *Gibbs v. Manchester*, 73 N. H. 265; *People v. Hayden*, 80 Hun (N. Y.), 397; *People v. Police Com'rs*, 93 N. Y. 97; *People v. Humphrey*, 156 N. Y. 231, rev'g 22 N. Y. App. Div. 632; *People v. Welles*, 18 N. Y. App. Div. 132; *People v. Elmendorf*, 42 N. Y. App. Div. 306; *People v. York*, 53 N. Y. App. Div. 336; *People v. Scannell*, 80 N. Y. App. Div. 320; *Hayden v. Memphis*, 100 Tenn. 582; *State v. Common Council of Superior*, 90 Wis. 612.

Citizen may prefer charges against subordinate officer. *Lindblom v. Doherty*, 102 Ill. App. 14. Where a single

definite charge has been preferred against an employee of the city and the city authorities have heard and convicted him on that charge only, they cannot remove him on that ground and also on one or more other grounds upon which no charges were preferred or hearing had. *People v. Humphrey*, 156 N. Y. 231, rev'g 22 N. Y. App. Div. 632. A charge preferred against an officer as ground for removal should be in writing, in such form that he can clearly understand the ground assigned for his removal, but it need not be formulated in technical language similar to that of a declaration or indictment. *Joyce v. Chicago*, 216 Ill. 466, aff'g 120 Ill. App. 398; *Lindblom v. Doherty*, 102 Ill. App. 14; *State v. Common Council of Superior*, 90 Wis. 612. Specification of charges against police officer held insufficient when neither the time nor place, nor the approximate time or place, of the commission of the alleged offence was stated. *People v. Elmendorf*, 42 N. Y. App. Div. 306.

³ *State v. Bryce*, 7 Ohio, 414; *Rex v. Richardson*, 1 Burr. 517; *Rex v. Liverpool*, 2 Burr. 723; *Murdock v. Phillips Academy*, 12 Pick. (Mass.) 244, where the requisites of a valid proceeding to remove are stated. *Rex v. Chalke*, 1 Ld. Raym. 225; *Rex v. Derby*, Cas. temp. Hardw. 155; ante, § 481, note; *Bakely v. Nowrey*, 68 N. J. L. 95; aff'd 68 N. J. L. 732; *Bowlby v. Dover*, 68 N. J. L. 97; *People v. Nichols*, 79 N. Y. 582, rev'g 18 Hun (N. Y.), 539; *People v. McCartney*, 34 N. Y. App. Div. 19; *Matter of Du Mahaut*, 43 N. Y. App. Div. 56.

admitted, be examined and proved.¹ But the technical rules that have been judicially adopted with reference to criminal prosecu-

See also *People v. Board of Fire Com'rs*, 72 N. Y. 445. In *Massachusetts*, it is held that the hearing need not be public. *Hogan v. Collins*, 183 Mass. 43.

Where a party is protected from removal from a public office or employment *except for cause to be ascertained and adjudged as matter of fact upon a hearing*, the proceeding is judicial in character and the tribunal before which the investigation is had cannot dispense with the usual form of procedure by acting upon statements not given under the responsibility of an oath. *People v. Police Com'rs*, 155 N. Y. 40, rev'g 12 N. Y. App. Div. 628; *People v. McCartney*, 34 N. Y. App. Div. 19; *People v. York*, 45 N. Y. App. Div. 503; *People v. York*, 51 N. Y. App. Div. 502; *People v. York*, 166 N. Y. 582, rev'g 58 N. Y. App. Div. 624. See also *People v. Humphrey*, 156 N. Y. 231, rev'g 22 N. Y. App. Div. 632. Rule is otherwise in *Wisconsin* in the absence of a statute requiring the oath to be administered. *Nehrling v. State*, 112 Wis. 637. But the fact that the record returned on *certiorari* does not disclose whether the witnesses were sworn or not is not sufficient to invalidate the proceedings on the trial of the accused officer. The presumption is that the officer conducting the trial acted legally until the contrary appears. *People v. Moss*, 34 N. Y. App. Div. 475.

A board of aldermen, sitting in a judicial capacity as a court of impeachment to try charges preferred against a city officer by another branch of the municipal governing body, is a court of limited jurisdiction, and, if not sworn, or not sworn by an officer authorized to administer oaths, their proceedings and judgment of guilty are void, and create no vacancy. *Tompert v. Lithgow*, 1 Bush (Ky.), 176. When the statute confers upon an officer the right to a hearing, he is entitled to the assistance of counsel at the hearing. *People v. Thompson*, 94 N. Y. 451, 465; *People v. Hannan*, 56 Hun (N. Y.), 469, aff'd 125 N. Y. 691; *People v. O'Brien*, 9 N. Y. App. Div. 428; *People v. Flood*, 64 N. Y. App. Div. 209; *Christy v. Kingfisher*, 13 Okla. 585. But in *Connecticut*, it is held that, while the refusal to allow

counsel is unusual and might tend to prove an arbitrary or unfair exercise of the removing power, it does not necessarily render the removal invalid. *Avery v. Studley*, 74 Conn. 272.

The past record of an officer cannot be considered in determining his guilt or innocence; but it may be considered for the purpose of determining the punishment to be awarded after he has been found guilty. *People v. French*, 119 N. Y. 502; *People v. Roosevelt*, 168 N. Y. 488, aff'g 4 N. Y. App. Div. 611; *People v. MacLean*, 57 Hun (N. Y.), 141; *People v. Wurster*, 91 Hun (N. Y.), 233; *People v. Roosevelt*, 1 N. Y. App. Div. 577; *People v. Roosevelt*, 2 N. Y. App. Div. 498, aff'd 151 N. Y. 675; *People v. Roosevelt*, 2 N. Y. App. Div. 536, aff'd 153 N. Y. 657; *People v. Roosevelt*, 7 N. Y. App. Div. 144; *People v. Roosevelt*, 13 N. Y. App. Div. 404; *People v. York*, 50 N. Y. App. Div. 359; *People v. York*, 52 N. Y. App. Div. 295. But to set aside the removal, it must affirmatively appear that the record was improperly used for the purpose of determining the officer's guilt. If that does not appear, it will be assumed that it was used only for a proper purpose. *People v. Roosevelt*, 2 N. Y. App. Div. 498, aff'd 151 N. Y. 675; *People v. Roosevelt*, 2 N. Y. App. Div. 536, aff'd 153 N. Y. 657; *People v. Roosevelt*, 17 N. Y. App. Div. 301; *People v. Scannell*, 56 N. Y. App. Div. 51; *People v. Lewis*, 111 N. Y. App. Div. 375, aff'd 186 N. Y. 583. The affidavits or testimony of the commissioners who conducted the trial and dismissed the officer, but who have themselves gone out of office, cannot be received for the purpose of invalidating their proceedings by showing that the past record of the officer was considered in determining his guilt, when that fact is not disclosed by the record of the trial made pursuant to statute. *People v. York*, 78 N. Y. App. Div. 432, aff'd 174 N. Y. 533. Strict conformity with the modes of procedure of trials applicable to trials in courts of law, is not required and the legality of the trial is not affected by the order in which the proofs are received. *People v. McClave*, 123 N. Y. 512.

¹ *Rex v. Faversham Fishermen's Co.*, 8 Term R. 356; *Harman v. Tap-*

tions are not to be applied to these investigations, for while it is proper that proceedings to deprive persons of common rights for alleged crimes should be confined within strict limits, the removal of incompetent or ill-behaved officials from their positions of authority and responsibility should be easy and prompt, and no forms should be requisite which are not in themselves substantial safeguards of justice.¹

§ 483. **Constitution of Trial Board; Disqualification of removing Power.** — The *trial board must be constituted* according to the requirements of the statute, or the rules and regulations of the civil service commission, where these are applicable.² Upon a trial, the

penden, 1 East, 555; Willc. 267; Glover, 334; *Murdock v. Phillips Academy*, 12 Pick. (Mass.) 244; *Christy v. Kingfisher*, 13 Okla. 585, quoting text. A municipal officer, when removed by the corporation appointing him, is entitled to actual notice of his removal, and to compensation until he receives such notice. *Jarvis v. Mayor, &c. of New York*, 2 N. Y. Leg. Obs. 396. The failure of the accused officer to take the stand in his own behalf does not raise a presumption of guilt as to matters not established by competent evidence. *People v. Greene*, 89 N. Y. App. Div. 296. A plea of guilty entered without other evidence justifies a conviction of a violation of the rules and a dismissal therefor. *People v. York*, 53 N. Y. App. Div. 336.

¹ *Devault v. Camden*, 48 N. J. L. 433; *Ayers v. Newark*, 49 N. J. L. 170; *Reilly v. Jersey City*, 64 N. J. L. 508. A reasonable notice and a fair hearing and investigation, without formality in the procedure, are all that are required. *Ayers v. Newark*, 49 N. J. L. 170.

² *Chicago v. People*, 210 Ill. 84, rev'g 111 Ill. App. 594. The legislature may change the tribunal to hear and determine a charge against an officer, and a statute making such change as to past offences, is not retroactive if it does not affect the offence itself, or increase or diminish the liability or penalty. *People v. Coyle*, 55 N. Y. App. Div. 223. Where by statute the mayor, recorder, and an alderman are constituted a body to try charges against policemen appointed by the corporation, with power to suspend or remove, the *presence of the mayor is*

essential to the constitution of the legal body, and if one act in the trial of such a charge as mayor, who is not such *de jure* (or *de facto*), the order of removal is void. *Hadley v. Mayor, &c. of Albany*, 33 N. Y. 603. Where the officer was "subject after hearing to removal by the mayor, by and with the advice and consent of the aldermen," it was held that the hearing should have been by a board consisting of the mayor and aldermen; a hearing by the aldermen alone was held insufficient, though the officer had consented to it. It was also held that the mayor and aldermen should first find as a fact and adjudicate that such cause for removal existed, before a valid order of removal could be made. *Andrews v. King*, 77 Me. 224. Specific provision of charter construed to give power of removal to the mayor and council, and not to the council alone. *Charles v. Hoboken*, 27 N. J. L. 203.

When the power of appointment and removal is vested in a board, a committee thereof cannot prefer charges against one of the board's appointees, and give a hearing thereon, — at least, without an express reference of the matter to the committee by resolution, or by-law duly adopted; and a removal by the board on the report of the committee without any hearing before the board is invalid. *Craigie v. New York*, 114 N. Y. App. Div. 880. A board of police commissioners which has power to make rules for the government and discipline of the police power, may adopt a rule: *that the testimony shall be taken before one commissioner*, and submitted to the board. *People v. Police Com'rs*, 93 N. Y. 97; *People v. Bd. Police Com'rs*, 20 Hun (N. Y.),

hearing should be full and fair, and where it appears that through design, or inadvertence, this has not been accorded, a judgment of removal should be set aside and the removed officer reinstated.¹

402; *People v. Police Com'rs*, 31 Hun (N. Y.), 40. Under the provision of such rule that in case testimony be heard by less than three commissioners, it shall be laid before and examined by the several commissioners before judgment thereon, it is not necessary that the testimony be examined by all the commissioners; it is sufficient if it be laid before and examined by the several commissioners constituting the board, at a regular meeting when a majority is present. *People v. Board of Police Com'rs*, 99 N. Y. 676. If the board having the power of removal is composed of several commissioners, and a trial or proceeding is had before a single commissioner and the term of that commissioner expires, and the other commissioners in office at the time of hearing are removed before the testimony is acted upon, their successors cannot dismiss upon the proceedings had. That proceeding terminated with the retirement or removal of the commissioners in office at the time of the hearing. *People v. Roosevelt*, 7 N. Y. App. Div. 144.

When a deputy has power to act for the head of the department in case of absence or sickness, the deputy may hear and determine charges against a subordinate and remove him from office. But he cannot hear the testimony and conduct the trial during the absence of his principal, and leave it to the principal to pass upon the evidence in the absence of the accused subordinate and without a hearing. *People v. Hamilton*, 84 N. Y. App. Div. 369. If the deputy receives an express delegation of the power of his chief for a limited time, a decision rendered after that time has expired is a nullity, though made on testimony taken before him while the delegation was in force. *People v. Monroe*, 105 N. Y. App. Div. 61. Trial and conviction before deputy, and determination of punishment by police commissioner, who is the head of department, held to be authorized by statute. *People v. Partridge*, 86 N. Y. App. Div. 310; *People v. Partridge*, 87 N. Y. App. Div. 573; *People v. Partridge*, 88 N. Y. App. Div. 60. But under this statute it was also held that the deputy must be expressly authorized either by special

delegation or by rule of the department to try the charges. *People v. Greene*, 97 N. Y. App. Div. 404. Under this statute the deputy commissioner before whom the charge may be examined, heard, and investigated, is not required to make a written finding of guilt in order to give the police commissioner authority to convict and punish. *People v. Partridge*, 180 N. Y. 237, rev'g 95 N. Y. App. Div. 633; *People v. McAdoo*, 112 N. Y. App. Div. 32 (overruling *People v. Partridge*, 87 N. Y. App. Div. 573; and *People v. Partridge*, 93 N. Y. App. Div. 473).

Additional police commissioner appointed or created pending the trial of an officer held not to be entitled to take part in the trial. *Tibbs v. Atlanta*, 125 Ga. 18. The incumbent of an office created subsequent to the act charged and expressly given power and jurisdiction over the department, has jurisdiction to hear and determine charges preferred against a member of the department prior to the date of the creation of the office. *People v. Coyle*, 55 N. Y. App. Div. 223. In determining charges of incompetency or unfaithfulness, the mayor may consider acts of the officer which occurred before the mayor's term of office began. *Avery v. Studley*, 74 Conn. 272; *People v. Elmendorf*, 57 N. Y. App. Div. 340.

The fact that a former mayor of a city had the acts of the accused officer brought to his attention and took no action thereon, does not preclude the present mayor from entertaining charges founded on these acts and exercising the power of removal. *Avery v. Studley*, 74 Conn. 272. The fact that the charges are stale and that a former mayor refused to consider them may be considered by the court in determining whether the evidence is sufficient to reasonably sustain the removal. *People v. Hogan*, 101 N. Y. App. Div. 216.

¹ *People v. Greene*, 179 N. Y. 195, rev'g 91 N. Y. App. Div. 613; *People v. Martin*, 17 N. Y. App. Div. 555, aff'd 154 N. Y. 775; *People v. Sturgis*, 91 N. Y. App. Div. 286; *People v. Greene*, 179 N. Y. 253, 256, rev'g 94 N. Y. App. Div. 287. When the charges are preferred to the head of the department by a superior of the accused officer and

Hence, if it appears that by the action of the trial board or judge or in reliance upon his assurance the accused has been induced to withhold testimony in his favor, and has thereby been prejudiced, a judgment of removal against him should be set aside.¹ But the body or officer in whom the power of removal is vested is not subject to all the rules governing the courts in the transaction of business, and interest or conduct on the part of members of the trial board which might disqualify a strictly judicial officer, will not necessarily invalidate a removal.² The proceeding being administrative in its purpose, the fact that the charges are preferred by the trial board or officer, is not a ground of disqualification,³ unless it should appear from the acts and conduct of the trial board or judge that his attitude towards the accused officer is such that the decision of removal is not in fact the decision of an impartial or fair tribunal.⁴

the head of department, after expressing the opinion that they have not been sustained, discharges the accused under the threat of his superior to resign if he is not dismissed, the dismissal will be set aside. *People v. Monroe*, 97 N. Y. App. Div. 283.

¹ *People v. Martin*, 17 N. Y. App. Div. 555, *aff'd* 154 N. Y. 775.

² *State v. Common Council of Superior*, 90 Wis. 612; *People v. York*, 53 N. Y. App. Div. 336. The fact that an alderman will act as mayor in case of the removal of the latter, and that another signed the charges upon which the mayor is under trial by the common council, does *not prevent them from sitting as members of the council on the trial*. *State v. Common Council of Superior*, 90 Wis. 612. When, by statute, the mayor or head of department is the only tribunal authorized to try charges against an officer, prejudice against the removed officer does not deprive him of jurisdiction, for otherwise the officer could not be tried or removed, however flagrant the offence. *People v. Magee*, 55 N. Y. App. Div. 195; *People v. Elmendorf*, 57 N. Y. App. Div. 340. The fact that the police commissioner has discussed charges against a patrolman with the captain who preferred the charge, and has stated to the accused's council that he is guilty of the charge, does not deprive the commissioner of jurisdiction to try the patrolman. *People v. Partridge*, 99 N. Y. App. Div. 410, *aff'd* 180 N. Y. 542. Expressions of opinion of guilt of the accused officer prior to

and during the trial by a member of the board of commissioners, who took part in the proceedings, but did not vote on the question of guilt or innocence, held not to invalidate the proceedings of the board. *Tibbs v. Atlanta*, 125 Ga. 18.

³ *People v. Common Council of Auburn*, 85 Hun (N. Y.), 601; *Fuller v. Attorney-General*, 98 Mich. 96; *People v. Sherman*, 66 N. Y. App. Div. 231; *Riggins v. Richards*, 97 Tex. 229; *State v. Common Council of Superior*, 90 Wis. 612. But see to the contrary, *People v. Saratoga Springs*, 4 N. Y. App. Div. 399; *People v. Roosevelt*, 23 N. Y. App. Div. 533. Direction to police captain to prefer charges against police officer does not disqualify deputy giving the direction to hold the trial. *People v. Greene*, 106 N. Y. App. Div. 230, *aff'd* 184 N. Y. 565.

⁴ *People v. Roosevelt*, 23 N. Y. App. Div. 533; *People v. Sturgis*, 91 N. Y. App. Div. 286. The mayor of a city, who presided at the trial, preferred and formulated charges against a policeman, took an interest in procuring witnesses to support them, had previously removed the officer from his position and had made declarations to the effect that he would get rid of him. It was held upon a review of the testimony that the decision of the mayor removing the officer was not impartial or unbiassed, and that the removal must be set aside. *People v. Elmendorf*, 51 N. Y. App. Div. 173; s. c. 165 N. Y. 676. In a later case, this decision was explained upon the ground

§ 484. **Power of Courts to review Removal for Cause.**—As pointed out, the removal of a public officer for cause, even after a hearing, is an administrative and not a judicial act, and the *power of the courts to review the acts of the removing power is necessarily limited*. When the method prescribed by statute or required by law has been substantially complied with, and a sufficient cause for removal is assigned by the removing power, the power to determine whether it exists or not is vested exclusively in the removing power, and its decision upon the facts cannot be reviewed by the courts. The courts generally hold that the only question of judicial cognizance is as to whether the removing power has kept within its jurisdiction, and whether the cause assigned is cause for removal under the statute.¹ Even where the court has felt itself authorized to examine into the existence of the cause as a matter of fact, it has only been to a restricted extent to satisfy itself that no substantial injustice has been done to the removed officer.²

that the determination of the removing power was against the weight of the evidence. *People v. Magee*, 55 N. Y. App. Div. 195.

Avery v. Studley, 74 Conn. 272; *Pierce's Appeal*, 78 Conn. 666; *State v. Johnson*, 30 Fla. 433, 477; *State v. Hay*, 45 Neb. 321, 330; *State v. Hawkins*, 44 Ohio St. 98, 115; *Cameron v. Parker*, 2 Okla. 277; *State v. McGarry*, 21 Wis. 496.

Illinois. In trials by the civil service board, if the board has jurisdiction and acts according to the forms of law applicable to the proceeding, its decision that the offence charged is cause for removal is final and not subject to review. *Chicago v. People*, 210 Ill. 84, rev'g 111 Ill. App. 594; *Joyce v. Chicago*, 216 Ill. 466, aff'g 120 Ill. App. 398; *Kammann v. Chicago*, 222 Ill. 63; *Heaney v. Chicago*, 117 Ill. App. 405; *Feldman v. Chicago*, 126 Ill. App. 186.

Massachusetts. If the cause assigned is a reasonable one, then, whether under the circumstances it is sufficient to justify a removal, is for the removing power to decide, and his decision is final and will not be reviewed by the courts. But whether the cause assigned constitutes, of itself, as matter of law, ground for removal, is a question for the court to determine in a proper proceeding. "For the good of the service," held sufficient cause to justify removal under a statute, authorizing the mayor to remove officers "for such cause as he

shall deem sufficient." *Ayres v. Hatch*, 175 Mass. 489.

Washington. When charges have been regularly preferred, opportunity given to defend, and the removing power has exercised its judgment and discretion, its judgment in that respect is not subject to review by the courts. *Ryan v. Handley*, 43 Wash. 232.

² In *Minnesota*, the court, on *certiorari*, will examine the evidence, not for the purpose of weighing it, but to ascertain whether it furnished any legal and substantial basis for the removal. *State v. Common Council of Duluth*, 53 Minn. 238; *Townsend v. Common Council of Sauk Centre*, 71 Minn. 379; *post*, chapter on *Certiorari*; *infra*, § 488.

In *New Jersey*, it is sufficient, to sustain a removal on *certiorari*, if there was evidence upon which the officer was found guilty, and which formed a rational basis for the judgment of removal. *Devault v. Camden*, 48 N. J. L. 433; *Ayers v. Newark*, 49 N. J. L. 170; *Ackerly v. Jersey City*, 54 N. J. L. 310; *Dodd v. Camden*, 56 N. J. L. 258; *Cavanagh v. Hoboken Police Com'rs*, 59 N. J. L. 412; *Wendell v. Newark*, 63 N. J. L. 216; *Alcutt v. Trenton Police Com'rs*, 66 N. J. L. 173, aff'd 67 N. J. L. 351.

New York. On *certiorari* to review a removal for cause after a hearing, the question whether the accused officer presented a sufficient excuse for his conduct is for the determination of the

§ 485 (256). **Effect of Valid Amotion; Vacancy.** — If the amotion be *legal and authorized*, the office becomes *ipso facto vacant* from the time the amotion is declared, and another person may be elected or appointed to fill it. If the removed officer afterward continues to act, he is a mere usurper, and may be ousted on *quo warranto* and punished. Amotion from one office does not, of course, affect the party's title to another.¹

§ 486. **Mandamus; Discretionary Acts.** — Under the principle that the courts will not issue a writ of *mandamus* to control the

removing power, both as to whether the excuse existed and as to whether it was sufficient to exonerate the accused officer, — a matter largely resting in the discretion of the removing power. *People v. York*, 35 N. Y. App. Div. 430. On *certiorari*, where the accused officer denies his guilt, the court must review the evidence to determine whether there was sufficient evidence to justify the verdict of a jury against the accused officer, and if it appears that such a verdict would be set aside as against the weight of evidence, the removal will be set aside and the officer reinstated. *Code Civ. Proc.*, § 2140; *People v. French*, 119 N. Y. 502, 508; *People v. Martin*, 142 N. Y. 352; *People v. Martin*, 28 N. Y. App. Div. 73; *People v. York*, 35 N. Y. App. Div. 430; *People v. Elmendorf*, 51 N. Y. App. Div. 173; *People v. Magee*, 55 N. Y. App. Div. 195; *People v. Magee*, 57 N. Y. App. Div. 281; *People v. Greene*, 89 N. Y. App. Div. 296; *People v. Greene*, 92 N. Y. App. Div. 243. The result of the trial will not be interfered with, unless it is clearly counter to the weight of the evidence, or in some obvious sense is obnoxious to the claims of justice. *People v. Partridge*, 88 N. Y. App. Div. 60; *People v. Partridge*, 91 N. Y. App. Div. 557, *aff'd* 179 N. Y. 531. If, on *certiorari*, it appears that an officer has been found guilty of four offences, and that the finding is against the weight of the evidence as to two of these offences, but that all four offences were taken into consideration in dismissing the officer, the court will set aside the dismissal and direct a new trial. *People v. Partridge*, 86 N. Y. App. Div. 310.

The punishment to be inflicted on a police captain who has been found guilty after a trial by the police commissioner, rests entirely with the com-

missioner and his determination is not subject to review by the court. *People v. York*, 53 N. Y. App. Div. 336; *People v. Greene*, 96 N. Y. App. Div. 1, *aff'd* 181 N. Y. 550.

¹ *Jay's Case*, 1 Vent. 302; *Symmers v. Regem*, Cowp. 502; *Wille*, 268, pl. 704; *Rex v. Doncaster*, 2 Ld. Raym. 1564; 1 Barnard. 265; *Rex v. Chalke*, 1 Ld. Raym. 225. *Mr. Willcock*, 267, pl. 704, whose language is adopted by *Glover (Corp. 334)*, states that if a person legally amoved continues to act, he is a mere usurper, and that "all corporate acts in which he has concurred are equally void, as though he had never been elected or admitted." But if he is permitted to act after amotion, it would probably be considered, in this country, that his acts would, as to third persons, be valid, like those of an officer *de facto*. If the removal be unauthorized, *Mr. Willcock* states the rule to be, "That all corporate acts in which he has concurred between the moment of his removal and restitution are of equal validity as if he had never been amoved," &c. *Wille*, 269, pl. 707. If he was regularly present and concurred, it can well be seen how this should be so; but his concurrence when not regularly acting, or when a *de facto* successor has taken his place and is acting, would not seem to alter the legal quality of the act. In this country the acts of a *de facto* officer of a *de jure* office are everywhere considered valid as respects the public. *Ante*, §§ 395, note, 413, note, 422, note, 429, note; *post*, §§ 518, 1554, note; *Cushing v. Frankfort*, 57 Me. 541. *Quo warranto* held to be the proper remedy to review the legality of proceedings of removal. *State v. Van Brocklin*, 8 Wash. 557; *Daniels v. Newbold*, 125 Iowa, 193; *State v. Kirkwood*, 15 Wash. 298.

exercise of a discretionary power conferred by statute upon a public officer, a person aggrieved by the action of the civil service board or appointing power must in many cases seek a remedy otherwise than by *mandamus*. Thus, the action of the civil service commissioners in determining whether positions shall be classified as exempt or non-exempt from competitive examination, involves the exercise of discretion and judgment, when the statute simply directs the commissioners to classify the positions without specifying the class into which the position shall be placed. Therefore, any classification by the civil service commission is not subject to control by *mandamus* in the absence of a manifest and palpable abuse of discretion.¹ But, if the commission refuses to make any classification at all in violation of the statutory duty imposed upon it to classify the office, it may be compelled to make a classification in accordance with the statutory provision, although the discretion of the commission as to the class in which the position shall be placed will not be interfered with.² And if the classification which has been made clearly violates the constitution or the statute, *mandamus* will lie to correct it to the extent at least of compelling the position to be stricken from the class in which it has been placed and directing that it be placed in some class to which it properly belongs.³ Under the rule too that *mandamus* will not lie to control discretionary powers, *mandamus* cannot issue to compel an appointment to a position (even in the case of a veteran who has passed the requisite examination and is entitled to a preference in appointment) when the appointing power has discretion to determine the number of clerks and subordinates which he requires, and to fill the vacancy or not as he deems expedient.⁴ Other instances in which the court will not control the exercise of discretionary power are cases where the appointing authority has

¹ *People v. Collier*, 175 N. Y. 196, rev'g 78 N. Y. App. Div. 620, and 79 N. Y. App. Div. 636; *People v. McWilliams*, 185 N. Y. 92, rev'g 100 N. Y. App. Div. 176; *post*, chapter on *Mandamus*.

² *Chittenden v. Wurster*, 152 N. Y. 345; *People v. McWilliams*, 185 N. Y. 92, rev'g 100 N. Y. App. Div. 176.

³ *People v. McWilliams*, 185 N. Y. 92, rev'g 100 N. Y. App. Div. 176; *Matter of Dill*, 185 N. Y. 106, aff'g 100 N. Y. App. Div. 155. In *People v. McWilliams*, 135 N. Y. 92, 99, *supra*, *Cullen, C. J.*, said: "If the position is clearly one subject to competitive ex-

amination, the commissioners may be compelled to so classify it. On the other hand, if the position be, by statute, or from its nature, exempt from examination, and the action of the commission be palpably illegal, the commission may be compelled to strike the position from the competitive or examination class, though in such case, redress by *mandamus* would often be unnecessary as a valid appointment could be made notwithstanding the classification."

⁴ *People v. Palmer*, 9 N. Y. App. Div. 252.

discretion to determine the qualification of applicants for the office,¹ or where the commission is required to exercise judgment and discretion in determining whether a newly created position is similar to an abolished position, the incumbent of the abolished position being entitled to a transfer only in the event that the duties of the two positions are similar.² Under the rule that *mandamus* is not the proper method to try the title of an incumbent to an office or position, a person who considers himself aggrieved on the ground that he should have had his name placed on the eligible list and should have been appointed to the office therefrom, is not entitled to *mandamus* compelling the cancellation of an appointment already made, apparently in accordance with the requirements of law, from an eligible list reported by the civil service commission. The appointment having been made in conformity with the law, is valid until cancelled in proper form, and the cancellation, involving, as it does, the title to the office, cannot be effected by *mandamus*.³

§ 487. **Mandamus; Wrongful Removal.**— Subject to the qualifications hereafter mentioned, if an officer or employee of a city has been *summarily removed in violation of a provision of the civil service law or other statute* giving him the right to retain his position until removed for cause and after notice and a hearing, he is entitled to *mandamus* to compel the appointing officer to restore him to his office or position.⁴ Where the specific charge stated is insufficient to justify the removal, or where the removal is erroneous and

¹ When the statute only entitles the veteran to appointment provided he possesses "the business capacity necessary to discharge the duties of the position involved," the discretion and power to determine the qualification of applicants for the office is vested in the appointing power, and if the appointing power decides in good faith that the veteran does not possess the capacity for the office, its decision cannot be overruled by the court on *mandamus*. *People v. Almshouse Commissioners*, 65 Hun (N. Y.), 169; *People v. Saratoga Springs*, 54 Hun (N. Y.), 16; *People v. Balston Spa*, 19 N. Y. App. Div. 567; *People v. Scannell*, 63 N. Y. App. Div. 243; *People v. Wendell*, 57 Hun (N. Y.), 352.

² *Mandamus will not lie* to compel the civil service commission to certify the name of the incumbent of an abol-

ished position for appointment to a newly created position, when the commission is vested by statute with discretion to determine whether the duties of the two positions are similar, and under the statute the relator is only entitled to appointment to the newly created position in the event that the duties of the two positions are similar. *Matter of Donovan v. Cantor*, 89 N. Y. App. Div. 50; s. c. 179 N. Y. 527.

³ *People v. Sheffield*, 24 N. Y. App. Div. 214.

⁴ *Hill v. Mayor of Boston*, 193 Mass. 569; *Sims v. Boston Police Com'rs*, 193 Mass. 547; *People v. Scannell*, 172 N. Y. 316, aff'g 69 N. Y. App. Div. 400; *People v. Cahill*, 188 N. Y. 489, rev'g 116 N. Y. App. Div. 885; *Nuttall v. Simis*, 31 N. Y. App. Div. 503. See also *Matter of Shepard v. Oakley*, 181 N. Y. 339.

no good and sufficient ground therefor appears, the officer is entitled to a *mandamus to restore him*.¹ But where the proceedings are in conformity with the charter, and are regular, the sentence will not be inquired into collaterally, nor its merits examined by *mandamus* or action.² But in applying this rule a distinction must be made between those positions which are offices, and those which are mere employments. If the person wrongfully removed is a public officer, and not merely an employee of the city, and if the office has been filled by the appointment of another person, the actual incumbent of the office is entitled to be heard, and under the rule that title to office cannot be determined by *mandamus*, the remedy of the person alleged to have been wrongfully removed is by *quo warranto* and not by *mandamus*.³ But it has also been held that the rule that the

¹ *Reg. v. Ipswich*, 2 Ld. Raym. 1232; *Madison v. Korbly*, 32 Ind. 74; *Commonwealth v. German Society*, 15 Pa. St. 251; *State v. Jersey City*, 25 N. J. L. 536; *State v. New Orleans*, 107 La. 632, citing text. The restoration puts him in the same situation that he was before the attempted removal. *Wille*, 269; *post*, § 847. Since there is an adequate remedy at law by *quo warranto* (*post*, chap. xxx.), or by *mandamus to restore* (*post*, § 1504), *equity will not enjoin* the corporate authorities from making an unlawful removal or appointing a successor. *Delahanty v. Warner*, 75 Ill. 185; *post*, § 517. Under the statute of *Florida* the action of a council in removing an officer is reviewable by *mandamus*, and in that proceeding the court will review all the action of the council and the testimony adduced before it. *Donnelly v. Teasdale*, 21 Fla. 652. In *New York*, it has been held that when a person has been removed without a hearing, &c., as provided by law, the proper remedy is by *mandamus*. If a hearing has been had on which it has been determined that cause exists for the removal, the remedy is by *certiorari*. *People v. Hayes*, 106 N. Y. App. Div. 563; *post*, chapters on *Certiorari* and *Mandamus*.

² *Society, &c. v. Commonwealth*, 52 Pa. St. 125; *People v. Bearfield*, 35 Barb. (N. Y.) 254. See also *Hogan v. Collins*, 183 Mass. 43. Though the removal is illegal, the officers who took part in it are not *personally liable*, unless both malice and want of probable cause be shown. *Harman v. Tappenden*, 3 Espin. 278; s. c. 1 East, 555; *Ferguson v. Earl of Kinnoul*, 9 Cl. & F. 289. *Jurisdiction as to the election and*

motion of officers in corporations, when not changed by statute belongs to the common-law courts and not to equity. *Attorney-General v. Earl Clarendon*, 17 Ves. 491; *Dyer*, 332; *Cochran v. McCleary*, 22 Iowa, 75. See also *In re Sawyer*, 124 U. S. 200; *ante*, §§ 379, note, 381, note, 517, and note. Where, by charter, a city council had power to remove police officers, and the mayor had power also to increase or diminish their number at discretion, it was held, in an action brought by a policeman, removed by the mayor for malfeasance, for his salary, that in the former case the judgment of the council, being judicial, was conclusive, while the action of the mayor, being ministerial, was not conclusive upon the officer. *Oliver v. Americus*, 69 Ga. 165; *ante*, § 379; *post*, § 517.

³ *People v. Goetting*, 133 N. Y. 569; *People v. Dalton*, 34 N. Y. App. Div. 6, aff'd 158 N. Y. 204; *People v. Tracy*, 35 N. Y. App. Div. 265; *People v. Rickerson*, 56 N. Y. App. Div. 588; *People v. McAdoo*, 110 N. Y. App. Div. 432. See also *People v. Yonkers Police Com'rs*, 174 N. Y. 450, rev'g 79 N. Y. App. Div. 82. If, however, the removed officer is one of a number of subordinate officers, and there is no particular office to which the relator is entitled and there is no allegation that the position from which the officer has been removed has been filled by the appointment of another, or that there is any question as to the title to the office between the relator and one actually occupying the position from which he has been removed, *the person wrongfully removed* is entitled to compel a reinstatement by *mandamus*. *People v.*

courts will not at the instance of a person out of possession of an office try the title thereto by *mandamus*, but will leave the party to his remedy by writ of *quo warranto*, has reference only to public officers created by law, and is not applicable to mere clerks or employees who are unlawfully removed from their positions by superior authority. Consequently, when the person who has been wrongfully removed is an employee and not a public officer, his remedy is by *mandamus* and not by *quo warranto*, although the position may have been filled by the appointment of another person since his removal.¹ So, too, under a statute which expressly declares that if a person, *e. g.*, a veteran, be wrongfully removed without notice and a hearing, he shall be entitled to a remedy by *mandamus* for righting the wrong, his remedy is by *mandamus* and not *quo warranto*, although the office may, after his removal, have been filled by the appointment of another person to it.² But the granting of the writ of *mandamus* is within the judicial discretion of the courts, and if a person has been wrongfully removed from public office or employment, he must seek reinstatement promptly, and, if he delays doing so, his action may amount to laches which will deprive him of any right to relief by *mandamus*.³

Kearney, 44 N. Y. App. Div. 449, *aff'd* 161 N. Y. 648.

Illinois. In a proceeding by *mandamus* to restore an officer wrongfully removed from office, the question of title may be raised so far as may be necessary to justify the issuance of the writ. *Chicago v. People*, 210 Ill. 84; *rev'g* 111 Ill. App. 594.

¹ *People v. Cahill*, 188 N. Y. 489, *rev'g* 116 N. Y. App. Div. 885; *People v. Sutton*, 88 Hun (N. Y.), 173; *People v. McAdoo*, 98 N. Y. App. Div. 312; *People v. Hamilton*, 98 N. Y. App. Div. 59. See also *People v. Kearney*, 44 N. Y. App. Div. 449, 450, *aff'd* 161 N. Y. 648; *People v. Hayes*, 106 N. Y. App. Div. 563.

² *People v. Dalton*, 158 N. Y. 204, *aff'g* 34 N. Y. App. Div. 6; *People v. Tracy*, 35 N. Y. App. Div. 265. But to entitle him to a remedy by *mandamus* under the statutory provision, he must make the present incumbent of the office a party to the proceeding. *People v. Scannell*, 63 N. Y. App. Div. 243; *People v. Dobbs Ferry*, 63 N. Y. App. Div. 276; *Matter of Jones v. Wilcox*, 80 N. Y. App. Div. 167. If, however, the appointment of the present incumbent is only temporary, he

need not be made a party. *People v. Scannell*, 63 N. Y. App. Div. 243.

³ *Kenneally v. Chicago*, 220 Ill. 485; *Hill v. Mayor of Boston*, 193 Mass. 569; *Taylor v. Bayonne*, 57 N. J. L. 376; *People v. Justices*, 78 Hun (N. Y.), 334; *People v. Palmer*, 3 N. Y. App. Div. 389; *People v. Collis*, 6 N. Y. App. Div. 467; *People v. McCartney*, 28 N. Y. App. Div. 138; *Matter of Murphy v. Keller*, 61 N. Y. App. Div. 145; *People v. Guilfoyle*, 61 N. Y. App. Div. 187; *People v. Sturgis*, 82 N. Y. App. Div. 580; *People v. Maxwell*, 87 N. Y. App. Div. 391. In *New York*, when there is no statutory limitation of the period within which *mandamus* may be applied for, the statutory four months limitation applicable to *certiorari* is applied thereto by analogy. *People v. Justices*, 78 Hun (N. Y.), 334; *People v. Collis*, 6 N. Y. App. Div. 467; *Matter of McDonald*, 34 N. Y. App. Div. 512; *People v. Lantry*, 48 N. Y. App. Div. 131; *People v. Greene*, 87 N. Y. App. Div. 346. If reinstatement is sought on the ground that the abolition of an office or position was only pretended and not in good faith and the discharge of a veteran consequently illegal, a *delay* that is explained by the fact that

§ 488. **Certiorari.** — As pointed out hereafter,¹ the writ of *certiorari* is, at common law, only addressed to inferior courts and officers, exercising judicial power, to review acts which are judicial in their nature and not merely ministerial. But in the *administration of civil service laws*, it has been held that many acts, although involving the exercise and discretion of judgment, are legislative or executive in their nature, rather than judicial or *quasi* judicial, and therefore are not reviewable by *certiorari*. Thus, *certiorari* will not lie to review the determination of the municipal civil service commission in classifying positions in the public service,² or in prescribing the method of examination and reaching an opinion as to the qualification and standing of applicants for office or employment,³ or the appointment of an officer under the civil service acts and rules formulated pursuant thereto.⁴ Under similar principles, if the incumbent of an office or position is subject to removal at the pleasure of the appointing power, the act of removal is ad-

the removed officer had no reason to doubt that the position had been in good faith abolished, does not constitute laches. *Matter of McDonald*, 34 N. Y. App. Div. 512. Delay for four and one half months in applying for *mandamus* pending decision by the courts of similar question in other actions, held not to constitute laches requiring the denial of the application. *People v. Lantry*, 48 N. Y. App. Div. 133. But the mere fact that the removed officer is informed that the law is unsettled and that some applications are pending undetermined is not in itself sufficient to excuse a delay of nine months in applying for *mandamus*. *People v. Keating*, 49 N. Y. App. Div. 123. See also *Matter of Murphy v. Keller*, 61 N. Y. App. Div. 145; *People v. Greene*, 87 N. Y. App. Div. 346. If an *appeal* from the removing power to a higher board or officer is provided by statute, a person wrongfully removed must take an appeal before applying for *mandamus* to compel reinstatement. *People v. White*, 59 N. Y. App. Div. 17.

In *Louisiana*, it has been held that before a dismissed police officer can maintain *mandamus* to compel the police board to reinstate him, he must show that he has exhausted his legal remedies before the board by applying for a new trial. *State v. Board of Police Com'rs*, 113 La. 424. If the head of department who has wrongfully exercised the power of removal has died, the re-

moved officer must demand reinstatement of the deceased's successor, before applying for *mandamus*. *People v. Welde*, 61 N. Y. App. Div. 581. See also *State v. Slick*, 86 Ind. 501. In *New York*, a proceeding by *mandamus* to compel reinstatement does not abate by the resignation, removal or expiration of the term of the defendant. *People v. Best*, 187 N. Y. 1. But upon any of these events occurring, the proceeding must be expressly continued against the successor in office by making him a party to it. *People v. Morton*, 156 N. Y. 136.

¹ *Post*, chapter on Certiorari.

² *People v. McWilliams*, 185 N. Y. 92, rev'g 100 N. Y. App. Div. 176; *People v. Burt*, 65 N. Y. App. Div. 157, aff'd 170 N. Y. 560.

³ *People v. Roosevelt*, 19 N. Y. App. Div. 431. See also *People v. Lindblom*, 182 Ill. 241; *State v. Harrison*, 141 Mo. 12. Even if it be assumed that *certiorari* would lie to review the action of an examining board, a candidate who has not been placed upon the eligible list cannot bring before the court the records of the other applicants used by the commissioners in rating such other applicants. These have nothing to do with the action of the commissioners in rating the unsuccessful candidate. *People v. Roosevelt*, 19 N. Y. App. Div. 431.

⁴ *Attorney-General v. Northampton*, 143 Mass. 589.

ministrative, does not involve the exercise of judicial functions, and cannot be reviewed by *certiorari*.¹ This rule is applied, although the discretion of the removing power is only to be exercised for cause and according to a procedure which does not involve notice and a hearing. Thus *certiorari* will not lie to review a removal, although by statute such removal can only be made after the reasons therefor have been stated in writing and filed with the head of the department, and the person so removed given an opportunity to make explanation,² or where the removal is required to be for cause and notice of the cause given to the person removed.³ But when by statute or by implication of law, the power of removal can only be exercised for cause and after a hearing, the proceeding, although an exercise of an administrative power, is judicial in its nature, and as a necessary consequence it is subject to review by *certiorari*.⁴

§ 489. **Actions by Taxpayers.** — If an officer be appointed without a previous determination of his merit and fitness by competitive

¹ *People v. Hubbell*, 38 N. Y. App. Div. 194; *People v. Guilfoyle*, 65 N. Y. App. Div. 498. The fact that the removing power has preferred charges against, and given notice and a hearing to an officer who is removable at pleasure, does not entitle the removed officer to *certiorari* to review the proceedings. *People v. Guilfoyle*, 65 N. Y. App. Div. 498; *People v. Simonson*, 66 N. Y. App. Div. 18.

² *People v. Brady*, 166 N. Y. 44, rev'g 53 N. Y. App. Div. 279; *People v. Gleason*, 63 N. Y. App. Div. 435; *People v. Hynes*, 101 N. Y. App. Div. 453; *People v. Woodbury*, 112 N. Y. App. Div. 79; *People v. Woodbury*, 114 N. Y. App. Div. 188.

³ *Matter of Carter*, 141 Cal. 316. If a statute provides that a person discharged from office or employment "shall have the right to sue out a writ of *certiorari* or other appropriate remedy" to review his discharge, this does not give him the right to *certiorari* when the discharge does not involve any judicial or quasi judicial action. *Certiorari* is not "the appropriate remedy." *People v. Woodbury*, 112 N. Y. App. Div. 79.

⁴ *Gill v. Brunswick*, 118 Ga. 85; *Tibbs v. Atlanta*, 125 Ga. 18; *Merrick v. Township Board of Arbela*, 41 Mich. 630; *State v. Slover*, 113 Mo. 202; *People v. Nichols*, 79 N. Y. 582, rev'g 18 Hun (N. Y.), 539; *People v. Flood*,

64 N. Y. App. Div. 209; *People v. Hayes*, 106 N. Y. App. Div. 563. But it has been said that if the statute requires a hearing, but the person is removed without a hearing, the proper remedy is by *mandamus*, and that it is only where a hearing has been had and a determination made that the officer should be removed for cause that the remedy is by *certiorari*. *People v. Hayes*, 106 N. Y. App. Div. 563.

Illinois. *Certiorari* will lie to review the proceedings of the civil service commissioners in removing a police patrolman from office, although only personal and not property rights are involved. *Powell v. Bullis*, 221 Ill. 379; *Blake v. Lindblom*, 225 Ill. 555; *Chicago v. Condell*, 224 Ill. 595; s. c. 124 Ill. App. 64; *Chicago v. Bullis*, 124 Ill. App. 7; *Chicago v. Gillen*, 124 Ill. App. 210.

But if the legislature in providing that removals shall only be for cause after notice and a hearing has also provided that the determination of the removing power shall be final, *certiorari* will not lie to review a removal. *People v. Ham*, 59 N. Y. App. Div. 314; *People v. Peck*, 73 N. Y. App. Div. 89. *Laches* held to bar right to apply for *certiorari*. *Chicago v. Condell*, 224 Ill. 595; *Heaney v. Chicago*, 117 Ill. App. 405; *Glori v. Newark Police Com'rs*, 72 N. J. L. 131.

examination, as prescribed by statute an action may be maintained under the legislation of New York, *by a taxpayer of the city* enjoin the city from paying his salary.¹ But even under a statute which confers upon a taxpayer the right to restrain the payment of salaries of officers appointed in violation of the civil service law, a taxpayer's action will not lie when the ground of complaint is that although the appointments are valid in form, they are invalid in fact. The proper procedure to determine title to office is by *quo warranto*, and if a person holds office by virtue of a regular and presumptively valid appointment in the civil service made in compliance with every requirement of the letter of the law, and the appointment is attacked on the ground that the apparent regularity is merely fraudulent and colorable, a taxpayer's action to restrain the payment of salary cannot be maintained under the statute because, the title of the office being held by a presumptively valid appointment, the question of that title is necessarily involved, and a remedy must be obtained by *quo warranto*.²

¹ *Rogers v. Common Council of Buffalo*, 123 N. Y. 173; *Peck v. Belknap*, 130 N. Y. 394. As to remedy of citizen and taxpayer, see *post*, chapter on Remedies. In *New York*, it was held that if the mayor of a city classified a position as exempt from examination, when, under the statute, it was not properly exempt, his act, though voidable, was not void; and the remedy of a citizen was to compel a correct classification by *mandamus*, or, in some cases, by *certiorari*, and not by a taxpayer's action to restrain the payment of salary. *Chittenden v. Wurster*, 152 N. Y. 345, rev'g 14 N. Y. App. Div. 483. But this rule has now been changed by a statute which declares that the right of a taxpayer to restrain the payment of salaries shall not be limited or denied because of any classification of the office as exempt. New York Civil Service Law (Law of 1900, chap. 195), § 27.

² *Greene v. Knox*, 175 N. Y. 4, aff'g 76 N. Y. App. Div. 405. An employee of a city, or a public officer, cannot maintain an equitable action to restrain the appointing powers of the city from discharging him before the expiration of his term of service. *Miller v. Warner*, 42 N. Y. App. Div. 2; *Palmer v. Board of Education*, 47 N. Y. App. Div. 547. See also *Delahanty v. Warner*, 75 Ill. 185.

CHAPTER XIII

CORPORATE MEETINGS

	Section		Section
Common-Law Requisites of a Valid Corporate Meeting . . .	500	Appointment to Office by <i>de facto</i> Council or Board	519
Corporate Meetings	501	Action by Indefinite Body; Majority Present may act	520
Requisites of a Valid Corporate Meeting of the Old English Municipal Corporations	502, 503	Quorum and Majority of Definite Body	521
Notice of Corporate Meetings at Common Law, and under the English Municipal Corporations Act	504	Extent of the Majority Principle	522
Requisites of Notice at Common Law; Time and Place; Waiver	505	Illustrative Instances	523, 524, 525
Notice under English Act	506	Excessive Number of Votes	526
New England Town Meetings; Notice and Adjournment	507	Effect of Refusal to vote	527
Requisites of Notice of Town Meeting; Object of Meeting . . .	508	Effect of casting Blank Ballot . .	528
Specification of Object of Town Meeting	509	Elections or Appointments to Office by Council	529
Power to adjourn Town Meeting . .	510	Charter Provisions requiring Majority of Whole Body	530
Constitution of Meetings of Councils or Select Governing Bodies . .	511	Application of Majority Principle to Joint Assemblies	531
Mayor's Presence and Function . .	512	Stated and Special Meetings; Constructive Notice of Stated Meetings	532
Status of Mayor as Member of Council	513, 514	Notice of Special Meetings; how given	533
Constitution of Council	515	Notice how given and how waived	534
Proper Corporate Body must act . .	516	Adjournment of Meetings	535
Injunction where two Conflicting Municipal Bodies are concurrently acting	517	Mode of Proceeding when convened	536
Acts of <i>de facto</i> Councils and Officers	518	Committees of Council	537
		Presumption of Regularity	538
		Right to rescind Previous Acts . .	539
		Charter Requirement of Vote by Ayes and Nays	540
		Acts by less than Quorum Void . .	541

§ 500 (258). **Common-Law Requisites of a Valid Corporate Meeting.** — As respects *their mode of action*, municipal corporations in this country are of *two general classes*. In the one, as in the organization of *towns* in the New England States, heretofore adverted to, *all of the qualified inhabitants* meet, act, and vote *in person*.¹ In the other, which is the kind that prevails generally throughout the States, and even in many of the larger places in New England, the affairs of the town or city are administered by a *select or representative body*, usually denominated the council, and which is elected

¹ *Ante*, chap. ii. § 40.

by the qualified voters of the incorporated place, not assembled together in a meeting, but at an election, where each elector votes separately and by ballot.¹

§ 501 (259). **Corporate Meetings.** — The *latter class* of corporations is properly municipal. The *former class* is not so strictly municipal as it is public in its character.² Where there is a *council* or *governing body*, the inhabitants or voters, in their natural capacity, have no power to act for or to bind the corporation, but the corporation must act, and can be bound only through the medium of this body. Therefore, authorized acts done by the council are not their acts, but those of the corporation. The council is a body which is constantly changing; it is simply the agent of the corporation. But its members, it has been well observed, are not only not *the* municipal corporation, but are not even *a* corporation.³ Whether the corporation be of the one class or the other, *its affairs must be transacted at a corporate meeting*, in the one case of the qualified inhabitants, and in the other of the members of the council or governing body, duly convened at the proper time and place, and upon due notice in cases where notice is requisite.⁴ It is a well-settled rule that when municipal councils or boards of any kind are called upon to perform legislative acts or acts involving discretion and judgment in administering the public affairs, *they can only act at authorized meetings* duly held. The council or board must meet and act as a board or council. The members cannot make a valid determination binding upon the corporation by their assent separately and individually expressed.⁵

¹ *Ante*, chap. ii. §§ 40 *et seq.*; chap. xi. §§ 370 *et seq.*

² *Ante*, chap. i. § 15; chap. ii. §§ 34, 35 and note.

³ *Regina v. Paramore*, 10 Ad. & El. 286. See *Regina v. York*, 2 Q. B. 850; *Lichfield v. Simpson*, 8 Q. B. 65, 73; *ante*, § 59. The Municipal Corporations Act, 1882, § 10, expressly provides that "the council shall exercise all the powers vested in the corporation by this act or otherwise." *Post*, §§ 506, 511.

⁴ *Dey v. Jersey City*, 19 N. J. Eq. 412; *Baltimore v. Poultney*, 25 Md. 18; *Kleimenhagen v. Dixon*, 122 Wis. 526.

⁵ *Harrington v. Liston Dist. Tp.*, 47 Iowa, 11; *Young v. Black Hawk County*, 66 Iowa, 460; *Cedar Tp. Independent School Dist. v. Wirtner*, 85 Iowa, 387; *Forcum v. Montezuma*

Dist., 99 Iowa, 435; *Paola & F. R. R. Co. v. Anderson County*, 16 Kan. 309; *Aikman v. School Dist.*, 27 Kan. 129; *Mincer v. School Dist.*, 27 Kan. 253; *McNolty v. Morse School Directors*, 102 Wis. 261; *State v. Steele*, 106 Wis. 475; *Kleimenhagen v. Dixon*, 122 Wis. 526. "If all the members should sign a writing declaring their assent to a proposed ordinance, without other formality, the ordinance would not be adopted, because no legislative action was taken; and the presiding officer could not ascertain the will of the board, and declare the same, from non-legislative action of that character, however conclusive such evidence might be of the individual wishes of the members." *Per Walker, J.*, in *Attorney-General v. Remick*, 73 N. H. 25. See also *Cleveland Cotton Mills v. Cleveland County Com'rs*, 108 N. Car. 678.

§ 502 (260). **Requisites of a Valid Corporate Meeting of the Old English Municipal Corporations.** — In England, prior to the General Municipal Corporations Act of 1835,¹ the *requisites of a valid corporate meeting* depended upon the constitution of the particular corporation under its charter, or prescriptive usage. To constitute a *corporate assembly* there must *at common law* be present the mayor or other head-officer (he being considered an *integral part* of the corporation,² in whose absence no valid corporate act could be done), a *majority* of the members of each select or definite class (these classes being also considered integral parts), and *some members* of the indefinite body (indefinite in point of numbers) usually styled the commonalty, and of each of the indefinite classes if there be more than one.³ If there be no indefinite class, and the governing body consist of a select or definite class, the common-law requisite of a valid corporate assembly is that a majority of the select class must be present; and if there be more than one such class, then a majority of each of the select classes of which the corporation is constituted; and the presence of the mayor at a select assembly of this kind is not necessary, unless it is expressly required.⁴ But where a common council exists (which, in contemplation of the ancient law, is a meeting of the body at large, or those of them who thought proper to attend, or were considered by their fellow freemen the men best fitted to attend), though such council has become a select or definite class, there the presence of the mayor or head presiding officer is necessary to a valid assembly, though such presence be not required by the charter.⁵

§ 503 (261). **Same Subject.** — *A majority of each definite part* means a majority of the number of members of which that part consists, not merely a majority of the existing members of the part; but if the act is to be done by an indefinite body alone, it is valid if done at a meeting duly convened, although but a small fraction of the whole body at large be present. But while the presence of a majority of each definite integral part was necessary to a valid corporate meeting, yet it is settled law that a majority of those present, when legally assembled, will bind the rest.⁶ Not only did the law

¹ *Ante*, chap. iii, §§ 53 *et seq.*

² *Ante*, chap. iii, § 53. Further as to mayor, see *ante*, chap. xi., relating to Municipal Elections and Officers, § 387.

³ Willc. 52, 53, 66; *Rex v. Atkins*, 3 Mod. 3; 1 Rol. Abr. 514; *Rex v. Carter*, Cowp. 59; *Rex v. Smart*, 4 Burr. 2143; *Rex v. Gaborian*, 11 East, 87, note;

Rex v. Morris, 4 East, 26; *Rex v. Bellringer*, 4 Term R. 810; *Rex v. Miller*, 6 Term R. 277; *Rex v. Varlo*, Cowp. 250; *Rex v. Monday*, Cowp. 530.

⁴ See authorities cited in the last note.

⁵ Willc. 67.

⁶ *Rex v. Bellringer*, 4 Term R. 810,

of the old corporations in England require the presence of a majority of the members of each definite integral part, but it went to the extreme length of holding that where the presence of the mayor was necessary, he must be the *legal* mayor, and if he be merely an officer *de facto*, and afterwards be ousted on *quo warranto*, all corporate acts done under the sanction of his office are voidable.¹ By reason of the change in the constitution of municipal corporations in England, wrought by the Corporations Act of 1835, many of the rules respecting corporate meetings are no longer applicable, though, as we shall see, some of them still are. Under that statute the corporation acts, and can only act, through the council; and it is provided that all questions shall be decided by a majority of all the councillors present, including questions of adjournment; that one-third part of the number of the whole council shall be a quorum; that the mayor, if present, shall preside, and if absent, that a presiding officer shall be chosen, who shall have a second or casting vote.²

§ 504 (262). **Notice of Corporate Meetings at Common Law, and under the English Municipal Corporations Act.** — Due notice of the time and place of a corporate meeting is, by the English law, essential to its validity, or its power to do any act which shall bind the corporation. Respecting notice, the courts in England adopted certain rules, which, since they form the basis of much of the statute law in this country upon the subject, and have in the main been followed by our courts, and are founded on reason, may advantageously be here mentioned. All corporators are presumed to know of the days appointed by the charter, statute, usage, or by-laws, for the transaction of particular business, and hence no notice of such meeting for the transaction of *such* business is necessary, or for the

and cases cited; *Rex v. Miller*, 6 Term R. 277; *Rex v. Monday*, Cowp. 530, 531, 538; *Rex v. Devonshire*, 1 Barn. & Cress. 609; *Rex v. Bower*, 1 Barn. & Cress. 492; *Rex v. May*, 4 Barn. & Ad. 843; *Rex v. Headley*, 7 Barn. & Cress. 496; Willc. 216, pl. 546; *Blackett v. Blizzard*, 9 Barn. & Cress. 851; *Rogers, In re*, 7 Cow. (N. Y.) 526; *Ib.*, note a, 764; *Willcocks, In re*, 7 Cow. (N. Y.) 402, and note 462, 463; *Young v. Buckingham*, 5 Ohio, 485, 489; *Buell v. Buckingham*, 16 Iowa, 284, and cases cited; *State v. Delieesseline*, 1 McCord (S. Car.), 52; *State v. Huggins*, Harper (S. Car.), Law, 94; *Booker v. Young*, 12 Gratt. (Va.) 303, approving Willc. 216, pl. 546; *Labourdette v. Municipi-*

ality, 2 La. An. 527; *Kingsbury v. Quincy School District*, 12 Met. (Mass.) 99; *Damon v. Granby*, 2 Pick. 345, 355; *Coles v. Trustees, &c. of Williamsburg*, 10 Wend. (N. Y.) 658; *Rex v. Greet*, 8 Barn. & Cress. 363; *Queen v. Barnhart*, 7 Upper Can. L. J. 103; *Queen v. Murray*, 1 Upper Can. L. J. n. s. 104; 2 Kent Com. 293; *Angell & Ames Corp.* § 501; *Launtz v. People*, 113 Ill. 137.

¹ *Rex v. Carter*, Cowp. 59; *Rex v. Hebden*, Andr. 391; *Rex v. Dawes*, 4 Burr. 2277, 2279; Willc. 54, 55.

² 5 and 6 Wm. IV. chap. lxxvi. § 69; *Rawlinson on Corp.* (5th ed.) § 136; *ante*, chap. iii. §§ 53, 55; English Municipal Corporations Act, 1882, § 21.

transaction of the mere ordinary affairs of the corporation on such days; yet if it is intended to proceed to any other act of importance, a notice is necessary, the same as at any other time.

§ 505 (264). **Requisites of Notice at Common Law; Time and Place ; Waiver.** — The notice must state *the time* of meeting, and *the place*, if it be not the usual place. It is not necessary to state what business is to be done, when the meeting relates only to the ordinary affairs of the corporation; but when it is for the purpose of electing or removing officers, passing ordinances, and the like, the fact should be stated, so that members may know that something more than the usual routine of business will be transacted. Such great importance is attached to notice that it can *only be waived by universal consent*; but if every member of a select body be present at a regular or stated meeting or at a special meeting, they may, if *every one* consents, but not otherwise, transact any business, ordinary or extraordinary, though no notice was given, or an insufficient notice, but the unanimity of consent should plainly appear from their recorded declaration, acts, or conduct. This unanimity is only necessary in order to enter upon the business; once commenced, the usual rules which govern the body and its actions apply. It is to be observed that the foregoing rules are not applicable where they are in conflict with the charter; and hence, if this *imperatively* requires a *special notice*, it cannot be waived, even by consent of all. The guild hall is the proper place for the meeting; if there be none, the meeting should be at the usual place; and if at any other place, it should be stated, to prevent fraud or surprise. Acts done at an unusual place will be closely scrutinized.¹

§ 506 (265). **Notice under English Act.** — By the English Municipal Corporations Act,² *the subject of meetings*, stated and special,

¹ Authorities in support of the last and two preceding sections of the text: Willc. chap. i. §§ 42 *et seq.*; *Rex v. Hill*, 4 B. & C. 441; *Rex v. Liverpool*, 2 Burr. 723; *Rex v. Doncaster*, 2 Burr. 738; *Rex v. Theodorick*, 8 East, 545; *Rex v. May*, 5 Burr. 2682; *Rex v. Oxford*, Palm. 455; *Rex v. Grimes*, 5 Burr. 2601; *Kynaston v. Shrewsbury*, 2 Stra. 1051; *Musgrove v. Nevison*, 1 Stra. 584; s. c. 2 Ld. Raym. 1359; *Rex v. Mayor of Shrewsbury*, Cases temp. Hardw. 147; *Smyth v. Darley*, 2 House of Lords Cases, 789; *Grant on Corp.* 154-156; *Glover on Corp.* chap. viii. pp. 146-173. Formerly the rule that where notice was necessary every member must be notified, was applied only to the case of definite bodies, but it has more recently been declared to be applicable to both select and indefinite bodies of public corporations. *Rex v. Langhorne*, 4 Ad. & El. 538. See also *Rex v. Faversham Fishermen's Co.*, 8 Term. R. 356, *per* Lord Kenyon, *arguendo*.

² 5 and 6 Wm. IV. chap. lxxvi. § 69; *ante*, §§ 53, 55; Consolidated Act, 1882, § 22.

and the notice and summons required are made matter of express regulation. It provides for every borough or city four quarterly meetings of the council in each year, to be held at a fixed date. No notice of the business to be transacted at these quarterly meetings is necessary; but three days' notice, by posting on or near the town hall, is required of the time and place of every intended meeting. Power is given to the mayor to call special meetings, or, on his refusal, to five members of the council, in which case the notice on or near the town hall shall state therein the business proposed to be transacted at such meeting, and in every case a summons (in addition to the notice) must be left at the usual place of abode of every member of the council, or at the premises occupied by him, in respect of which he is enrolled as a burgess, at least three clear days before the meeting, and no business can be transacted not specified in the summons. Power to adjourn meetings is expressly conferred upon the council by the same section.¹

§ 507 (266). **New England Town Meetings; Notice and Adjournment.** — In New England the inhabitants are required to be notified or warned of town meetings. The requisites of such notice, and manner of giving it, are prescribed by statute. The provision is quite general that the articles or matters to be acted upon shall be specified or inserted in the notice or warrant. The courts in those States concur in requiring the statute as to notice to be faithfully observed by the officers charged with the duty of calling meetings. Meetings, to be valid, must be warned or notified according to law. The rule of the English courts applied to indefinite corporate bodies, that if all are present notice may, by unanimous consent, be waived,² is not regarded as applicable to the town meetings of New England, and hence a *de facto* meeting, not duly notified, though attended by all the voters capable of attending, is not a valid meeting, and its acts are void.³

¹ In construing this statute, it has been held that where the meeting is an adjourned quarterly meeting, notice is necessary as to any business which was not actually entered upon at the general or regular quarterly meeting, but not otherwise; and hence, a coroner cannot be elected at such an adjourned quarterly meeting without the notice and summons which the statute requires. *Regina v. Grimshaw*, 10 Queen's Bench, 747, 755. See *Regina v. Thomas*, 8 Ad. & El. 183; *Rex v. Harris*, 1 Barn. & Ad. 936. As to notice, *Kidderminster Town Council v. Court*, 1 E. & E. 770; *Regina v. Whipp*, 4 Queen's Bench, 141; *ante*, § 501, note.

² *Rex v. Theodorick*, 8 East, 545; *ante*, § 40.

³ *Hayward v. No. Bridgewater School District*, 2 Cush. (Mass.) 419; *Moor v. Newfield*, 4 Me. 44; *Stoughton School District v. Atherton*, 12 Met. (Mass.) 105; *Little v. Merrill*, 10 Pick. (Mass.) 543; *Perry v. Dover*, 12 Pick. (Mass.) 206; *Reynolds v. New Salem*, 6 Met. (Mass.) 340; *Congregational Society of Bethany v. Sperry*, 10 Conn.

§ 508 (267). **Requisites of Notice of Town Meeting: Object of Meeting.** — It is, however, sufficient if the *purpose or object* of the

200; *Bloomfield v. Charter Oak Bank*, 121 U. S. 121, 130; *Rand v. Wilder*, 1 Cush. (Mass.) 294; *Stone v. Hamilton School District*, 8 Cush. (Mass.) 592; *Brewster v. Hyde*, 7 N. H. 206; *Northwood v. Barrington*, 9 N. H. 369; *Giles v. Sanbornton School District*, 31 N. H. 304; *Lander v. Smithfield School District*, 33 Me. 239; *Jordan v. Lisbon School District*, 38 Me. 164. So in *Vermont* it has been decided that it cannot be shown, by parol, to validate the *levy of tax* by a meeting not legally warned, that *all the legal voters* of the district were present at the meeting. *Sherwin v. Bugbee*, 17 Vt. 337; distinguished by the court from *Rex v. Theodorick*, 8 East, 545. And see also *Hunt v. Norwich School District*, 14 Vt. 300; *Pratt v. Swanton*, 15 Vt. 147. *Requisites of notice and sufficiency.* *Wyley v. Wilson*, 44 Vt. 404.

Under the legislation of *Connecticut*, although it is held that the right to call a borough meeting for any lawful purpose is a legal right of every freeman, yet, as it is shared with all other freemen, it can be enforced only by a proceeding in the name of the State. *Peck v. Booth*, 42 Conn. 271. But see *post*, §§ 1527, 1562, 1586. "A town [in Connecticut] cannot make a contract, or authorize any officer or agent to make one in its behalf, except by vote in a town meeting duly notified or warned; and the notice or warning must specify the matter to be acted on, in order that all the inhabitants (whose property will be subject to be taken on execution to satisfy the obligations of the town) may know in advance what business is to be transacted at the meeting. If the subject of the vote is not specified in the notice or warning, the vote has no legal effect, and binds neither the town nor the inhabitants. No one can rely upon a vote as giving him any rights against the town, without proving a sufficient notice or warning of the meeting at which the vote was passed. *Reynolds v. New Salem*, 6 Met. 340; *Stoughton School District v. Atherton*, 12 Met. 105; *Moor v. Newfield*, 4 Me. 44; *Dillon Mun. Corp.* §§ 266-268 [now §§ 507-509]. Upon this point the statutes and decisions of Connecticut are perfectly clear." *Per Mr. Justice Gray*, *Bloomfield v. Charter Oak Bank*, 121 U. S. 129.

A tax voted at a meeting not legally warned is *illegal*, and may be recovered back if the party did not pay it voluntarily. *Rideout v. Dunstable School District*, 1 Allen (Mass.), 232. So it may be recovered back if the assessment is *void*. *Gerry v. Stoneham*, 1 Allen (Mass.), 319; *Tobey v. Wareham*, 2 Allen (Mass.), 594; *post*, chapter on Actions. See *Massachusetts Act of 1859*, chap. cxviii., limiting, in such cases, the plaintiff's right of recovery to illegal excess of taxation.

Authority to the clerk to call and warn "the annual meetings" does not authorize him to call and warn special meetings; and the acts and doings of a special meeting thus called are wholly void. *Stoughton School District v. Atherton*, 12 Met. (Mass.) 105. And authority "to warn" future meetings does not authorize him "to call" such meetings. *Stone v. Hamilton School District*, 8 Cush. (Mass.) 592.

As to *proof of notice*, and the return of the person or officer making the warning, and what it shall show, see *State v. Williams*, 25 Me. 564; *Auburn v. Union Water Power Co.*, 90 Me. 71; and the *Massachusetts* and *Maine* decisions therein cited and commented on. *Christ's Church v. Woodward*, 26 Me. 172; *Fossett v. Bearce*, 29 Me. 523; *Bearce v. Fossett*, 34 Me. 575; *Jordan v. Lisbon School District*, 38 Me. 164; *Perry v. Dover*, 12 Pick. (Mass.) 206; *Houghton v. Davenport*, 23 Pick. (Mass.) 235; *Williams v. Lunenburg School Dist.*, 21 Pick. (Mass.) 75; *Briggs v. Murdock*, 13 Pick. (Mass.) 305; *Rand v. Wilder*, 11 Cush. (Mass.) 294; *Cardigan v. Page*, 6 N. H. 182; *State v. Donahay*, 30 N. J. L. 404; *Hardcastle v. State*, 27 N. J. L. 552; *Detroit E. R. & Ill. R. Co. v. Bearss*, 39 Ind. 598; *McPike v. Parr*, 51 Mo. 63; *French v. Edwards*, 13 Wall. 511.

In *Sherwin v. Bugbee*, 17 Vt. 337, the strict view is held that the *notice or warning must be recorded* by the clerk. If, as recorded, the *time* for which the meeting was to be holden is not specified, the defect cannot be supplied by parol evidence that in the original warning the hour for the meeting was named. This decision was not put upon the ground that the statute expressly required the warning to be recorded (which it did not), but upon the ground

meeting can fairly be understood from the notice or warrant.¹ And where the statute requires the *time and place* to be stated in the notice, its requirements must be observed, and there can be no legal meeting unless it originally assembles at the prescribed time and place. The law is strictly held as to the important particulars of time and place, as will appear by the illustrations in the notes.²

that the statute intended that the records should furnish all the means for testing the validity of the proceedings. See also *Stevens v. Eden M. H. Society*, 12 Vt. 688; *post*, § 579. Where the place of an annual meeting is not fixed by statute or charter, notice of the meeting and place is essential. *United States v. McKelden*, 11 D. C. 162; *McArthur & Mackey*, 162. *Presumption in favor of legality of meeting after lapse of long time*. *Peterborough v. Lancaster*, 14 N. H. 382, 392; *post*, §§ 508, note, 532, note. *Length of notice*. *Hunt v. Norwich School District*, 14 Vt. 300; *Pratt v. Swanton*, 15 Vt. 147; *post*, § 532, note.

Under a statute of *New York*, the notice it required of school meetings held to be *directory* only, and the want of notice, when not fraudulently or willfully omitted, does not render the meeting invalid, and its proceedings void. *Marchant v. Langworthy*, 6 Hill (N. Y.), 646; affirmed in error, 3 Denio (N. Y.), 526. See also *Williams v. Larkin*, 3 Denio, 114; *post*, § 539. Where the charter required the clerk to publish a notice requiring all persons interested in and opposed to a local improvement to attend before the council at a day named, and such notice was given and a hearing had, it was held that since the charter provided for but one notice and one hearing, it was a matter of discretion with the council whether another hearing should be allowed, and that subsequent action by the council without such notice or second hearing was not, under the circumstances, invalid. *Locke v. Rochester*, 5 Lansing (N. Y.), 11; *post*, §§ 1457, 1593, note.

¹ *South School District v. Blakeslee*, 13 Conn. 227.

² *Sherwin v. Bugbee*, 16 Vt. 439, 444. In reference to town meetings, the statute of *Vermont* requires that the notice shall be in writing, and shall "specify the business to be done, and the *time and place* of holding said meeting." Referring to this statute, *Redfield, J.* (in *Sherwin v. Bugbee*, *supra*), says: "We have no doubt the *place*

of holding the meeting must be definitely specified. It would hardly do to warn a meeting to be held at *some place* in the district, or at a designated village, or at one of two or more dwelling-houses. So, too, in regard to *time*, there seems to be a propriety in having it definitely fixed. If the day, only, is named, the question immediately arises, Shall the inhabitants be required to attend the whole day? or, When can the meeting transact the business for which they meet, so as to bind the absent members? The fact that the meeting adjourned to another day and hour will not help the matter, on the obvious principle that the adjourned meeting could have no more authority than the original meeting, which was void."

Where it appears that a meeting was held on the day appointed, it will be presumed that it was held at a suitable time in the day, and pursuant to the notice. A meeting should be opened within a reasonable time after the hour specified; but what is such reasonable time depends upon circumstances. *South School District v. Blakeslee*, 13 Conn. 227. Where a meeting was called at a certain school-house, it was held to mean within the walls of the building. An assemblage of some of the citizens in the highway near the school-house, and an adjournment to another place, was not a legal meeting, and its transactions were not binding, though the school-house was locked, and the weather cold and no fire in the building. *Chamberlain v. Dover*, 13 Me. 466. See also *Haines v. Readfield School District*, 41 Me. 246; *Kingsbury v. Quincy School District*, 12 Met. (Mass.) 99. But, in *Maine*, where a meeting had been called for the *basement of a building*, the fact that the meeting, which was crowded, being unable to take a division within the walls with ease or comfort, by unanimous consent and without protest from any one, passed out into the open air, where the count was made, was held not to render its proceedings invalid. *Brown v. Winterport*, 79 Me. 305.

§ 509 (268). **Specification of Object of Town Meeting.** — Where the statute requires the notice “*to specify the business to be done*,” an omission to comply with this requirement makes the meeting void, and it is held that a notice stating generally “*to do any proper business*,” is insufficient, and the acts and votes of a meeting held under it are of no binding or legal force.¹ Indeed, the rule is general that where the statute requires the business to be stated in the warrant or notice, this is absolutely essential, and the meeting must be confined to those matters.²

§ 510 (269). **Power to adjourn.** — At a meeting duly constituted and organized, a majority of the members, electors, or corporators present, in the absence of any statute either conferring or denying the power, have, in the absence of any restrictive statute, the implied incidental corporate right *to adjourn the meeting* to another time,

¹ Hunt v. Norwich School District, 14 Vt. 300; Sherwin v. Bugbee, 16 Vt. 439; s. c. 17 Vt. 337, 444. “Such meetings are void for all purposes of transacting business not specified” in the written notice required by the statute. *Ib.*, per Redfield, J. Text approved and followed; Mills v. San Antonio (Tex. Civ. App.), 65 S. W. 1121.

² *Ib.*; Johnstone v. Wilson, 2 N. H. 202; Tucker v. Aiken, 7 N. H. 113; Baker v. Shepherd, 24 N. H. 212.

By-laws passed at a town meeting not duly warned (as, for example, where the notice did not “specify the objects” of the meeting as required by statute) are void. Hayden v. Noyes, 5 Conn. 391; Willard v. Killingworth, 8 Conn. 247; Bloomfield v. Charter Oak Bank, 121 U. S. 121, 130. To the same effect is Mills v. San Antonio (Tex. Civ. App.), 65 S. W. Rep. 1121. The party claiming under a by-law must show it was passed at a meeting duly warned. 8 Conn. 247, *supra*. And must, perhaps, show all the essentials of its validity, such as the due passage, publication, &c. *Ib.*

Where the statute requires that all matters to be acted upon at the meeting shall be inserted in the warrant or notice, a failure to do this will avoid as to both parties any contract that may be made, or any act that may be done, with respect to a matter not embraced in the warrant or notice. Cornish v. Pease, 19 Me. 184; Spear v. Robinson, 29 Me. 531; Little v. Merrill, 10 Pick. (Mass.) 543; Blackburn v. Walpole, 9

Pick. (Mass.) 97; Torrey v. Millbury, 21 Pick. (Mass.) 64; *Ib.* 75; Hadsell v. Hancock, 3 Gray (Mass.), 526; Jones v. Andover, 9 Pick. (Mass.) 146; Kingsbury v. Quincy School District, 12 Met. (Mass.) 99; Rand v. Wilder, 11 Cush. (Mass.) 294. But if the matter is embraced in the warrant or notice, and the meeting duly met, it is no objection to its action that it was had near the close of the meeting, and when a portion of the voters had retired. Bean v. Jay, 23 Me. 117. Subsequent legal meeting may ratify acts of previous meeting not duly notified. Jordan v. Lisbon School District, 38 Me. 164. By participating in a meeting illegally called, a party is not estopped to deny its legality. Stoughton School District v. Atherton, 12 Met. (Mass.) 105. *Proof of notice.* Where there is evidence that notice of the meeting was properly served, the court will not hold the meeting to be unlawful, even if the proof is lacking in technical nicety. Lewick v. Glazier, 116 Mich. 493.

Where the city charter provided that the mayor might call *special sessions* of the council, and that he should “*specially state* to them when assembled the objects for which they have been convened, and their action shall be confined to such objects,” an ordinance, passed at a meeting so called, having no reference to anything alluded to in the mayor’s message, was declared void. St. Louis v. Withaus, 16 Mo. App. 247; *aff’d* on appeal, 90 Mo. 646.

either on the same or to a future day, and, if fairly done, to another place within the corporate limits.¹

§ 511 (270). **Constitution of Meetings of Councils or Select Governing Bodies.** — Unlike the towns of New England, in which all the qualified voters meet and act in their primary capacity, the *councils of cities and towns are representative bodies*, the number of whose members is fixed by law, and they are elected by the legal voters of the incorporated place. This council is the governing body of the municipal corporation, and the corporation, unless it is otherwise provided, can act and be bound only through the medium of the council.² The *charter or constituent act of the place usually contains provisions* as to the constitution of the council, its stated and special meetings, and the notice thereof requisite to be given, how many shall constitute a quorum, and an enumeration of its powers.

¹ *Chamberlain v. Dover*, 13 Me. 466; *People v. Martin*, 5 N. Y. 22; *Hubbard v. Winsor*, 15 Mich. 146; *Kimball v. Marshall*, 44 N. H. 465; *Drisko v. Columbia*, 75 Me. 73; *Ex parte Wolf*, 14 Neb. 24; *Goodell v. Baker*, 8 Cowen (N. Y.), 286; *infra*, §§ 532, 535. Electors exclusive judges of necessity of adjournment of town meeting; and such adjournment to next day, and at another place, in the town twenty miles distant, was considered lawful. *Ib.* The statute provided that if at any annual town meeting no place is fixed by the electors for the next annual town meeting, such town meeting shall be held at the place of the last annual town meeting. *Held*, in *People v. Martin*, 5 N. Y. 22, 27, that though the place of meeting was thus contingently fixed by *statute*, the electors, being duly assembled, might adjourn it for the residue of the day to *another place* in the town. Concluding his opinion in this case, *Paige, J.*, well remarks: "I confess that I have had some difficulty in coming to this conclusion, and I think the power [which is decided to exist] of adjourning a town meeting to another time and place, may, under peculiar circumstances, be oppressively exercised, and lead to a defeat of the popular will. This power ought not to be exercised except in a case of extreme necessity."

After a valid adjournment, acts by a portion of the voters who remain are invalid. *Kimball v. Lamprey*, 19 N. H. 215. In *Massachusetts*, an adjournment of a meeting should appear *of record*, and parol evidence of an adjournment to another day is held to be inadmissible. *Taylor v. Henry*, 2 Pick. (Mass.) 397. See *State v. Jersey City*, 25 N. J. L. 309, and chapter on Corporate Records and Documents, *post*, § 555. An adjourned meeting of a meeting not legally called cannot validate the former meeting, nor itself legally act. *United States v. McKelden*, 11 D. C. 162; *ante*, § 509, note. The *statute of New York* (1 Rev. Sts. 342) only requires the town meeting to be kept open during the daytime, or some part thereof, but not that it shall be kept open during the whole and every part of the day, between the rising and setting of the sun. *People v. Martin*, 5 N. Y. 22.

² *Central Bridge Corp. v. Lowell*, 15 Gray (Mass.), 106, 116, where an act affecting a city was, by its terms, to take effect on acceptance by the city, it was held that the acceptance might be made by the governing body. The legislative and corporate powers of a municipality, whose exercise is, by the charter or constituent act, committed to the council or governing body, can be exercised only at a *corporate meeting duly held*; and the corporate will must be ascertained by vote and embodied in a definite form. The form which the corporate will assumes is usually either a resolution or ordinance, or something equivalent thereto. *Schumm v. Seymour*, 24 N. J. Eq. 143; *State v. Jersey City*, 35 N. J. L. 404; *ante*, § 501. See chapter on Ordinances, *post*, § 570, note.

The usual scheme of the organization of the council is to divide the territory of the incorporated place into districts or wards, the voters in each of which elect one or more representatives, annually, called aldermen or councilmen; and these, when duly convened, constitute the council, over which *the mayor or head executive officer of the corporation presides*, sometimes constituting a member of the council, and in other instances having power to vote only when there is a tie or to give a second vote in case of a tie.¹

§ 512 (271). **Mayor's Presence and Function.** — The doctrine of the English courts as to the old corporations in that country, that the *mayor was an integral part* of the corporation, whose presence, unless otherwise provided in the charter, was necessary to a valid corporate meeting; that, during a vacancy in the office of mayor, the corporation could do no valid act, unless expressly empowered, except to elect another and thus complete the body; and that the acts of the corporation under the presidency of any other than a mayor *de jure*, were voidable, has, it is believed, no application to the office of mayor in the corporations of this country.²

§ 513. **Status of Mayor as Member of Council.** — The question whether *the mayor of a city shall be regarded as a member of the council*, is one of legislative intent. It is within the power of the legislature to confer upon him the functions of a member of the council in every respect, and if the legislation on the subject calls for

¹ Power to preside and give casting vote at meetings of a religious corporation construed. *People v. Rector, &c.*, 48 Barb. (N. Y.) 603.

² *Infra*, § 531. The text approved, *Martindale v. Palmer*, 52 Ind. 411; *Welch v. Ste. Genevieve*, 1 Dillon C. C. 130; *Golden v. Toluca*, 108 Ill. App. 467; *People v. Mount*, 186 Ill. 560, quoting text. And see *ante*, chap. xi, as to powers and duties of the mayor, §§ 387, 388. A provision in a charter that "the mayor, recorder, and aldermen, when assembled together, shall constitute the common council," makes the mayor a member of the council. *People v. Harshaw*, 60 Mich. 200; *infra*, § 515.

The presiding officer of a town meeting, with statute authority to maintain order, may make a valid order, though it be by parol only, for the removal of a disorderly person who disturbs the busi-

ness of the meeting. *Parsons v. Brainard*, 17 Wend. (N. Y.) 522. Approval by the mayor of proceedings of the council may, by special requirement of charter, be essential to their validity. *Graham v. Carondelet*, 33 Mo. 262; *Kepner v. Commonwealth*, 40 Pa. St. 124. A charter required every resolution of the council to be sent to the mayor, who should either approve it, in which case it would become operative and effectual, or disapprove it, in which case he should return it. It was held that his approval was to be made known by a written declaration attested by his signature. *N. Y. & N. E. R. Co. v. Waterbury*, 35 Conn. 19. When approval by mayor not necessary. *State v. Jersey City*, 30 N. J. L. 93, 148. See *Dey v. Jersey City*, 19 N. J. Eq. 412; *Taylor v. Palmer*, 31 Cal. 240, 241; *State v. Newark*, 125 N. J. L. 399; *post*, § 603, note.

that construction, he will be so regarded.¹ But in *American jurisprudence the mayor is not necessarily a constituent part of the legislative power* of the municipality. His functions are intended to be, and usually are, of an executive or administrative character, and whatever power he may at any time exercise in the legislative functions of a municipal government is never to be implied, but must find its authority in some positive statute.² In this view, in the absence of a statute necessarily implying that he has the same standing in the council as any other member, and particularly when his powers are expressly stated to be to preside at meetings and to give a casting vote in case of a tie, he is only a member of the council *sub modo*, and to the extent of the powers specially committed to him.³

¹ When the city has a council in which the mayor sits, and over whose action he has no veto, he is a member as much as an alderman. *People v. Harshaw*, 60 Mich. 200. A village charter provided that "the president and trustees, when assembled and duly organized, shall constitute the common council of the village," and that in its proceedings "each member present shall have one vote, and, when there shall be a tie, the president shall give the casting vote." It was held that the president was a member of the common council, and as such had a vote in addition to the casting vote given him by statute, and was not a mere presiding officer. *Whitney v. Hudson*, 69 Mich. 189, distinguishing *Mills v. Gleason*, 11 Wis. 470, 496. The mayor of a city had for other purposes only the right to preside and to give a casting vote in case of a tie. By statute, however, it was provided that any vacancy in the council should be filled by the vote of a majority of *all* the members of the council, and it was held that for the purpose of filling vacancies he was a member of the council, and also entitled to vote as such. *People v. Wright*, 30 Colo. 439.

² "The mayor is not . . . necessarily a constituent part of the legislative power of the municipality. His functions are of an executive or administrative character. . . . Whatever power he may at any time exercise in the legislative functions of a municipal government is never to be implied, but must find its authority in some positive statute." *Jacobs v. San Francisco*, 100 Cal. 121, 135, *per Harrison, J.* See also *Brooks v. Fischer*, 79 Cal. 173; *McDonald v. Dodge*, 97 Cal. 112; *Tru-*

man v. San Francisco Supervisors, 110 Cal. 128; *Harrison v. Roberts*, 145 Cal. 173.

³ In *Cate v. Martin*, 70 N. H. 135, 141, in a case where a mayor who by statute was presiding officer, assumed to veto the determination of the board of aldermen as to the election of a member thereof, *Blodgett, C. J.*, said: "The mayor of a city is not an alderman or councilman of the city in any general or proper sense of these terms. He is designated in the statutes as the 'principal officer' and the 'chief executive' of the city; and both properly and primarily his duties are executive and administrative. He is not a member of either branch of the city's councils unless expressly made such by law; and when this is the case it is to the extent of such powers as are specially committed to him, and no further, that he is a part of the city council. He is not one of its own members in the sense in which an alderman is, nor has it been understood that he is to be counted in determining the presence of a quorum [citing authorities]. Applying the principles of these authorities (and none have been found to the contrary) to the statutory provisions relating to mayor and aldermen cited in behalf of the defendants, the result is indubitably to establish the proposition that while the mayor is a constituent part of the board for some special purposes, he sits and acts in the board not in the capacity of an alderman, but in the capacity of *ex officio* presiding officer, and exercises those powers only which have been specially committed to him as the chief executive of the city."

A charter provided that "the mayor,

On the question whether a mayor who has only the right to preside and to give a casting vote in the case of a tie, *should be counted in*

board of aldermen, and common council shall constitute the city council," and that certain subordinate city officers "shall be elected by joint convention of the city council." It was held that, notwithstanding the declaration that the mayor should form a part of the city council, yet, as other provisions of the charter were inconsistent with any right on his part other than the right to preside and to vote in the case of a tie, he had no right to vote as a member of the council. The court considered the charter as a whole for the purpose of arriving at what it deemed to be the legislative intent. *Brown v. Foster*, 88 Me. 49. When the charter provides that a measure shall only be carried by the vote of a specified majority of "the members elect," this implies that the vote is to be the vote of the persons elected to the council and excludes the mayor, although the charter also declares that the "common council shall consist of the mayor, aldermen," etc. *Mills v. Gleason*, 11 Wis. 470, 496. A city charter provided that "the mayor and aldermen of the city shall constitute the common council thereof," and that the common council "shall be judge of the election and qualification of its own members." By other provisions of the charter, the mayor had *only the power to preside* at meetings, to give a *casting vote* in the case of a tie, and to *submit propositions* to the common council for its consideration. It was held that the mayor was *not* a member of the council within the meaning of the provision making it judge of the election and qualification of its members. *Garside v. Cohoes*, 12 N. Y. Supp. 192. To the same effect, *Winter v. Thistlewood*, 101 Ill. 450. When the charter declares that the *trustees shall constitute the council* and shall *elect from their own body a president*, and makes no mention of the mayor as a member of the council, the fair if not necessary implication is that the mayor is not a member of the council. *Cochran v. McCleary*, 22 Iowa, 75; s. c. *infra*, § 514, note.

In *Mississippi*, under a statute which authorized the *mayor to preside* at meetings of the board of aldermen and to give a *casting vote* in case of a tie, the mayor of a municipality is *not*

a member of the board of aldermen in such sense as to give him a vote as a member in addition to his casting vote. *Bousquet v. State*, 78 Miss. 478; *Ott v. State*, 78 Miss. 487, 498; *Rich v. McLaurin*, 83 Miss. 95. The language of the decisions which declares that a mayor who is only a presiding officer with a casting vote in case of a tie is not a member of the council, must not be taken in its absolute and literal sense. He is a member for the purpose of presiding with a vote in the contingency specified. It is anomalous that he should take any part in the proceedings of the council and not be regarded as a member. *Carrollton v. Clark*, 21 Ill. App. 74. When the statute confers upon the mayor the *right to preside* and to give a *casting vote* in case of a tie, he is so far a member of the council that the aldermen or councilmen cannot deprive him of these rights. *State v. Yates*, 19 Mont. 239; *McCourt v. Beam*, 42 Oreg. 41. If the mayor is by statute made presiding officer and is present ready to act, the council is not legally constituted if he is excluded from the chair by the acts of the members, and its proceedings are void. *State v. Lashar*, 71 Conn. 540.

In *Golden v. Toluca*, 108 Ill. App. 467, it was held that when the *mayor is the presiding officer* of the council by statute another cannot act as such, while he is present; and therefore, where the mayor refused to put the question and by direction of the majority the clerk put the question and votes were taken upon it sufficient to carry it, it was held that the mayor was deprived of his statutory right to preside and that the proceedings were invalid. But in *Hicks v. Long Branch Com'rs*, 69 N. J. L. 300, it was declared that the presiding officer is merely the mouthpiece of the council; that it is his duty to put a motion which has been duly made; and that if he refuses to put it, any member may put it. The duty of the mayor as presiding officer to *put a motion is purely ministerial*, and does not involve the exercise of any discretion, and *mandamus* may issue to compel him to put the motion, although his refusal to do so is based upon the assertion that it contemplated an *ultra*

determining whether a quorum of the members are present, the decisions are not unanimous. Some of the cases hold that he should not be counted for such purpose,¹ but other cases seem to adopt the contrary view.² On the question of the *power of the mayor to vote as a member of the council* when it is expressly provided by statute that he shall be the presiding officer and shall have a casting vote in case of a tie, it has been held that, as municipal officers only have such powers as are expressly conferred by statute, the enumeration of the powers of the mayor is exclusive, and in the absence of language, either expressly or by clear implication, conferring the right to vote upon him as a member of the council, the power is withheld. By providing that he shall have a casting vote, it is implied that he shall have no other vote.³ When a *tie exists*, the right of the mayor to give a casting vote is not affected by the fact that the question before the council involves the approval or disapproval of some action on his part as mayor. In case of a tie he may vote, although it be on a motion to confirm an appointment made by him. The

vires act by the common council. *People v. Brush*, 110 N. Y. App. Div. 720, citing *Tennant v. Crocker*, 85 Mich. 328; *State v. Meier*, 143 Mo. 439, 448, 449. As to the power of a majority of the council to continue business and to appoint a new presiding officer after the mayor has arbitrarily and improperly declared the meeting adjourned and has left the meeting, see *Attorney-General v. Remick*, 73 N. H. 25.

¹ *McLean v. East St. Louis*, 222 Ill. 510; *Somerset v. Smith*, 105 Ky. 678; *Somerset v. Somerset Banking Co.*, 109 Ky. 549; *Bybee v. Smith*, 22 Ky. Law Rep. 1684; 61 S. W. Rep. 15; *Attorney-General v. Shepard*, 62 N. H. 383; *Cate v. Martin*, 70 N. H. 135.

By statute it was made the duty of the mayor to preside, and he was given a vote only in case of a tie. It was held that in his absence a member of the council might be chosen as mayor *pro tem.* with power to preside, and that the mayor *pro tem.* so chosen did not lose his vote as a member of the council, but that he could not also vote as mayor. The court held that the mere fact that he was temporarily discharging the duties of the office of mayor did not interfere with the performance of his duties as councilman, and that he should be counted for the purpose of determining whether a quorum of the council were present. *Harris v.*

People, 18 Colo. App. 160; *Shugars v. Hamilton*, 122 Ky. 606; 92 S. W. Rep. 564; *Somerset v. Smith*, 105 Ky. 678; *Bybee v. Smith*, 22 Ky. Law Rep. 1684; 61 S. W. Rep. 15.

² In *Horner v. Rowley*, 51 Iowa, 620, the council consisted of the mayor, recorder, and five councilmen, — seven in all. At a meeting there were present the mayor and four councilmen. The statute provided that the mayor should be the presiding officer and that he should have a vote only in case of a tie. It also provided, however, that he should be a member of the city council. It was held that *the mayor must be included* in determining whether a question had been carried by the vote of three-fourths of *all the members of the council*, and that a motion which was voted for by only four councilmen was not carried. Similarly, under the same statute, it was held in *Griffin v. Messenger*, 114 Iowa, 99, that where the council consisted of the mayor and six councillors, and five councilmen voted for a proposal, it was not carried by the vote of three-fourths of all the members of the council.

³ *People v. Ransom*, 56 Barb. (N. Y.) 514; *Matter of Dudley*, 33 N. Y. App. Div. 465. These cases were approved and followed in the decision of a cognate question in *People v. Bresler*, 171 N. Y. 302, aff'g 70 N. Y. App. Div. 294.

mere fact that the appointment is made by him does not deprive him of his vote in the absence of statutory language excluding it.¹

§ 514 (272). **Same Subject.** — The right of the mayor or other officer to *preside* over the meeting of the council is a *franchise*, and may be tested by an information in the nature of a *quo warranto*,² but cannot be determined, at least ordinarily, unless by statute provision, *on a bill in chancery* to enjoin, or in any other indirect or collateral proceeding.³

¹ State v. Pinkerman, 63 Conn. 176, 191; Carroll v. Wall, 35 Kan. 36; Hecht v. Coale, 93 Md. 692; State v. Yates, 19 Mont. 239; McCourt v. Beam, 41 Oreg. 42. Where the mayor has the power to give a casting vote in case of a tie on a motion to appoint to office, his power to give such vote *includes ties on preliminary questions* in the conduct of the proceedings for appointment, as well as on the election or appointment itself. State v. McFarland, 149 Ind. 266.

² Cochran v. McCleary, 22 Iowa, 75, and authorities there cited; Re Sawyer, 124 U. S. 200; Reynolds v. Baldwin, 1 La. An. 162; Rex v. Williams, 1 Burr. 402; Willc. 456, pl. 337; Rex v. Hertford, 1 Ld. Raym. 426; approved, Commonwealth v. Arrison, 15 Serg. & Rawle (Pa.), 130; ante, chap. xi. § 387. In Cochran v. McCleary, *supra*, it was held that the mayor, in cities of the second class, organized under the General Incorporation Act (Rev. of Iowa, 1860, chap. li.), is not *ex officio* a member of, nor has he any right to preside over, the city council; that the council was composed exclusively of trustees or aldermen, and elected its own presiding officer. Ante, § 513. The mayor of New York was held not to be a member of the common council; and the common council, having the power by statute to appoint to office, may exercise it without the concurrence of the mayor, who has no veto power upon the appointment. Achley's case, 4 Abb. Pr. (N. Y.) 35. The burgess of a borough incorporated under the Pennsylvania General Borough Law of 1851 has no right to act as a member of the town council, and cannot refuse to sign ordinances regularly passed by the town council, on the ground that he was not present as a member when they were adopted. Commonwealth v. Kepner, 10 Phila. (Pa.) 510.

The president of the city council, required by statute to be elected by the members from their own number, holds an office as such within the meaning of the Ohio statutes authorizing an action in *quo warranto* against any one who usurps, intrudes into, or unlawfully holds, or exercises a public office. State v. Anderson, 45 Ohio St. 196. But in Minnesota it has been held that as the city council is merely required to elect a president to preside over its meetings, who is removable at pleasure, under the rule that a legislative body having the power to choose its presiding officer from its own members has also the inherent power to remove at pleasure, unless prohibited by some express constitutional or statutory provision, the president has no franchise as such presiding officer, and is not, as such, an officer of the city under the statutes or constitution in such sense that *quo warranto* will lie by the Attorney-General to determine his title to the office. This is the case although he is also by statute authorized to act as mayor in the latter's absence. State v. Kiichli, 53 Minn. 147, distinguishing State v. Anderson, 45 Ohio St. 196, *supra*; post, chapter on Quo Warranto.

³ Cochran v. McCleary, 22 Iowa, 75, 86; Re Sawyer, 124 U. S. 200; post, chap. xxxi.; Topping v. Gray, 7 Hill (N. Y.), 259; aff'g s. c. 9 Paige, 507; Markle v. Wright, 13 Ind. 548; Hullman v. Honcomp, 5 Ohio, 237; People v. Cook, 8 N. Y. 67; aff'g s. c. 14 Barb. 257; Mozley v. Alston, 1 Phill. 790; Lord v. Governor Cop. Miners, 2 Phill. 740; Peabody v. Flint, 6 Allen (Mass.), 52; Hagner v. Heyberger, 7 Watts & Serg. (Pa.) 104; People v. Carpenter, 24 N. Y. 86; People v. Draper, 15 N. Y. 532; People v. Utica Insurance Co., 2 Johns. Ch. 371; People v. Utica Insurance Co. (*quo warranto*), 15 Johns.

§ 515 (273). *Constitution of Council.* — Who shall *compose the council* or governing body of the corporation is in all cases prescribed by the charter or incorporation act, but the language used has been such as sometimes to lead to controversy.¹ The organic act of a city provided "that the intendant of police shall have a seat in the board of commissioners [the governing body of a city corporation], and when present shall preside therein; *in his absence*, the board shall appoint a chairman *pro tempore*." It was held that the intendant was thereby constituted one of the commissioners, and had the right to participate in making ordinances.² Where the power to legislate for the corporation is *vested in "the mayor and councilmen,"* the council by itself cannot legislate, but must act in conjunction with the mayor. In deciding the point the court observes: "If a simple resolution [instead of an ordinance] would be sufficient, yet, before it would have any validity, it would necessarily have to be signed by the mayor as a part of the law-making power: the co-ordinate action of both is required."³

358; *Demarest v. Wickham*, 63 N. Y. 320; *Commonwealth v. Bank of Pa. (quo warranto)*, 28 Pa. St. 389; in *chancery*, *Ib.* 379; *Hughes v. Parker*, 20 N. H. 58; *Strahl, In re*, 16 Iowa, 369; *Updegraff v. Crans*, 47 Pa. St. 103; *Facey v. Fuller*, 13 Mich. 527; see *Kerr v. Trego*, 47 Pa. St. 292, cited *infra*, § 517.

¹ *Cochran v. McCleary*, 22 Iowa, 75; *supra*, §§ 513, 514.

² *Raleigh Com'rs v. Sorrell*, 1 Jones (N. Car.) Law, 49. In this case the Supreme Court of North Carolina admits (*arguendo*) that an officer — as, for example, the intendant — has no right, under the act of incorporation, to sit with the legislative body of the corporation; but if he does so and acts with them, that an ordinance thus passed will be void, because the powers given to the corporation must be exercised in strict conformity to the special delegation of authority, and because, in the case supposed, the ordinance is not passed by the body to which the power is given; citing *Rex v. Croke*, Cowp. 29. The view of the court is in accordance with the rule of the English courts as applied to their corporations. Thus, Mr. Willcock says: "It may be unnecessary to add that whenever a particular business is delegated to a select body, *if others join in the performance of it, the act is void*; as if the mayor, aldermen, and com-

monalty join in making a by-law which is directed to be made by the mayor and aldermen. For if others are allowed to vote, a by-law might be established, although all those to whom the power is specifically delegated should be in the minority." Corp. 68, pl. 128; *Parry v. Berry*, Comyns, 269; *Rex v. Head*, 4 Burr. 2521; *Hoblyn v. Regem*, 2 Bro. P. C. 520; *Rex v. Westwood*, 4 B. & C. 721; *Green v. Durham*, 1 Burr. 131; see *post*, § 518 and note. Whether the mere fact that a single unauthorized person is, by a mistaken construction of the charter, allowed to participate in the transactions of a meeting of the council, would, in this country, be held necessarily to avoid them, is a question which perhaps remains yet to be settled. Perhaps not where his vote did not determine or control the result. *Infra*, §§ 518, 519. It has been held that if persons who are not qualified, vote at a town, parish, or district meeting, without objection or challenge at the time, proof of that fact cannot afterwards be made with a view to invalidate the proceedings. *Sutton First Parish v. Cole*, 3 Pick. (Mass.) 232. So if such a meeting is called by persons acting under *color* of authority, it will be legal if no exception to their authority is taken at the time. *Ib.*

³ *Saxton v. Beach*, 50 Mo. 488, *per Wagner, J.* Sequel of the case, *Saxton*

§ 516 (274). **Proper Corporate Body must act.** — It is undoubtedly true, as already stated, that *the corporate authority must be exercised by the proper body*. Thus, where a town was organized under a charter which vested the corporate powers of the place in a president and six trustees, and subsequently a general incorporation act was passed which was erroneously supposed to apply to the town, and under which the town elected different officers from those provided in the special charter, at a different time and constituting a different body, it was held, in the absence of legislative ratification, that this latter body could not exercise the authority of the corporation, since they were a body without any legal existence, and were not *the* body authorized to act for the corporation. The principle that *the acts of de facto officers are valid* was considered not to be applicable.¹

§ 517 (275). **Injunction where Two Conflicting Municipal Bodies are concurrently acting.** — Where there are two bodies, *each of which claims to be the regularly organized municipal council and each is acting as such*, to the detriment and confusion of the public, the Supreme Court of Pennsylvania awarded to the body which was, *prima facie*, legally entitled to act, a provisional injunction to restrain the other body from interference with them. The bill in the case was filed by the body which, *prima facie*, had the written or legal title, as against the other and presumptively usurping body. Neither the Attorney-General nor any public officer was a party. To the defendants' objection that in such a case the Attorney-General alone can file a bill, the court replied: "We do not think so. It is right for those to whom public functions are entrusted to see that they are not to be usurped by others."²

v. St. Joseph, 60 Mo. 153; *Golden v. Toluca*, 108 Ill. App. 467, and *People v. Mount*, 186 Ill. 560, both quoting and approving text. *Ante*, § 512, note. Where the city charter provided for a board of mayor and aldermen, and made no mention of a "council," a city ordinance which referred to the "council" of the city was construed to mean the board of mayor and aldermen. *Cooke v. Loper*, 151 Ala. 546; 44 So. Rep. 78.

¹ *Decorah v. Bullis*, 25 Iowa, 12; *Welch v. Ste. Genevieve*, 1 Dillon C. C. 130; *infra*, § 518.

² *Kerr v. Trego*, 47 Pa. St. 292. *Author's Comments.* In reference to the important point decided in the case

just cited it may be observed that, in the absence of statute, chancery has no jurisdiction over corporate elections, or to determine the title to corporate offices. In a case like that above mentioned, prompt and efficacious judicial intervention such as chancery only can afford is extremely convenient, or even needful, but the difficulty is to find, aside from statutory aid, an acknowledged head of equitable jurisdiction under which such a case can be brought. The general doctrine of our jurisprudence undoubtedly is that which is thus stated by Mr. Justice Gray, *In re Sawyer*, 124 U. S. 200: "The jurisdiction to determine the title to a public office belongs exclusively to the courts

§ 518 (276). **Acts of de facto Councils and Officers.** — In this country the doctrine is everywhere declared, that the acts of *de facto*

of law, and is exercised either by *certiorari*, error, or appeal, or by *mandamus*, prohibition, *quo warranto*, or information in the nature of a writ of *quo warranto*, according to the circumstances of the case and the mode of procedure established by the common law or by statute. No English case has been found of a bill for an injunction to restrain the appointment or removal of a municipal officer. In the courts of the several States such a power in a court of equity has been denied in many well-considered cases," citing them.

In *Kerr v. Trego*, *supra*, the Supreme Court of Pennsylvania rested the right to grant a provisional injunction upon the ground, very broadly stated, that all corporate bodies and officers are *under law*, and that "this remedy [by injunction] extends to all acts that are contrary to law and for which there is no adequate remedy at law; and we can hardly imagine any act that more clearly falls within this description than one that casts so deep a shade of doubt and confusion on the public affairs of a city as this does. In such a case no remedy is adequate that is not prompt and speedy." Similar views are expressed in the dissenting opinion of *Waite*, C. J., in *re Sawyer*, 124 U. S. 200. The stress of the question therefore is, whether the jurisdiction in equity is to be strictly limited by the existing landmarks and to the acknowledged heads of that jurisdiction, or whether, agreeably to the principles in which one source of equity jurisdiction has had its origin, namely, the inadequacy of common law remedies, the jurisdiction of the court may, by a species of judicial legislation which, consciously or otherwise, is always in operation, be extended to a case of such an urgent and extraordinary nature as that which was presented by the facts in *Kerr v. Trego*.

On the whole it seems to the author that *Kerr v. Trego* may be regarded as a sound, or at least an allowable, application of the principles of equity jurisdiction to a case of great public urgency, where, under the legislation of the State as it existed in Pennsylvania, the common law remedies were not only inadequate, but wholly unsuited to the emergency in hand. The

temptation to supply serious defects and *lacunæ* which experience from time to time discloses in common law remedies, by a judicial extension of the principles of equity jurisdiction, so as to secure justice or prevent its failure, is always strong, and on the whole resistless. A conservative chancellor may say here and there, "I have no power — the case is one for the legislature"; but the natural and general tendency when such a course is not contrary to existing legislation or policy, is to assert in the particular case a power felt to be necessary, and whose exercise promises to be beneficial. This, it is true, is judiciary law; but it is law which is necessarily evolved in the very process of legal administration. So it has been in the past, and so from the very nature of the case it must continue in the future. Law thus originating in actual experience, and limited by the judges in its application to the exigency which calls it into existence, must on the whole be excellent, though likely to be incomplete. It will be observed that the court did not undertake on the bill filed to adjudge the questions of title between the conflicting bodies. It disclaimed the right to do so. Its injunction, granted in the public interest, simply maintained the existing *prima facie* legal status until the question of title should be determined in the usual mode and by the proper tribunals.

Demarest v. Wickham, 63 N. Y. 320, was an action by two assistant aldermen in their own names to restrain the defendant, as mayor, from recognizing the board of aldermen, organized as the common council and usurping the rights of the board of assistant aldermen, of which the plaintiffs were members, on the ground that they had usurped the office in question, having been elected under an alleged unconstitutional act, and to restrain this alleged illegal and usurping body from the exercise of unauthorized powers. It was held that the action could not be maintained, and that the remedy under the legislation of New York was an information in the nature of a *quo warranto* by the Attorney-General in the name of the State. The case is distinguishable from *Kerr v. Trego*.

officers, as distinguished from the acts of mere usurpers, *are valid*, and the principle extends not only to municipal officers generally, but also to those composing the council, or legislative or governing body of a municipal corporation.¹ But it has been said that in order

Mode of organizing councils to which new members are to be admitted, and tests in case of conflicting councils, for determining which is the legal organization. *Kerr v. Trego*, 47 Pa. St. 292; *supra*, §§ 379, note, 381, 482, note, 514. As to attempted organization, by rival and conflicting factions, of city council, see *Commonwealth v. Garvey*, 217 Pa. 425. Attempted organization of rival and contending factions of legislature, see *In re Gunn*, 50 Kan. 155.

City officers whose terms had not expired, and whom an unconstitutional new charter attempted to remove, brought and maintained a bill in equity against new city officers appointed by the governor under such unconstitutional charter, to restrain them from interfering with the city government until the final hearing and for a temporary injunction, *pendente lite*. The equity jurisdiction seems not to have been questioned, and may well be sustained, we think, in order to prevent the confusion, uncertainty, and conflict of jurisdiction otherwise likely to ensue. *Malone v. Williams* (Tenn.), 103 S. W. Rep. 798. That an officer has in general *no remedy by injunction to prevent his wrongful removal* before the expiration of his term, see *ante*, § 489.

¹ *Scoville v. Cleveland*, 1 Ohio St. 126; *Decorah v. Bullis*, 25 Iowa, 12; *Cochran v. McCleary*, 22 Iowa, 75, 84; *Strahl, In re*, 16 Iowa, 369; *People v. Stevens*, 5 Hill (N. Y.), 616; *State v. Jacobs*, 17 Ohio, 143; *People v. Bartlett*, 6 Wend. (N. Y.) 422; *Pritchett v. People*, 6 Ill. 529; *People v. Runkel*, 9 Johns. (N. Y.) 147; *Vernon Society Trustees v. Hill*, 6 Cow. (N. Y.) 23; *Williams v. Lunenburg School District*, 21 Pick. (Mass.) 75. See *Rex v. Tregony*, 8 Mod. 111; *DeGrave v. Monmouth*, 4 Car. & P. 411; *Laver v. McGlachlin*, 28 Wis. 364; *post*, § 1554, note; *Cushing v. Frankfort*, 57 Me. 541; *Lockhart v. Troy*, 48 Ala. 579; *Riddle v. Bedford County*, 7 S. & R. (Pa.) 386; *People v. Hopson*, 1 Denio (N. Y.), 574; *Hamlin v. Dingman*, 5 Lans. (N. Y.) 61; *People v. Nostrand*, 46 N. Y. 375; *Olmsted v.*

Dennis, 77 N. Y. 379; *Koontz v. Hancock*, 64 Md. 134; *Montpelier National Life Ins. Co. v. Huron Board of Education*, 27 U. S. App. 244 (*de facto* board of education); *Cripple Creek v. People*, 19 Colo. App. 390; *Pence v. Frankfort*, 101 Ky. 534, quoting text; *Perkins v. Fielding*, 119 Mo. 149, 159, quoting text; *Simpson v. McGonegal*, 52 Mo. App. 540; *Hilgert v. Barber Asphalt Pav. Co.*, 107 Mo. App. 385. As to *de facto* officers, *ante*, §§ 374, note, 413, note, 485; *post*, 1377, note, 1554, note; Index, *Acts, Office and Officer*. As to *municipal corporations de facto*, see *ante*, § 67.

The acts of a legislature elected under an apportionment which is invalid because it *contravenes the constitutional directions*, are valid as the acts of a *de facto* legislature. *Matter of Sherrill v. O'Brien*, 188 N. Y. 185, 211, 213. See also, as to *members de facto* of the legislature, *Auditor-General v. Menominee County Supervisors*, 89 Mich. 552, 598; *State v. Smith*, 44 Ohio St. 348.

In a case in the House of Lords, decided in 1851, it was held that an act done by a definite body, under authority of parliament, was *not invalid because officers de facto joined with officers de jure* in the doing of it. The judges having unanimously declared this to be their opinion, the Lord Chancellor said: The opinion of the judges as to vestrymen *de facto* and *de jure* was of great importance. When it was considered that there were many persons who were charged with very important duties, and whose title to perform those duties or to exercise the powers necessary for their performance the public could not easily ascertain at the time, and when it was remembered what inconveniences would arise if the validity of their acts depended on the propriety of the election of the persons who had to perform them, the value of the clear enunciation of the principle thus made by the judges was very great, and in the correctness of it he begged to declare his entire concurrence. *Scadding v. Lorant*, 5 Eng. Law & Eq. 16, 30, per Lord Chancellor *Truro*. See *ante*, § 515, note. A person acting in the

that there may be, within the meaning of the above rule, a *de facto* officer, there must be a *de jure* office; and that the notion that there can be a *de facto* office has been characterized as a political solecism, without foundation in reason and without support in law; and therefore that a person cannot claim to be a *de facto* officer of a municipal corporation when the corporation or people have, in law, no power, in any event, to elect or appoint such an officer.¹ But this rule, whilst in the abstract correct, has in later cases been held to be *subject to necessary and important qualifications*. Thus it is apparent that, technically speaking, an unconstitutional statute is a nullity and any office created thereby cannot exist *de jure*, yet as respects the public and third parties the acts of a person appointed or elected to an office pursuant to an unconstitutional statute and acting thereunder, if performed before the unconstitutionality of the law has been judicially declared, are valid as the acts of an officer *de facto*.²

capacity of a public officer is prima facie taken to be so. Doe v. Barnes, 8 Q. B. 1043; Regina v. Roberts (crown cases reserved), 38 Law Times Rep. 690; s. c. 6 Am. Law Rep. 414. The acts of *de facto* officers are valid so far as they concern the public and rights of third parties. Akers v. Kolkmeier & Co., 97 Mo. App. 520; Yancey v. Fairview, 23 Ky. Law Rep. 2087; 66 S. W. Rep. 637; Hale v. Bischoff, 53 Kan. 301; Lampasas v. Talcott, 94 Fed. Rep. 457; Landes v. Walls, 160 Ind. 216; Butler v. Walker, 98 Ala. 358; Attorney-General v. Varney, 68 N. H. 65.

¹ Decorah v. Bullis, 25 Iowa, 12; Hildreth's Heirs v. McIntire's Devisee, 1 J. J. Marsh. (Ky.) 206; People v. White, 24 Wend. (N. Y.) 520, 540, 541; Carleton v. People, 10 Mich. 250; Welch v. Ste. Genevieve, 1 Dillon C. C. 130. In Norton v. Shelby County, 118 U. S. 425, the doctrine referred to in the text was asserted and enforced as sound. Mr. Justice Field reviews the cases, and distinguishes State v. Carroll, 38 Conn. 449. See *post*, chapter on Contracts; Burt v. Winona & St. Peter Ry. Co., 31 Minn. 472 (approving text). *De facto* officer's official bond not obligatory, there being no such *de jure* office. Tinsley v. Kirby, 17 S. Car. 1, 8; *supra*, § 515; *post*, chapter on Quo Warranto.

The doctrine referred to in the text that there must be a *de jure* office is

questioned in Adams v. Lindell, 5 Mo. App. 197, *aff'd* 72 Mo. 198, where it was held that the rule as to the validation of the acts of *de facto* officers, being one of policy, may be applied, not only where there is no *de jure* officer, but where the legal office itself no longer exists. For example, where the person acting is not a mere usurper, but, owing to a mistake of fact, held under a perfect color of right, which justified men in concluding that he was a legal officer, holding a legal office, and where the fact that the office was abolished remained unknown for a time owing to a false announcement of election returns, his acts, as such officer done after the abolition of the office and before the fact was known, will be sustained for the purpose of supporting contracts made with him on the faith of which money and labor have been expended. See also Simpson v. McGonegal, 52 Mo. App. 540.

² State v. Carroll, 38 Conn. 449; Leach v. People, 122 Ill. 420; Donough v. Dewey, 82 Mich. 309; Auditor-General v. Menominee County Supervisors, 89 Mich. 552, 598; Thompson v. Couch, 144 Mich. 671; Walcott v. Wells, 21 Nev. 47, 56; Matter of Sherrill v. O'Brien, 188 N. Y. 185, 211, 213; *Ex parte* Strang, 21 Ohio St. 610; State v. Smith, 44 Ohio St. 348, 369; Kirker v. Cincinnati, 48 Ohio St. 507; State v. Gardner, 54 Ohio St. 24.

§ 519. **Appointment to Office by de facto Council or Board.** — It has been argued that, as a *de facto* council or board does not have title *de jure*, it cannot by its acts confer a greater or more valid title to office upon its appointee than it has itself, and that therefore a person appointed to office by a *de facto* officer or by a *de facto* board is not an officer *de jure* but only an officer *de facto*. But the weight of authority denies the existence of any such exception to the general rule that the acts of a *de facto* board or officer are valid and effectual both as concerns the public and as concerns a third party. In making an appointment pursuant to statutory authority, the power of appointment is exercised rather by the office upon which it is conferred than by the incumbent. In other words, the power of appointment is incident to the official authority of the incumbent, and the courts have held that no reason exists for making an exception in the case of its appointees. Accordingly, under the decisions, one appointed to office by a *de facto* officer or by *de facto* board becomes entitled to the office to which he is appointed *de jure*, and is not a mere officer *de facto*.¹

§ 520 (277). **Action by Indefinite Body; Majority Present may act.** — The common law principle, that if an *act is to be done by an indefinite body* it is valid if passed by a majority of those present at a legal meeting, no matter how small a portion they may constitute of the whole number entitled to be present, has been deemed appli-

¹ Attorney-General v. Parsell, 99 (N. Y.), 616, *Bronson, J.*, used language Mich. 381; Brady v. Howe, 50 Miss. 607, 623; Attorney-General v. Megin, 63 N. H. 378; Bownes v. Meehan, 45 N. J. L. 189; Dugan v. Farrier, 47 N. J. L. 383, aff'd 48 N. J. L. 613; Brinkerhoff v. Jersey City, 64 N. J. L. 225, 227 (overruling Jersey City v. Erwin, 59 N. J. L. 282); Ellis v. North Carolina Institution, &c., 68 N. Car. 423; People v. Staton, 73 N. Car. 546; State v. Alling, 12 Ohio, 16; State v. Jacobs, 17 Ohio, 143; State v. Smith, 44 Ohio St. 348; Merchant's Nat. Bank v. McKinney, 2 S. Dak. 106. In England, it appears to have been held that a judgment of ouster against the *de facto* incumbent of an office is admissible in evidence to impeach the title of his appointees, and is conclusive as against them except for fraud in obtaining it. See Rex v. Lisle, Andr. 163, 2 Str. 1090; Rex v. York, 4 Term R. 669; Rex v. Grimes, 5 Burr. 2601; Rex v. Hebden, Andr. 391. In *New York*, in People v. Stevens, 5 Hill (N. Y.), 616, *Bronson, J.*, used language to the effect that an appointment to office by an incumbent who merely holds the office *de facto*, makes the appointee an officer *de jure*; but in later cases the correctness of these views has been questioned, and, largely upon the authority of the English decisions cited above, the contrary view seems to have been adopted. People v. Anthony, 6 Hun (N. Y.), 142; New York v. Flagg, 6 Abb. Pr. (N. Y.) 296; Nichols v. McLean, 63 How. Pr. (N. Y.) 448. See also People v. Murray, 73 N. Y. 535. In any event, an officer holding title only *de facto* cannot by his own act confer upon himself a title *de jure*. Thus an alderman, holding over *de facto* and not *de jure*, cannot by his own vote upon the question of his qualification confer upon himself a *de jure* title. Winters v. Warmolts, 70 N. J. L. 615. To the same effect Armstrong v. Whitehead, 67 N. J. L. 405.

cable to the towns of New England. In those towns the corporate power resides, as we have seen, in the inhabitants, or citizens at large, and these form the constituent body. If the meeting has been duly called and warned, those who assemble, *though less than a majority of the whole*, have the power to act for and bind the whole, unless it is otherwise provided by law. Those who remain away are justly and conclusively presumed to assent to what may lawfully be done by those who attend.¹

§ 521 (278). **Quorum and Majority of Definite Body.**—The common law rules as to *quorums* and *majorities*, established with reference to corporate bodies consisting of a *definite number* of corporators, have also, in general, been applied to the common council, or select governing body of our municipal corporations, where the matter is not specially regulated by the charter or statute.² The *quorum of a body has been defined* to be that number of the body which, when assembled in their proper place, will enable them to transact their proper business, or in other words that number that makes the lawful body, and gives them the power to pass a law or ordinance.³ If there be no statutory restriction, a *majority* of a muni-

¹ *Damon v. Granby*, 2 Pick. (Mass.) 345, 355; *Commonwealth v. Ipswich*, 2 Pick. (Mass.) 70; *Williams v. Lunenburg School District*, 21 Pick. (Mass.) 75; *Madison Ave. Bap't Church v. Oliver St. Church*, 5 Robt. (N. Y.) 649; *Sudbury First Parish v. Stearns*, 21 Pick. (Mass.) 148; *State v. Binder*, 38 Mo. 450.

At a popular election a candidate for a municipal office received a *plurality* of all the votes cast, but not a majority. There was no provision of the charter and no by-law on the subject. The usage in the corporation seemed to have been to consider the person having the highest number of votes, although not a majority of the whole, as duly elected. The statute in relation to State elections expressly provided that "plurality, or the highest number of votes, should make a choice." Under these circumstances, the majority of the court were of the opinion that the common law rule, that a *majority* is necessary to a valid election, applied, and was not controlled by the terms or spirit of the general election law of the State. *State v. Wilmington C. Council*, 3 Harring. (Del.) 294. *Harrington, J.*, dissented, holding (and, as it would seem, with reason) that the plurality

principle had been the one "invariably adopted as most in consonance with our institutions in all cases where the law of election is silent in this respect." *Ib.*, p. 305. See *Sudbury First Parish v. Stearns*, 21 Pick. (Mass.) 148. As to *municipal elections*, *ante*, chap. xi. § 383.

² Text approved in *Heiskell v. Baltimore*, 65 Md. 125, where *Stone, J.*, said: "But when in the case, like the present, of a municipal corporation, the statute law creating it is silent as to what shall constitute a legal assembly, the common law both in England and in this country is well settled, that the *majority* of the members elect shall constitute the legal body."

³ *Per Stone, J.*, in *Heiskell v. Baltimore*, 65 Md. 125, 149. Quoted and approved in *Zeiler v. Central R. Co.*, 84 Md. 304, 322. In *State v. Deliesse-line*, 1 McCord (S. Car.), 52, the court said: "According to the principle of all the cases referred to, a *quorum* possesses all the powers of the whole body; a majority of which quorum must, of course, govern."

Mandamus does not lie to compel aldermen to attend meetings of the common council, and to perform their general duties regularly. *People v. Whip-*

cipal council or board is a *quorum*, and a majority of a quorum may act.¹ Thus, to use Mr. Dane's illustration, if the body consists of twelve common councilmen, seven is the least number that can constitute a valid meeting, though four of the seven [the seven being duly assembled and present] may act.² It has also been held that *the quorum fixed by law*, whether under the principles of the common law or by express statutory provision, *cannot be altered* by the action of the common council without express statutory authority, and that a general power conferred upon the council to settle its rules of procedure does not authorize it to declare that any number other than that fixed by the common law or by statute shall constitute a quorum.³

ple, 41 Mich. 548. The court said: "A *mandamus* would be entirely inefficient in reaching the mischief complained of, as no court by such means could keep up a continuous or repeated attendance. Courts are not created to conduct the municipal affairs of cities, and nothing short of any such general supervision would reach such cases as the present. The remedy, if there is one, is not judicial. This is not a case where there is some specific right involved, but is a general violation of public duty." See also *Johnston v. Mitchell*, 120 Mich. 589; *People v. Ihnken*, 129 Mich. 466.

¹ *People v. Wright*, 30 Colo. 439; *Thurston v. Huston*, 123 Iowa, 157; *Heiskell v. Baltimore*, 65 Md. 125; *Zeiler v. Central R. Co.*, 84 Md. 304, 322; *Dougherty v. Excelsior Springs*, 110 Mo. App. 623; *North Platte v. North Platte Waterworks Co.*, 56 Neb. 403; *McDermott v. Miller*, 45 N. J. L. 251; *Cadmus v. Farr*, 47 N. J. L. 208; *Barnert v. Paterson*, 48 N. J. L. 395; *Hutchinson v. Belmar*, 61 N. J. L. 443, 449; *Matter of Brearton*, 44 N. Y. Misc. 247, 257; *Cleveland Cotton Mills v. Cleveland County Com'rs*, 108 N. Car. 678; *Commonwealth v. Fleming*, 23 Pa. Sup. Ct. 404. See also *Oakland v. Carpenter*, 13 Cal. 540, 551; *People v. Lothrop*, 3 Colo. 428; *State v. Ellington*, 117 N. Car. 158, 163.

In *United States v. Ballin*, 144 U. S. 1, 6, Mr. Justice *Brewer* said: "The general rule of all parliamentary bodies is that, when a quorum is present, *the act of a majority of the quorum* is the act of the body. This has been the rule for all time, except so far as in any given case the terms of the organic act under which the body is as-

sembled have prescribed specific limitations." In *Rex v. Monday, Cowp.* 530, 538, Lord *Mansfield* said: "When the assembly are duly met, I take it to be clear law that the corporate act may be done by the majority of those who have once regularly constituted the meeting." In *Metropolitan Tel. Co. v. Domestic Tel. Co.*, 44 N. J. Eq. 568, 573, it was held that a director of a private corporation who was disqualified by interest from acting on a committee should be excluded in determining whether a quorum was present, and the proceedings were held to be invalid because no quorum was present without him. As to the disqualification of aldermen and members of city councils and boards from interest in the subject matter, see *post*, §§ 772, 773.

² 5 Dane, Abr. 150; *Willcocks, In re*, 7 Cow. (N. Y.) 402, 410, note *d*, and criticism on the rule stated, in 1 *Kyd on Corp.* 418, 425; 2 *Kent Com.* 293; *Buell v. Buckingham*, 16 Iowa, 284; *University of Maryland v. Williams*, 9 Gill & Johns. (Md.) 365; *Mills v. Gleason*, 11 Wis. 470.

³ *Heyker v. Herbst*, 106 Ky. 509; *Heiskell v. Baltimore*, 65 Md. 125; *Zeiler v. Central R. Co.*, 84 Md. 304; *Barnert v. Paterson*, 48 N. J. L. 395; *Tappan v. Long Branch Police, &c. Commission*, 59 N. J. L. 371; *Outwater v. Carlstadt*, 66 N. J. L. 510.

In *Zeiler v. Central R. Co.*, 84 Md. 304, 322, the city council of Baltimore, which was composed of two branches, adopted a rule of procedure (Rule XV.) that "No standing rule of the branch shall be rescinded or changed without the assent of three-fourths of the members of the branch, and after one day's notice shall have been given; but any

§ 522 (283). **Extent of the Majority Principle.** — And, as a *general rule*, it may be stated that not only where the corporate power resides in a *select body*, as a city council, but where it has been *delegated to a committee or to agents*, then, in the absence of special provisions otherwise, a *minority* of the select body, or of the committee or agents, are powerless to bind the majority or do any valid act. If all the members of the select body or committee, or if all the agents are assembled, or if *all* have been duly notified, and the minority refuse or neglect to meet with the others, a majority of those present may act, provided those present constitute a majority of the whole number. In other words, in such case, a major part of the whole is necessary to constitute a quorum, and a majority of the quorum may act. If the major part withdraw so as to leave no quorum, the power of the minority to act is, in general, considered to cease.¹ But where the *duties are purely ministerial, and not judicial*, or are of such a nature as to *exclude the idea of action as a body or board*, and where they are devolved on *public officers or agents* rather than

standing rule may be suspended, upon the assent of three-fourths of the members present, except Rule IX." Rule IX. required ordinances and joint resolutions to have two readings on two separate days "unless two-thirds of the members of the branch shall by a vote otherwise direct." It was held that, notwithstanding the terms of Rule XV., a motion to suspend Rule IX. might be carried by a two-thirds vote of a quorum of the members present. Page, J., said: "We do not deem it important to determine here what was meant by the use of these different terms [in Rule XV.]; whether by the words 'members present,' it was intended to include all who were actually present, as distinguished from those voting. The question now before us must be determined by the proper meaning to be placed upon the words 'members of the branch' as used in the ninth rule. It is now well settled that in all cases a majority of the legislative body is a quorum, entitled to act for the whole body, except where the power that creates it has otherwise directed. . . . There is no act of the State of Maryland that prescribes what number shall constitute a quorum of either of the two branches of the city council. That is determined by the common law, which fixes the 'majority as the legal body'; and under the authority granted by the legislature to 'settle their rules of procedure,' there

exists no power in either branch or both to fix a greater number. . . . It would therefore seem to follow from this, that when 'a branch' or 'the members of a branch' are the words used, with nothing to qualify them, and in the absence of clear intent to the contrary, they must be taken to mean that 'number of the body that makes a lawful body.' To construe the words 'two-thirds of the members of the branch,' as used in the ninth rule, to mean two-thirds of all the members, would be to fix a meaning upon them that would deprive the majority of their legal power to act. It would amount to declaring that a majority, constituting the lawful body, intended by a rule of procedure to take away from itself under certain circumstances the power it rightfully has to do the work it was assembled to do."

¹ Kingsbury v. Quincy School District, 12 Met. (Mass.) 99; Day v. Green, 4 Cush. (Mass.) 433, 438, 439; Fisher v. Attleboro School District, 4 Cush. (Mass.) 494; Coffin v. Nantucket, 5 Cush. (Mass.) 269; 11 Cush. 433; Damon v. Granby, 2 Pick. (Mass.) 345, 355; State v. Jersey City, 27 N. J. L. 493; Charles v. Hoboken, 27 N. J. L. 203; Dey v. Jersey City, 19 N. J. Eq. 412; Baltimore v. Poultney, 25 Md. 18. Text quoted and approved, Brown v. District of Columbia, 127 U. S. 579, 586; United States v. Ballin, 144 U. S. 1, 8.

on the agents of corporations, the rule above stated (as the cases below referred to will show) has been relaxed, and in some instances deemed to be wholly inapplicable.¹

¹ With respect to persons or officers appointed by law to act *judicially* in a public matter, it is generally held, there being no provision of statute to the contrary, that where *all meet* and act, a majority may decide and bind the rest, and this notwithstanding the express dissent of the minority, or their wrongful withdrawal before the act is consummated. *Rogers, In re*, 7 Cow. (N. Y.) 526 (appraisal of damages by canal appraisers), and see *Ib.* note *a*, and the cases there cited and reviewed; *Ib.* 764, explanation. See, further, *Willcocks, In re*, 7 Cow. (N. Y.) 402, and note; *Ib.* 462, 463; *Young v. Buckingham*, 5 Ohio, 485, 489; *Charles v. Hoboken*, 27 N. J. L. 203; *Martin v. Lemon*, 26 Conn. 192; *Astor v. New York*, 62 N. Y. 580; *People v. Palmer* (effect of death of one of the members or officers), 52 N. Y. 83; *People v. Syracuse*, 63 N. Y. 291; *ante*, § 247, note; *post*, chapter on Actions and Liabilities.

The statute authorized the appointment of three levee inspectors, and prescribed their duties, which involved the exercise of judgment. Held, that all must meet and act, and that the action of a majority in the absence of the third was void. *Ballard v. Davis*, 31 Miss. 525. Where a committee consists of two members, the action of both is necessary. *Rider v. Portsmouth*, 67 N. H. 298. The power of a committee is founded upon and is defined and limited by the resolution appointing the committee, or conferring authority upon it. *Ex parte Conrades*, 185 Mo. 411, 430. As to the power of the majority of the board to contract with one of the members of the board, see *post*, § 772. But a contract made by less than a majority of a committee of the corporation, though in the name of the whole, binds *neither* party. *Post*, § 541. But it will be binding if the authority was joint and several, or if ratified. *Adams v. Hill*, 16 Me. 215; *Kupfer v. South Parish in Augusta*, 12 Mass. 185; *Allen v. Cooper*, 22 Me. 133.

In *Damon v. Granby*, 2 Pick. (Mass.) 345, this distinction is taken. If a public corporation appoints a committee of its *own members*, a majority may bind, for such is the usage and the com-

mon law in relation to corporations. But if the authority is given to persons not members of the body, such persons are agents, and not technically a committee, and all must concur, unless it appear that it was intended that a majority should act. See authorities cited by Solicitor-General Davis in same case, p. 350; *Viner's Ab. title Authority*, B. pl. 7. Further as to binding force of the act of majority of a committee or board of selectmen, see *Jones v. Andover*, 9 Pick. (Mass.) 146; *Crommett v. Pearson*, 18 Me. 344; *Junkins v. Doughty Falls Union School District*, 39 Me. 220; *First Parish in Sutton v. Cole*, 3 Pick. (Mass.) 232, 244; *Kingsbury v. Quincy School District*, 12 Met. (Mass.) 99; *Keyes v. Westford*, 17 Pick. (Mass.) 273; *Green v. Miller*, 6 Johns. (N. Y.) 39; *Grindley v. Barker*, 1 Bos. & Pul. 236, *per Eyre*, C. J.; *King v. Beeston*, 3 Term R. 592; *Guthrie v. Armstrong*, 5 Barn. & Ald. 628, where it was held that a power given to fifteen jointly and severally was well executed by four. A school committee appointed according to and under a statute are public officers within the meaning of the statute which gives a majority of such officers authority to act for the whole. *Keyser v. Sunapee School District*, 35 N. H. 477.

Where an authority is given, by law, to a committee, or to more persons than one, to do an act of a public nature, one alone, unless there be something to show such intention, cannot act independently and without the concurrence of the others, or at least of a majority. If the act is ministerial, a majority at least must concur; but unless required, or such is the practice, *they need not act as a board*, and be convened or notified to be convened as such. But if the act is judicial in its nature, that is, requiring the exercise of judgment, unless special provision is otherwise made, all must meet or have notice to meet, a majority will constitute a quorum, and a majority of the quorum will be competent to act. *Martin v. Lemon*, 26 Conn. 192. In this case it was ruled that one of a committee of three to remove encroachments on highways could not act alone.

Committees of public corporations

§ 523 (278). **Illustrative Instances.** — The manner in which the courts have applied the rule that a *majority of a select body*, such as a city council or municipal board, *constitutes a quorum*, and a vote of a *majority of the quorum is sufficient* to bind the entire body, is perhaps best shown by a statement of the rulings in some of the cases which have arisen. Where a council consisted of eighteen members, exclusive of the mayor, the election of a clerk by nine votes was held lawful and valid, the other members remaining present, though protesting against the method of electing and refusing to vote. It was held that the legal effect of their refusal to vote while remaining

have sometimes been held to be governed, with respect to meeting and notice, by different rules from a board which has necessarily to be assembled or convened before it can act. And the acts of a majority of such committees have been considered valid, though some member of the committee was not notified. *Gallup v. Tracy* (town committee to stake out oyster grounds), 25 Conn. 60. But compare *Martin v. Lemon*, 26 Conn. 192. And see *Damon v. Granby*, 2 Pick. (Mass.) 345, 354; *Grindley v. Barker*, 1 Bos. & Pul. 236; *Keeler v. Frost*, 22 Barb. (N. Y.) 400; *Perry v. Tynen*, 22 Barb. (N. Y.) 137; *infra*, § 537. Town committee held to be an agent of the town, and not a board of public officers or a judicial body, and may act by the agreement of the individual members separately obtained. *Shea v. Milford*, 145 Mass. 528; *Haven v. Lowell*, 5 Met. (Mass.) 35. Where a public authority is to be exercised by two officers — a number not admitting of a majority — regularly, both should act; yet, to prevent a failure of justice, it seems one may, in certain cases, as where the other is dead, disqualified, or absent, act alone. But certain it is, that where one only acts, the consent of the other will be presumed. This is an application of the strong presumption which obtains in favor of the performance of official duty. *Downing v. Rugar*, 21 Wend. (N. Y.) 178, and authorities cited. This case also holds that the presumption of consent should be rebutted only by the testimony of the other officer. *Ib.* 185. "It is a general principle that where a board of officers (for example, overseers of the poor) is constituted to perform a duty provided by law, the act of the majority is the act of the whole body." *Per Bennett, J.*, *Wolcott v. Wolcott*, 19 Vt. 37,

39. See also *King v. Beeston*, 3 Term R. 592; *Jones v. Andover*, 9 Pick. (Mass.) 146.

Under the statutes of Pennsylvania, all powers conferred upon county commissioners may be legally executed by two without the concurrence of the third. *Commissioners v. Leckey*, 6 Serg. & Rawle (Pa.), 166; *Cooper v. Lampeter*, 8 Watts (Pa.), 128; *Curtis v. Butler Co.*, 24 How. 435; *Jefferson Co. v. Slagle*, 66 Pa. St. 202, where it is held that a contract by two county commissioners within the scope of their authority bound the county, although not made at their office.

Where three commissioners are appointed to contract for site for poor-house, two of them cannot make a valid purchase. *Pulaski Co. v. Lincoln*, 9 Ark. 320. Action of less than a majority of commissioners of public buildings, appointed by act of legislature, is void. *Petrie v. Doe*, 30 Miss. 698. A statute declaring that every board of township trustees, "and the members thereof," shall be overseers of the poor was construed to make each member an overseer, with power to act. *Knox County v. Jones*, 7 Ind. 3, 5.

When majority may lawfully execute powers of a public nature. *Allegheny County Com'rs v. Leckey*, 6 Serg. & Rawle (Pa.), 170; *Baltimore Turnpike*, 5 Binn. (Pa.) 484; *McCreedy v. Philadelphia Guardians*, 9 Serg. & Rawle (Pa.), 99; *Commonwealth v. Canal Commissioners*, 9 Watts (Pa.), 466, 471; *Cooper v. Lampeter*, 8 Watts (Pa.), 128; *Caldwell v. Harrison*, 11 Ala. 755; *Tallapoosa Com'rs Court v. Tarver*, 21 Ala. 661; *Crist v. Brownsville Trustees*, 10 Ind. 452; *Somerset v. Parson*, 105 Pa. St. 360; *Schenck v. Peay*, 1 Dillon C. C. 267.

present was an acquiescence in the action of those voting.¹ So, also, a statute in reference to a definite body, declaring that a "*majority of those present at any regular meeting shall be competent*" to transact business, leaves the number which may form a *quorum* to be determined by the common law; that is, there must be at least a majority present, and such a provision, it was considered, did not authorize a *minority of the whole body* to act.²

§ 524 (279). **Illustrative Cases; Quorum.**—So, if a board of village trustees consists of *five members, and all, or four, are present, two* can do no valid act, even though the others are disqualified by interest from voting, and therefore omit or decline to vote; their assenting to the measure voted for by the two will not make it valid. If three only were present, they would constitute a quorum; then the votes of two, being a majority of the quorum, would be valid;³ certainly so where the three are all competent to act.⁴

§ 525 (280). **Illustrative Cases.**—In another case the power of amotion was conferred upon a city council to be exercised "*by a vote of two-thirds of that body,*" and this was considered to give the power of removal to two-thirds of a legal quorum. Two-thirds of the whole number of members composing the council were held not to be required. The point was admitted to be close, and the French text of the charter was regarded as favoring the conclusion reached.⁵

§ 526 (282). **Excessive Number of Votes.**—In the absence of special provision, the *major part of those present*, at a meeting of a select body, *must concur* in order to do any valid act. Therefore, when it appeared that thirteen ballots were cast when the members present were only entitled to give twelve votes, of which seven were for one person and six for another, there was no election, and the council, though it had declared that the person receiving seven votes was duly elected, might subsequently rescind its action and proceed

¹ State v. Green, 37 Ohio St. 227.

² Willcocks, *In re*, 7 Cow. (N. Y.) 402; *Ib.* 463 and note; *Ib.* 526 and note; Heiskell v. Baltimore, 65 Md. 125; Barnert v. Paterson, 48 N. J. L. 395; *ante*, §§ 385, 522, note; *infra*, § 526.

³ Coles v. Williamsburgh, 10 Wend. (N. Y.) 658; McDermott v. Miller, 45 N. J. L. 251.

⁴ Buell v. Buckingham, 16 Iowa, 284 and cases cited; *post*, § 541, n. This

section is quoted and explained and its application pointed out by Elliott, J., in Rushville Gas Co. v. Rushville, 121 Ind. 206, 210. It is also cited and explained in Murdock v. Strange, 99 Md. 89.

⁵ Warnock v. Lafayette, 4 La. An. 419. See, on this point, Logansport v. Legg, 20 Ind. 315; State v. Porter, 113 Ind. 79; Zeigler v. Central R. Co., 84 Md. 304.

to a new election.¹ And in South Carolina the general rule is recognized, and a *majority* of the board of managers of elections — having power, by statute, to determine the validity of contested elections — is a quorum, and a majority of that quorum may act and decide.²

§ 527. *Effect of Refusal to vote.* — Minorities of councils and other deliberative bodies sometimes resort to *obstructive tactics to defeat measures* which they have reason to believe the majority favor. One of such methods is *by a refusal to vote*, by reason whereof a measure may be deprived of the support of a majority of the council present and participating. But the courts have steadfastly adhered to the rule that when members are present at a meeting, a mere refusal to vote on the part of some of the members cannot defeat the action of the majority of those actually voting. As long as the members are present in the council chamber and have an opportunity to act and vote with the others, it is their duty to act, and they will be regarded as present for the purpose of making a quorum and rendering legal the action of the council.³ Slightly divergent views

¹ *Labourdette v. Municipality*, 2 La. An. 527. See also *Baker v. Cushman*, 127 Mass. 105; *infra*, § 539.

² *State v. Deliesseline*, 1 McCord (S. Car.), 52, where the subject is elaborately considered by Nott, J.; s. p. *State v. Huggins, Harper* (S. Car.) Law, 94, further holding that where, of eighteen managers appointed by the legislature, two refused to qualify, one was disqualified, and one dead, the remaining fourteen (from necessity and public convenience) properly constituted the board, and might act by a majority of the fourteen. The decision rests upon the legislative intent, deduced from various provisions of the act, to commit the matter to the acting managers.

³ A full board of township trustees, six in number, met and proceeded to ballot for county superintendent. After a number of ballots had been taken without an election, *three of the trustees* protested against further balloting, *left the part of the room where the board were sitting*, and mingled with the spectators. On a further ballot being taken, the other three trustees voted for one candidate. It was held that there was no withdrawal of the three trustees in such sense as to break a quorum, and that the presiding officer

had the right to treat them as part of the board, and as present and failing or refusing to vote. *State v. Vannosdal*, 131 Ind. 388. *Olds, J.*, said: "They could not change from trustees to mere spectators in the same room when they still had an opportunity to act and vote with the others and thus prevent an election. Being present, it was their duty to act; they were in fact present. . . . If the facts showed that the three trustees had, in fact, withdrawn from the meeting and gone from the room, so as to have, in fact, left but three trustees in session, it would present an entirely different question."

In *United States v. Ballin*, 144 U. S. 1, a rule of the House of Representatives that "the names of members sufficient to make a quorum in the hall of the house who do not vote shall be noted by the clerk and recorded in the journal, and reported to the Speaker with the names of the members voting, and be counted and announced in determining the presence of a quorum to do business," was held to be a constitutional mode of ascertaining the presence of a quorum. Mr. Justice *Brewer* said with reference to the method by which the presence of a majority shall be determined: "But

have been expressed by the courts *as to the effect of a refusal of members of a council to vote*, although the courts are unanimous in declining to permit such refusal to defeat an expression of the will of the body. Thus, in some jurisdictions, it is said that silence or refusal to vote is concurrence, as it is the duty of the silent members to express their opinion if they desire to oppose the question before the council, and if they fail to perform their duty, they must be taken as assenting to the action of the majority of those who do vote.¹

how shall the presence of a majority be determined? The Constitution has prescribed no method of making this determination, and it is therefore within the competency of the house to prescribe any method which shall be reasonably certain to ascertain the fact. It may prescribe answer to roll-call as the only method of determination; or require the passage of members between tellers, and their count as the sole test; or the count of the Speaker or the clerk, and an announcement from the desk of the names of those who are present. Any one of these methods, it must be conceded, is reasonably certain of ascertaining the fact, and as there is no constitutional method prescribed, and no constitutional inhibition of any of those, and no violation of fundamental rights in any, it follows that the house may adopt either or all, or it may provide for a combination of any two of the methods. That was done by the rule in question; and all that that rule attempts to do is to prescribe a method for ascertaining the presence of a majority and thus establishing the fact that the house is in a condition to transact business."

The fact that, under a charter provision authorizing a smaller number than a quorum to adjourn from time to time and to *compel the attendance of absent members*, and under an ordinance regulating the manner in which such attendance may be compelled, members wilfully absenting themselves were *arrested by the city sergeant and brought to the meeting under duress and coercion*, does not render the proceedings of the meeting void, since the coercion only resulted in the performance of what the members were legally bound to do. *Schmulbach v. Speidel*, 50 W. Va. 553.

¹ In *Somers v. Bridgeport*, 60 Conn.

521, the board of police commissioners consisted of the mayor and four members. The mayor had only a vote in case of a tie. On a motion to appoint policemen, two members announced that they would not vote, but remained in the room. The resolution was put and received two votes in its favor, no other votes being cast. The mayor declared that the resolution was carried. The two non-voting members protested against this ruling. It was held that *the silence of the non-assenting members was concurrence*, and the resolution was legally passed. It was also held that the previous declaration that they would not vote and the protest against the ruling were unavailing. *Carpenter, J.*, said: "Sound policy requires that public interests should not suffer by their inaction. Had they voted against the resolution there would have been a tie, and the mayor would then have given the casting vote. Had he voted in the affirmative the legality of the appointment could not have been questioned. But they did not vote, although present. Their presence made a quorum. A quorum was present, and all who voted, voted in the affirmative. Why was not the mayor justified in declaring the resolution passed? The silence of the non-voting members was acquiescence, and acquiescence was concurrence. Their previous declaration and their subsequent protest avail nothing. The test is, not what was said before or after, but what was done at the time of voting."

In *Attorney-General v. Shepard*, 62 N. H. 383, *Doe. C. J.*, said: "There were seven aldermen. Four were a quorum. Six were present. Three voted for the adoption of the amendment, and the refusal of the other three was inoperative. In the absence of express regulation, a proposi-

In Indiana, however, a qualification of the rule with reference to acquiescence seems to have been adopted, although it is to be observed that the adoption of this rule would not have changed the result of the vote in any of the cases cited to support the doctrine of acquiescence as stated above. In that State the court holds that the rule is that if a quorum is present and a majority of a legal quorum vote in favor of a proposal, it will prevail, although an equal number should refrain from voting.¹

tion is carried in a town meeting or other legislative assembly, by a majority of the votes cast. The exercise of law-making power is not stopped by the mere silence and inaction of some of the law-makers present. An arbitrary, technical, and exclusive method of ascertaining whether a quorum is present, operating to prevent the performance of official duty and obstruct the business of government, is no part of our common law. The statute requiring the presence of four aldermen does not mean that in the presence of four a majority of the votes cast may not be enough." Followed in *Attorney-General v. Remick*, 71 N. H. 480, 483. In *Mount v. Parker*, 32 N. J. L. 341, of the six members present three voted in favor of a motion, two voted against it, and one refused to vote. It was held that the motion was carried, the court saying, "It being the well-established law that where no specified number of votes is required but a majority of the board regularly convened are entitled to act, a person declining to vote is to be considered as assenting to the votes of those who do."

In *State v. Green*, 37 Ohio St. 227, a city council which consisted of eighteen members duly qualified, all of whom with the mayor were legally assembled, proceeded to organize. The mayor acted as president. A motion was made to elect S clerk. An objection made to election by motion was overruled by the mayor. Nine members protested against his ruling. On a roll-call on the motion to elect S, the nine protesting members refused to vote, and the vote as taken stood nine yeas and no nays. No other candidate was nominated or voted for. One of the non-voting members objected on the ground that no quorum voted, but the objection was overruled and S declared elected. The nine members not voting protested. It was held that,

as there was only one nomination, it was competent to elect by motion; *that the members present could not, by refusal to vote, defeat the election or divest the body of its power to act*; and that the legal effect of their refusal to vote was an acquiescence in the choice of those voting; and that the fact that the mode of voting was objected to, and that objection was also taken that no quorum voted, did not change the legal effect of the vote.

¹ In *Rushville Gas Co. v. Rushville*, 121 Ind. 206, three of the six members of a city council voted in favor of a resolution. The other three members, although present, declined to vote. It was held that the resolution was adopted; that the rule is that if a quorum is present and a majority of the quorum vote in favor of a measure it will prevail, although an equal number should refrain from voting. A majority of the number of members required to constitute a quorum is sufficient. *Elliott, J.*, said: "The rule is that if there is a quorum present, and a majority of the quorum vote in favor of a measure, it will prevail, although an equal number should refrain from voting. It is not the majority of the whole number of members present that is required; all that is requisite is a majority of the number of members required to constitute a quorum. If there had been four members of the common council present, and three had voted for the resolution and one had voted against it, or had not voted at all, no one would hesitate to affirm that the resolution was duly passed, and it can make no difference whether four or six members are present, since it is always the vote of the majority of the quorum that is effective. *The mere presence of inactive members does not impair the right of the quorum to proceed with the business of the body.* If members present desire to defeat a measure, they must

In other cases where the council was evenly divided between those voting and those refusing to vote, and the mayor, who had only a casting vote in case of a tie, declared a tie and exercised his right to vote in that event, the courts have sustained the action of the council so evidenced as duly adopted, declaring that the action of the mayor in treating the votes of those who declined to assent as cast in the negative, was giving the greatest adverse effect to these votes which was possible; that no greater effect could be claimed for them under any circumstances, and that the *right of the council to exercise its functions could not be defeated by mere silence*. The courts in these cases declared that the action of the mayor in voting as in case of a tie was proper, but it is also to be observed that they used language which indicated that it was their opinion that those refusing to vote might be taken as assenting to the action of those who actually did vote, and as bound by the result of the vote.¹ But it is to be observed that where the statute requires the *affirmative action of a majority of the entire board or a majority of the members present*, a refusal to vote may result in defeating the proposition because in such case *affirmative* action is required, and those who refuse to vote cannot be counted on the affirmative side under such a specific statutory requirement, and the proposal before the council may be defeated by lack of the affirmative majority required by the statute.²

vote against it, for inaction will not accomplish their purpose. Their silence is acquiescence rather than opposition. *Their refusal to vote is, in effect, a declaration that they consent that the majority of the quorum may act for the body of which they are members.*" This decision, which seems to rest on sound practical reasons, has been reaffirmed and followed in *State v. Dillon*, 125 Ind. 65; *State v. Vanosdal*, 131 Ind. 388; *Landes v. State*, 160 Ind. 479, 483. It is cited and approved in *Wheeler v. Commonwealth*, 98 Ky. 59, 64, cited *infra*, § 528, note. In *Morton v. Youngerman*, 89 Ky. 505, the council consisted of twelve members, and a vote was taken upon two candidates for office. One candidate received six votes, and the other three votes; three members refused to vote. It was held that the candidate who received six votes was elected. *Infra*, §§ 527, 528.

¹ A city council was composed of the mayor and eight aldermen, all of whom were present when the roll was called for confirmation of a nomination, four aldermen voted for the

nomination, and the others refused to vote. The mayor, who presided, was entitled to a casting vote only, and treated the refusals to vote as negative votes. It was held that treating the refusals as negative votes was giving them the greatest effect possible; that the mayor was entitled to vote as in case of a tie, and that the resolutions were duly carried. *State v. Yates*, 19 Mont. 239; *Launtz v. People*, 113 Ill. 137. In each of these cases the court said that it was inclined to the opinion that the proper rule is that those who remain silent shall be deemed to assent to the action of those who vote.

² *Somers v. Bridgeport*, 60 Conn. 521, 529. See also *Murdock v. Strange*, 99 Md. 89, where it is pointed out that the same result necessarily attends the casting blank ballots when affirmative action of a majority of the entire body or of the members present is required. *State v. Alexander*, 107 Iowa, 177, is an example of the rule that a tie cannot be declared by the mayor by reason of the refusal of members to vote, when the *statute requires an affirma-*

§ 528. **Effect of casting Blank Ballot.** — The nature and effect of a blank ballot cast by a member of a city council at an election for an officer, has been before the courts for consideration and the weight of authority, and, as we think, the better view is, that *the blank ballot is a mere nullity*; that it cannot be counted for or against either of the candidates voted for; and that the vote for the candidates is to be determined by a majority of the valid ballots actually cast.¹ But in Tennessee the Supreme Court took a differ-

ent vote by a majority of the whole number elected to the council. In that case the mayor had as presiding officer only a vote in case of a tie. On a motion three out of a board of six voted in the affirmative, one in the negative, and two refused to vote. He thereupon directed that all persons not voting should be recorded in the negative, declared a tie, cast his vote and declared the proposal carried. It was held that he was not justified in so doing. See *infra*, § 528.

¹ In *Murdock v. Strange*, 99 Md. 89, the court considered the nature and effect of a blank ballot cast at a meeting of the council on a ballot to elect an officer. The facts were that the city council, numbering in all eight members, proceeded to ballot upon the candidates for the office of market-master. On the ballot Strange received four votes, Murdoch three votes, and there was one blank ballot. The mayor thereupon declared that there was no election. In a proceeding to determine the right of Strange to the office, it was held that the blank ballot was a nullity, and that as Strange received a majority of the votes cast he was elected. *Page, J.*, said, in disposing of the case: "The 'blank ballot' referred to in these proceedings, was a blank piece of paper, having on it no words or marks of any kind whereby the meaning and intent of the person who deposited it may be ascertained. To denominate such a paper a 'ballot' would seem to be to miscall it. It is in fact nothing; it cannot be expressive of any intention; no rule or method of interpretation can relieve it of its dumbness. It no more indicates a preference for one of the candidates than for another. If there is but one candidate, there is nothing to indicate assent to the one; nor, where there are two or more candidates, as a vote of assent or dissent to either candidate. . . . It is not easy to see

how a blank ballot can be given any significance. If it expresses nothing, and therefore cannot be counted for or against either of the candidates voted for, how can it serve to indicate assent to the person receiving a plurality of the other votes cast, or of dissent? How can a blank piece of paper be construed to express an intent of any kind? If it be regarded as an expression of dissent, it may be asked, to what does he dissent? Is it to the holding of the election? And if this be so, how can the person who deposits it, by a mere arbitrary interpretation of the act of placing a blank piece of paper in a ballot box, be permitted to defeat the votes of electors who are endeavoring to perform an important public duty? . . . It is a safer principle, it seems to us, and one more in harmony with sound reason to hold that the voter who deposits a blank piece of paper in the ballot box *throws away his vote*, because the paper he has voted is not expressive of any meaning whatever, and is therefore utterly null and void."

In *Wheeler v. Commonwealth*, 98 Ky. 59, the court also expressed the opinion that blank ballots are a nullity and were not to be counted under the peculiar circumstances of the case before the court. In that case the council consisted of twelve members, all of whom were present. Three candidates for office were voted on; one received six votes, another five votes, and the remaining candidate one vote. After several ballots with the same result, a resolution was adopted declaring that the candidate receiving the smallest number of votes should be dropped. The court sustained this resolution as a valid exercise of the power of the council to regulate its proceedings. Another ballot was taken, and the vote was the same as before, one member still continuing to vote for the third candidate. The mayor

ent view, and held that a blank vote was an act of negation, affirmatively showing that another person acted, and to be considered negatively in determining the majority, and that a candidate who only received the votes of one-half of the members participating and casting the ballots was not elected to office.¹ It has, however, been pointed out that the rule that blank ballots are nullities can have no application when the statute requires the *affirmative* action of a majority of the entire body, or a majority of all the members present. Then the blank ballot cannot be counted on the affirmative side, and for lack of sufficient votes in the affirmative, the proposal may be defeated.²

§ 529. **Elections or Appointments to Office by Council.** — In the decisions of some of the States a suggestion is to be found that when the city council is engaged in *the duty of electing officers* pursuant to statutory authority, the members of the council for that purpose are constituted *a definite board of electors*, and are not engaged

then declared that the vote for the candidate who had been dropped could not be counted, and that the candidate who had received six votes was elected. The court held that the vote for the third candidate was, under the peculiar circumstances and in view of the resolution adopted, in effect a blank ballot; that it was a nullity, and that the candidate elected, having received a majority of the valid votes and the vote of a majority of the legal quorum of the body, was elected to the office. *Infra*, § 529, note.

In *Murdock v. Strange*, 99 Md. 89, it is said that the same principles should be applied in the case of refusals to vote and blank ballots in the case of definite bodies as are applied in the case of elections by indefinite bodies. The contrary view is expressed in *Lawrence v. Ingersoll*, 88 Tenn. 52. See *supra*, § 527; *infra*, § 529.

¹ In *Lawrence v. Ingersoll*, 88 Tenn. 52, the board of aldermen consisted of nine aldermen, one of whom was absent. The mayor, who acted as presiding officer, had only a vote in case of a tie. By statute it was declared that a majority of the members of the board should form a quorum for the transaction of business. There was no other statutory provision affecting the proceedings, and the case was decided upon the views of the court as to the common law. On a ballot for office,

four votes were cast for one Lawrence, three for one Fisher, and one blank vote was cast. It was held that Lawrence had not received the majority of those present, and was not elected. *Snodgrass, J.*, said: "It is true that the blank vote cannot be, in the technical sense, a ballot; but it is nevertheless an act of negation, — affirmative in showing that another voter acted, and negative in determining the majority. It was one of eight attempted to be cast with a purpose of not supporting complainant, and is only to be counted as showing that he did not get a majority; just as would have resulted had it been an illegal vote as being for two candidates, or otherwise." *Turney, C. J.*, dissented, and wrote an opinion supporting the view that the blank ballot was a nullity, and that Lawrence, having received a majority of the votes cast, was elected.

² *Murdock v. Strange*, 99 Md. 89. In this case the following decisions are cited as instances where blank ballots were cast and there was a failure to elect because the statute required the affirmative action of a majority of the entire body, or of all the members present, viz.: *Yules v. Mallory*, 1 Bartlett Election Cas. 608; *People v. Conklin*, 7 Hun (N. Y.), 188; *Commonwealth v. Wickersham*, 66 Pa. St. 134; *supra*, § 527.

in deliberative business which is the ordinary work of the council.¹ But the *more correct view* would seem to be that the council, although a definite body of electors for the purpose of electing to office, still performs that function as a council or board, which, in its forms of procedure, is inherently deliberative and governed by parliamentary law and practice. Thus, it has been held that even when the council are engaged in electing to office, they may adopt all reasonable rules tending to further the performance of that duty.² And when the law does not in terms prescribe *any precise method or form* by which a council or board shall elect an officer, the form or means by which the appointment shall be made is not material and is within the discretion of the council or board. The choice of the officer may be ascertained by ballot, or by *viva voce* vote, or by the adoption of a motion or resolution declaring that the person therein named be appointed to fill the office.³ In Ohio, as a result apparently of the view adopted by the courts of that State that the council for the purposes of an election is a select body of voters, and is not a deliberative

¹ "The duty of electing a city attorney was imposed on the council in express terms. The members were thus constituted a definite body of electors for that purpose. . . . The members were acting not only as councilmen, but as electors." *Per Hazelrigg, J.*, in *Wheeler v. Commonwealth*, 98 Ky. 59, 65. In *State v. Miller*, 62 Ohio St. 436, 445, *Davis, J.*, said: "The council was engaged in the duty of electing officers, a duty imposed on the members thereof, not on the body as a council. They were not engaged in the deliberative business which is the ordinary work of the council, but in the election of a city officer. They were not acting under parliamentary law, but were casting their votes and making their choice as required by a specific statute."

² In *Kentucky*, it has been held that, under the power of the council to adopt reasonable rules for elections, it may by resolution adopt a rule that after the next ballot the lowest of more than two candidates shall be dropped, and so on until the election is had. Such a rule is reasonable and in furtherance of the objects of the meeting. *Morton v. Youngerman*, 89 Ky. 505; *Wheeler v. Commonwealth*, 98 Ky. 59, 65; *supra*, § 528, note. "The members were acting not only as councilmen, but as electors, and were permitted to adopt all reasonable rules necessary to transact their business, not inconsistent

with the general law. As electors they might not adopt an ordinance or by-law, but as electors and as members of the council, charged with the special duty of electing an officer of the city, they might, it seems to us, adopt any reasonable rule by which the duty might be performed, and especially so if it appeared to them that that duty could not have been performed otherwise." *Per Hazelrigg, J.*, in *Wheeler v. Commonwealth*, 98 Ky. 59, 65.

³ *State v. Barbour*, 53 Conn. 76, 81; *State v. Kilroy*, 86 Ind. 118; *State v. McFarland*, 149 Ind. 266, 270; *Attorney-General v. Remick*, 71 N. H. 480; *Trowbridge v. Newark*, 46 N. J. L. 140. See also *ante*, § 392.

"The term *viva voce* when applied to elections is used in opposition or contradistinction to the ballot, and simply means that the voter shall declare himself by voice instead of by ballot. In this country, as a general rule, the people vote by ballot, so that their action may be secret, free, and untrammelled; their representation *viva voce*, so that their action may be public and known to their constituents. So that when a nomination is made either by written resolution or oral motion, and each person announces his vote for or against it by his voice, the vote is *viva voce*." *Per Herrick, J.*, in *Matter of Brearton*, 44 N. Y. Misc. 247, 258.

body, the principle has been applied that a plurality of the votes cast for more than two candidates is sufficient to elect, although the candidate receiving the greatest number of votes may not receive a majority of those participating in the election.¹ But the usual practice in other jurisdictions appears to be to treat the question whether a person has been elected to office by the council as subject to the usual rules in determining whether a vote or resolution has been carried by the council, both as to quorum and as to the majority required.² In electing to office it has been held that the vote given determines the result, and that a formal declaration by the mayor as presiding officer that the candidate has been elected is not essential,³ nor is a resolution by the board or council declaring the candidate to be elected.⁴ The weight of authority is also to the effect that when a

¹ In *Ohio*, it has been said that the principle of plurality is generally applied to elections, and accordingly it was held that under a statute which simply required that the members of the city council shall "proceed forthwith to organize by electing a president," any person receiving a plurality of votes is elected to the office. Hence, where the council consisted of six members, and on a vote for president, A received three votes, B received two votes, and C one vote, it was held that A was legally elected to the office. *State v. Anderson*, 45 Ohio St. 196. In another case the council consisted of eight members present and acting. On a vote for the election of an officer, A received four votes, B received two votes, and C received two votes. It was held that A, having a plurality of the votes cast, although not a majority thereof, was elected. *State v. Miller*, 62 Ohio St. 436.

² See *State v. Deliesseline*, 1 McCord (S. Car.), 52, cited *supra*, § 525. In *Kentucky*, although the court considers the council to be a definite body of electors for the purpose of filling an office, it appears to regard the question of the majority required to elect as governed by the rules applicable to the ordinary deliberative proceedings of the council, — particularly when the question is affected by refusals to vote or by blank ballots. Thus in *Morton v. Youngerman*, 89 Ky. 505, two candidates were placed in nomination before a council consisting of twelve members. One candidate received six votes, and the other three votes. Three members refused to vote.

It was held that the candidate who received six votes was elected. In *Wheeler v. Commonwealth*, 98 Ky. 59, *supra*, § 528, the council consisted of twelve members, all of whom were present. Three candidates for office were voted on, one of whom received six votes, another five votes, and the remaining candidate one vote. After several ballots, the candidate receiving one vote was, under a resolution to that effect, declared by the mayor to be dropped, and another ballot was taken, when the vote was the same as before, one member voting for the candidate so dropped. The mayor then declared that the vote for the candidate who had been dropped could not be counted, and that the candidate who had received six votes was elected. The court held that the vote for the dropped candidate was in practical effect a blank ballot; that as seven members constituted a quorum, and the candidate receiving six votes had received more than the votes of a majority of that quorum, he was elected and entitled to the office. It followed in this respect the views of the Supreme Court of Indiana, in *Rushville Gas Co. v. Rushville*, 121 Ind. 206, cited *supra*, § 527.

³ *State v. Miller*, 62 Ohio St. 436. The ballots for two candidates being equal, the mayor, after ascertaining the result, declared one of the candidates elected without going through the formality of casting a ballot. It was held that he had sufficiently exercised his power to give a casting vote and that the candidate was legally elected. *Small v. Orne*, 79 Me. 78.

⁴ *State v. Barbour*, 53 Conn. 76.

completed vote has been taken which results in the giving of the necessary majority or plurality to one of the candidates, the council cannot rescind its vote or reconsider its action and elect another person.¹ But in Massachusetts the court seems to reject this view, and to hold that a vote for a candidate by a council or board is subject to the same right to reconsider as the other proceedings, resolutions, and determinations of the council or board.²

¹ *State v. Barbour*, 53 Conn. 76. See *infra*, § 539. Where the resignation of the chief of police was presented to the council by the mayor for acceptance, was voted upon and accepted by the council, and a nomination by the mayor to fill the vacancy, voted upon and confirmed, it was held that *the action of the council was final*, and that it could not reconsider it. *Whitney v. Van Buskirk*, 40 N. J. L. 463, 467; *infra*, § 539. After an officer has been elected by the board of aldermen and the result declared and recorded, the board cannot, at an adjourned session held the next day, reconsider the election of such officer and elect another person to the office. *State v. Phillips*, 79 Me. 506. A resolution confirming an appointment to office cannot be rescinded at a subsequent meeting after the appointee has taken all the steps required of him to qualify him for the office. *Matter of Fitzgerald*, 88 N. Y. App. Div. 434. See also *People v. Sewell*, 9 Abb. New Cas. (N. Y.) 456.

In *Ohio*, the rule that a vote for an officer cannot be reconsidered is deduced from the fact that the council is acting as an elective and not as a deliberative body. Thus, in *State v. Miller*, 62 Ohio St. 436, the council was composed of eight members. On a vote for office, A received four votes, B two votes, and C two votes. Thereupon the members voting for C sought to change their votes, and the mayor, who presided, permitted it to be done. They thereupon transferred their votes to B, creating a tie, and the mayor voted for B and declared him elected. It was held that this was erroneous and improper; that as A had received a plurality of votes on the ballot as originally taken, he was elected, and the result could not be changed. *Davis, J.*, said: "The council was engaged in the duty of electing officers, a duty imposed on the members thereof, not on the body as a council. They were not engaged in the deliberative business

which is the ordinary work of the council, but in the election of a city officer. They were not acting under parliamentary law, but were casting their votes and making their choice as required by a specific statute. They could make this choice but once. Having done so, they could not reconsider it. Much less could some of them against the protest of a plurality, under the suggestions or invitations of the presiding officer or *sua sponte*, change their votes. This would give to the minority the power of defeating the choice of a plurality which had already been legally made and ascertained."

An appointment to office by the mayor for a definite term duly made and filed is absolute and cannot be recalled by him. *Speed v. Detroit Common Council*, 97 Mich. 198, citing *Marbury v. Madison*, 1 Cranch (U. S.), 137; *United States v. Bradley*, 10 Pet. (U. S.) 343.

² In *Baker v. Cushman*, 127 Mass. 105, it was held that a joint convention of the two branches of a city council might, after taking and counting a ballot for a municipal officer, at the same meeting and before the result of the election had been declared, treat the proceeding as invalid and vote anew. In this case, however, it appeared that too many votes had been cast. See also *Putnam v. Langley*, 133 Mass. 204. In *Wood v. Cutter*, 138 Mass. 149, it was held that the school committee of a town, having been required by a vote of the town to appoint a superintendent of schools, may, after having elected such superintendent by ballot, reconsider the vote at the same meeting, and before it has been communicated to the person appointed, and, at an adjourned meeting, elect another person by a yeas and nays vote. *Holmes, J.*, said: "Under these circumstances no reason has been suggested to us why this vote should not stand on the same footing as any other vote of a deliberative body, and re-

§ 530 (281). **Charter Provisions requiring Majority of Whole**

Body. — When the charter requires the *vote of a majority or prescribed proportion of "all the members elected"* to the council, for the purpose of passing a resolution or ordinance, or uses other language evincing an intention to depart from the rule of the common law that the majority of a quorum present is sufficient, a majority of the members present, which is less than a majority of the whole body, is not sufficient, and a majority of the entire board or council must concur in voting upon the proposition before it.¹ In a number of cases this language has been given a more extended effect and it has been held that the necessary vote is that of a majority of all the members required by law to be elected, and that, *although there may be vacancies* in the council resulting from death or resignation, the vacant memberships must be included in determining the number of "members elected," and the ordinance or resolution must receive the vote of a majority of the members of the council, computing that majority in the same way as if the vacancies did not exist.² But

main subject to reconsideration at the same meeting and before it has been communicated. It begs the question to say that the board had once definitely voted in pursuance of the instructions of the town meeting, and therefore was *functus officio*, and could not reconsider its vote. The vote was not definitive if it contained the usual implied condition that it was not reconsidered in accordance with ordinary parliamentary practice, and it must be taken to have been passed subject to the usual incidents of votes, unless some ground is shown for treating it as an exception to common rules. Whether the board could have cut down their powers of deliberation by communicating their vote before the meeting closed, or otherwise, is not a question before us. It is enough to say that an implied condition is as effectual as an express one; and that in this case the condition which has been stated must be implied." See also to the same effect, *Reed v. Deerfield*, 176 Mass. 473.

¹ *O'Dwyer v. Monett*, 123 Mo. App. 184. The rule stated in the text has been applied under statutory requirements as follows: "concurrence of a majority of all the members elected in the city council," *McLean v. East St. Louis*, 222 Ill. 510; *Evanston v. O'Leary*, 70 Ill. App. 124; "two-thirds of all the members elected,"

Buffington Wheel Co. v. Burnham, 60 Iowa, 493; "two-thirds of the whole number," *Blood v. Beal*, 100 Me. 30; "two-thirds of all the aldermen elect," *Tennant v. Crocker*, 85 Mich. 328; "concurrence of a majority of the whole number of members elected to the council," *State v. Gray*, 23 Neb. 365; *Magneau v. Fremont*, 30 Neb. 843; "vote of two-thirds of the members elected," *Stanton v. Hoboken*, 52 N. J. L. 88; "vote of three-fourths of all the members of the board," *Schermerhorn v. Jersey City*, 53 N. J. L. 112; *Suburban Elect. Co. v. Elizabeth*, 59 N. J. L. 134; "two-thirds of the aldermen elected," *Wood v. Galveston*, 76 Tex. 126. Where by statute it was provided that "all ordinances and resolutions, or orders for the appropriation or payment of money shall require for their passage or adoption the concurrence of a majority of all the trustees of any municipal corporation," &c., it was held that this provision did not require such majority concurrence in the case of a resolution for the extension of the boundaries of a city. *Strohm v. Iowa City*, 47 Iowa, 42.

² The charter of a city contained a provision that no ordinance should be passed by the common council, except by a majority of all the members elected. Eight were elected; and it was decided, under the above-mentioned requirement of the charter, that

when vacancies in the council caused by the death or resignation of elected members have been filled by persons appointed in the man-

an ordinance could not be passed by a vote of four against three, since four did not constitute a majority of all the members elected, although it did constitute a majority of the legal quorum present at the meeting. *San Francisco v. Hazen*, 5 Cal. 169; followed in *McCracken v. San Francisco*, 16 Cal. 591, 618. To the same effect, *Pimental v. San Francisco*, 21 Cal. 351, 360; *Satterlee v. San Francisco*, 23 Cal. 214. A council consisted of fourteen aldermen elected by the people, but there was one vacancy. For certain purposes the concurrence of "a majority of all the members elected in the common council" was required by statute. It was held that a vote of seven aldermen being a majority of the aldermen actually in office was not sufficient. *McLean v. East St. Louis*, 222 Ill. 510.

A city charter required a two-thirds vote of "all the members elected" of the common council to pass an ordinance over the mayor's veto. The charter provided for thirty-four aldermen, but one alderman had died and another resigned, and their places were vacant. A motion to pass an ordinance over the mayor's veto received twenty-two votes. It was held that a two-thirds vote of the aldermen actually in office was not sufficient, and that the ordinance had failed to pass. *Pollasky v. Schmid*, 128 Mich. 699. *Moore, J.*, said: "It is admitted that if two of the thirty-four aldermen had been temporarily absent, the ordinance would not have been passed. We cannot see how the fact that two of the thirty-four aldermen elected were permanently absent, instead of being temporarily so, would change the terms of the charter. The language is not ambiguous. The purpose, doubtless, was that when legislation was proposed the wisdom of which was so much in doubt as to meet with the veto of the mayor, before it became a law it should receive the vote of two-thirds of all the aldermen, when the wards of the city were fully represented in the council."

A city charter provided that ordinances might be passed by the city council over the veto of the mayor by the vote of two-thirds of the members elected. Under the charter eight members had been elected, one of whom had

died. The council having attempted, by the vote of five members, to pass an ordinance over the mayor's veto, it was held that it required the vote of six members, being two-thirds of the eight elected, the vacancy caused by death making no difference in that respect, and that the vote of five members was not sufficient. *Stanton v. Hoboken*, 52 N. J. L. 88. In *Schermerhorn v. Jersey City*, 53 N. J. L. 112, the board of aldermen provided for by statute consisted of thirteen members, of whom one had resigned. By statute, the ward lines might be changed by the vote of three-fourths of all the members of the board, and as construed by the court this required a vote of three-fourths of the entire body. On a motion to pass an ordinance to change the ward lines, nine voted in favor, two against, and one was absent. It was held that the statute required a vote of the entire body as provided for by law, and not merely of the then members, and that, as the nine votes for the ordinance were not three-fourths of thirteen, the ordinance was not legally adopted. In answer to the contention that the statute was complied with by the votes of three-fourths of the sitting acting members at the time the vote was taken, and that if any of the members die, resign, remove, or are disqualified, the remaining members are the unit by which the three-fourths shall be determined, *Scudder, J.*, said: "An extreme case, showing the position in which a city might be placed if the construction put upon this statute by defendant were adopted and there were several vacancies by death, removal, or resignation, is found in *King v. Bellringer*, 4 Term R. 810, where the charter required that the mayor and common clerk and the common council for the time being, or the major part of them, should elect all the officers and ministers of the borough; and the common council was a definite body, consisting of twenty-six; it was held that a majority of the whole number must meet to form an election assembly; and that if the corporation be so reduced that so many do not remain, no election can be had at all. It was then contended that the major part of them must mean the major part for the time being or of the existing corporation. Lord

ner prescribed by law, it would seem that the mere fact that the statute requires the vote of a majority of the *members elect*, does not deprive the appointed members of the right to participate in the vote.¹

Kenyon, in delivering the opinion of the court, quotes Lord *Mansfield*, in *Rex v. Monday*, Cowp. 530, 537, who asked the question: "Is there any case where the charter has directed the election to be by the majority of the body in which it has been held that a less number than a majority of the whole corporation can elect? For instance, suppose the corporation consisted of twelve and two were dead, is there any instance where the charter has said that the election shall be by a majority of the body in which it has been held that six, which are a majority of the remaining ten, were sufficient to elect?" He says further that the cases referred to in that case underwent perhaps more discussion than any case agitated at that time, and concludes with the words, "And we do not find a single decision in opposition in all the cases considering that this election should be made by a select definite body." *King v. Miller*, 6 Term R. 277, by the same court, approves their former decision."

In *Wood v. Gordon*, 58 W. Va. 321, the court held that whenever the words "a majority vote of all the members elected," or words of like import, are used in charters or statutes regulating the action of municipal councils, they are to be construed to mean a majority of the *whole number of members* to which the council is entitled under its charter. In this case the statute in question provided for filling vacancies in office, including, among the offices enumerated, councilmen, and provided that "the council for the time being" should act by "a majority vote of all the members elected." The charter number of councillors was twelve, but there was a vacancy. On a motion to fill the vacancy six voted for A, and four for B. It was held that A was not elected.

But the courts do not uniformly follow the rule stated in the text. In *Salem Com'rs v. Wachovia Loan & Tr. Co.*, 143 N. Car. 110, a statute required for the passage of an ordinance incurring debt "a three-fourth vote of the entire board." The board originally consisted of seven members, but one had resigned, leaving only six members of the board at the time of the passage of

the ordinance. The ordinance was voted for by five members, and it was held that this was a compliance with the statute. The court distinguished the terms "entire board" and "members elected" as used in the other cases cited above, and held that when the former term was used the legislature intended the entire board as it existed from time to time, and not a full board as provided for by law. In *State v. Orr*, 61 Ohio St. 384, the statute provided for a council of ten members, and that "a majority of all the members elected shall constitute a quorum for the transaction of business." A vacancy having arisen through the removal of a member from the ward for which he was elected, it was held that the council consisted of only nine members, and five — being a majority of nine — constituted a quorum. In *People v. Wright*, 30 Colo. 439, the city council was authorized to fill vacancies by a majority vote of all the members. The council provided for by the charter consisted of the mayor and eight councillors, but there were four vacancies. The court held that the mayor and the four councillors constituted the council; that three were a quorum; and that the quorum might fill the vacancies by a unanimous vote. In reaching this conclusion, the court said that the rule which requires a majority of the council provided for by law irrespective of vacancies should only be applied when the statute expressly required the vote of a majority of the *members elected*, or other similar expression; and that when there was no such express requirement the remaining members constituted the entire council for the purpose, and a majority of the remaining members constituted a quorum.

¹ In *Peck v. Berrien County Supervisors*, 102 Mich. 346, the statute provided that the board of supervisors should have power by a *vote of two-thirds of all the members elect*, to designate, &c. A resolution received eighteen out of twenty-six votes. Two of the eighteen had not been elected, but had been appointed to fill vacancies. *Hooker, J.*, said: "We find no authority for the proposition that a township

§ 531 (284). **Application of Majority Principle to Joint Assemblies.** — The doctrine of the English courts is, that *all of the integral parts* of a corporation necessary to do an act must not only meet, but *remain present till the act is completed*; and therefore if one of such parts deserts or withdraws, though wrongfully and to defeat any action, before the act is consummated, the act is not valid.¹ The liability of this rule to abuse, since it enables one of the parts of a joint meeting or assembly to defeat any action whatever, has led the courts in this country to deny its applicability here, or to apply it with caution.²

temporarily represented by an appointed supervisor has not the same voice upon the board that it had before the vacancy. . . . That the use of the term 'elect' in § 481, 1 How. Stat., has a purpose, is plain; but we think it more reasonable to believe that it was intended to require the consent of two-thirds of a full board, than it was designed to deprive townships which should be represented by appointive officers, of a voice in the proceedings. It was intended to preclude action by two-thirds of a quorum, or of a board whose numbers had been lessened by vacancies."

¹ *King v. Williams*, 2 Maule & Sel. 141; following *King v. Buller*, 8 East, 388, 389; questioning *King v. Norris*, 1 Barnard. K. B. 385; cited and reviewed, 7 Cow. 526, note; *King v. Miller*, 6 Term R. 277, 278; 2 Kent's Com. 292. Mr. Willcock vindicates the rule, but on grounds not very satisfactory. Corp. 53, 54; *supra*, § 512.

² *Humphrey, In re*, 10 Wend. (N. Y.) 612; *People v. Batchelor*, 22 N. Y. 128, 146; *per Denio, J.*; *Sudbury First Parish v. Stearns*, 21 Pick. (Mass.) 148; *Coles Co. v. Allison*, 23 Ill. 383; *ante*, § 512.

The common law rule, that to the *due constitution of a corporate assembly a majority*, at least, of each integral or component part or body must necessarily be present, was departed from by the Supreme Court of *New Hampshire* in the case of *Beck v. Hanscom*, 29 N. H. 213. By the charter, the city government of Portsmouth was vested in a mayor, "one council of seven, to be denominated the board of aldermen, and one council of twenty-one, to be denominated the common council, which boards should, in their joint capacity, be denominated the city council." It was further provided by the

charter that a "majority of each board shall constitute a quorum"; that the two bodies shall sit and act separately, except "when the two are required to meet in convention"; that at the meeting of the "city council in convention, if it shall appear that a majority of either of said bodies is not present," the members may compel the attendance of the absentees, &c. The board of aldermen and the common council separately voted to meet in convention on the 12th of June, for the choice of city officers; but when the time arrived only a minority (three out of seven) of the board of aldermen appeared. The common council and these aldermen, twenty-three in all, being a majority of both boards, proceeded to elect city officers; and it was held, 1st, that the election was valid; and 2d, that a majority of the twenty-three present could elect. In reference to this decision it may be observed that the court take no notice of the power of compelling the attendance of the absentees, and that this provision seemed to contemplate the presence of a majority of each of the constituent bodies. The court cites and approves *Whiteside v. People*, 26 Wend. 634, and *Humphrey, In re*, 10 Wend. 612; in both of which, however, the constituent bodies, so to call them, duly met, but refused to act. It is substantially admitted by the court that the decision they make is not in conformity with the English rule, but they consider it to be the one "which will best enable the government of the city to proceed with regularity"; and that "after every preliminary step has been properly taken, the mere neglect of one of the constituent bodies to carry its previous vote into effect ought not to hinder the other bodies from performing the duties required by the charter." *Per Gilchrist, C. J.*, in *Beck v. Hanscom*,

§ 532 (285). **Stated and Special Meetings; Constructive Notice of Stated Meetings.** — The usual division of the *meetings of corporate bodies* is into (1) *stated* or *regular*, and (2) *special* meetings; and meetings of either class possess an incidental power of *adjournment*, from whence we have another class known as *adjourned meetings*. The *time of holding regular or stated meetings* is fixed by the charter, or by ordinance or by-law passed in pursuance thereof; and, in either case, the time thus appointed is presumed to be known to the members of the body; and unless the charter or by-law otherwise provides, it is their duty to attend such meetings without further or special notice. Absent members, equally with those who are present, are bound by whatever is lawfully done at a regular or stated meeting, or any regular and valid adjourned meeting.¹

supra, 29 N. H. 213, 226. In *Kimball v. Marshall*, 44 N. H. 465, *Bell v. Hanscom*, *supra*, is approved, and its doctrine applied to a different state of facts.

Effect of refusal of *one of two distinct bodies* to go into a *joint* meeting, or, after being assembled in joint meeting, to participate in "the *joint* ballot" by which officers (by statute) are to be removed or appointed, see, in Court of Errors, *Whiteside v. People*, 26 Wend. (N. Y.) 634, reversing decision of Supreme Court in same case, 23 Wend. (N. Y.) 9. See Act of Congress of July 25, 1866 (14 Statutes at Large, 243), regulating the election of United States senators by the legislatures of the several States in *joint assembly*, containing provisions (the necessity for which has been shown by experience) to prevent one of the bodies from defeating action. Under a statute which provides that a majority of the members elect of the board of aldermen and general council shall constitute a *quorum for business in joint session*, the required majority is of both boards as a whole and not a majority of each board separately. *Davis v. Claus*, 125 Ky. 4; 100 S. W. Rep. 262. As to proceedings in *joint assembly* and as to power of minority of joint assembly to compel attendance of absent members, see *Schmulbach v. Speidel*, 50 W. Va. 553.

¹ *People v. Batchelor*, 22 N. Y. 128; *Smith v. Law*, 21 N. Y. 296; *ante*, §§ 520, 521; *State v. Smith* (presumptions of regularity), 22 Minn. 218; *Hudson Co. v. State* (presumptions of regularity), 24 N. J. L. 716, 718; *Atlantic Mut. F. Ins. Co. v. Sanders*, 36

N. H. 252; *Paola & F. R. R. Co. v. Anderson County*, 16 Kan. 302, 310. See and compare *State v. Jersey City*, 25 N. J. L. 309. If the charter does not provide for the manner in which the time for holding "stated meetings" shall be fixed, the city council may fix or change the time by simple motion, though it has previously been fixed by a formal resolution, approved and published. *State v. Kantler*, 33 Minn. 69. See *post*, § 538, as to presumptions of regularity.

"Inasmuch as it is not only the duty, but the right, of each member to be present and participate in the deliberations and proceedings of the council, a *legal notice to all of every meeting*, whether regular or special, is requisite, in order to enable a quorum of the council to act, and to give validity to its transactions. This object is accomplished, in the case of its *regular* meetings, by a resolution fixing the time and place thereof, of which all must take notice; whereas, as to *special* meetings, called by the mayor, personal notice must be served in the manner provided by the charter; and as these two are the only modes provided by the charter for convening the council, a meeting assembled under any other authority, or in any other manner, would be so far unauthorized and illegal that no valid action could be taken by a mere quorum." *Per Cornell, J.*, in *State v. Smith*, 22 Minn. 218.

Place of meeting. In *Kentucky*, it is held that when the council has designated by ordinance the *place* at which meetings of the city council shall be

§ 533 (286). **Notice of Special Meetings; how given.** — If the meeting be a special one, the general rule is, unless modified by the charter or statute or valid ordinance, that notice is necessary, and must be personally served, if practicable, upon every member entitled to be present, so that each one may be afforded an opportunity to participate and vote.¹ By the charter of a city, the power of imposing taxes belonged to the inhabitants assembled in annual town meeting. It was provided that if at this meeting no tax was voted,

held, a meeting held at some other place — unless cogent reason be shown why it should not be held at the regular place — is not authorized when the statute requires the place of meeting to be designated by ordinance; at a meeting not held at the regular place, the council has no power to enact ordinances for the government of the city. *Shugars v. Hamilton*, 122 Ky. 606; 92 S. W. Rep. 564; *Springfield v. People's Deposit Bank*, 111 Ky. 105; 63 S. W. Rep. 271. But if the council has not fixed the place of meeting by ordinance in compliance with the statute, the members may assemble and organize at some convenient place within the corporate limits. *Wells v. Mt. Olivet*, 126 Ky. 131; 102 S. W. Rep. 1182.

¹ *Harding v. Vandewater*, 40 Cal. 77; *Stow v. Wyse*, 7 Conn. 214; *Paola & F. R. Co. v. Anderson County*, 16 Kan. 302, quoting text; *Rogers v. Slonaker*, 32 Kan. 191; *State v. Seward County*, 36 Kan. 236, 237; *Leavenworth, N. & S. R. Co. v. Meyer*, 58 Kan. 305; *Shugars v. Hamilton*, 122 Ky. 606; 92 S. W. Rep. 564; *Burgees v. Pue*, 2 Gill (Md.), 254; *Beaver Creek v. Hastings*, 52 Mich. 528; *Harding v. Bader*, 75 Mich. 316; *Boyce v. Auditor-General*, 90 Mich. 314; *Lord v. Anoka*, 36 Minn. 176; *People v. Batchelor*, 22 N. Y. 128, 134, *per Selden*, J. *Ib.* 146, *per Denio*, J.; *Rogers, In re*, 7 Cow. (N. Y.) 526; *Downing v. Rugar*, 21 Wend. (N. Y.) 178; *Pike County v. Rowland*, 94 Pa. St. 238; *London & N. Y. Land Co. v. Jellico*, 103 Tenn. 320, citing text; *Knoxville v. Knoxville Water Co.*, 107 Tenn. 647, 656, citing text; *Smyth v. Darley*, 2 H. L. Cas. 789.

A charter provision that the council shall meet at such time and place as they may by resolution direct does not preclude other meetings than those fixed by such resolution, and such other meetings are valid if all the

members actually attend and participate in the proceedings, and they are otherwise regular. *State v. Smith*, 22 Minn. 218. *Presumption of regularity*, see *post*, § 538.

At a stated meeting of a select body at which all the members are not present, it is not competent, in the opinion of the Court of Appeals of New York, in the absence of a statute or by-law to that effect, to appoint a future new or special meeting to determine independent matters not taken up, and which could not legally have been taken up at the stated meeting, and to act at such future time, unless all have actual notice or all attend. *Infra*, § 534. If any one thus entitled to notice does not receive it, and is not present, the action is void. *People v. Batchelor*, 22 N. Y. 128; to be read in connection with *Smith v. Law*, 21 N. Y. 296.

No resolution had been adopted fixing the times of meetings of a municipal board. The mayor, who had the right to preside and vote in case of a tie, was not notified of a meeting and was not present, and had no knowledge of any custom or understanding among members of the board as to the time of meeting. It was held that notice to the mayor was essential, and that the meeting was not legally convened. *State v. Kirk*, 46 Conn. 395. In *Campbell School Dist. No. 4 v. Baier*, 98 Wis. 22, a special meeting was held to have been illegally convened, because the notice served on an absent member did not state the place of the meeting, but *quære* if there was a fixed, uniform, and known place of meeting. Failure to give notice to one member of the council of a special meeting at which an ordinance granting a franchise was adopted held to be obviated and cured by the subsequent adoption of an ordinance ratifying the ordinance granting the franchise. *Territory v. De Wolfe*, 13 Okla. 454.

or an insufficient tax, the common council "should call a meeting of the inhabitants, by advertisement or otherwise," for the purpose of having them vote a tax. The court seemed to be of opinion that the common council were obliged to specify the objects of the call in their notice, it being a special meeting; and it decided that if it did specify a particular purpose, any act of the meeting "wholly beside the special purpose of the meeting as stated" was void.¹

§ 534 (263). **Notice how given and how waived.** — A notice, when necessary, *e. g.*, in the case of *special* meetings, must, if practicable, *be given to every member* who has a right to vote, where the act is one to be done by a body consisting of a definite class or classes, and it must be given by, or issued by order of, some one who has the authority to convene a corporate meeting. But notice may be altogether *dispensed with* or its necessity *waived*, by the presence and consent of *every one* of those entitled to it.² It must be *served* personally upon every resident member, or left at his house. If temporarily absent, it may be left with his family, or at his house or last place of abode. An order to serve all is not sufficient; all, if practicable, must be served, but if the party entitled to notice is absent from the municipality, and it is impracticable to give him notice in proper form, the service of notice is excused.³ It must be served a *reasonable time before* the hour of meeting, of which the court will judge from all the circumstances, including usage. If the charter provides a method by which the notice shall be served, its provisions must be strictly obeyed.⁴

¹ *Bergen v. Clarkson*, 1 Halst. (N. J.) 352. See also *Rex v. Liverpool*, 2 Burr. 723, 735; *Rex v. Doncaster*, *ib.* 738; *King v. Carlisle*, 1 Str. 385; *Machell v. Nevinston*, 2 Ld. Raym. 1355; 2 Bac. Abr. 18.

² *Greeley v. Hamman*, 17 Colo. 30; *Lawrence v. Traner*, 136 Ill. 474; *Hanna v. Wright*, 116 Iowa, 275; *Moore v. Perry*, 119 Iowa, 423; *Beaver Creek Tp. v. Hastings*, 52 Mich. 528; *State v. Smith*, 22 Minn. 218; *Lord v. Anoka*, 36 Minn. 176; *Magneau v. Fremont*, 30 Neb. 843; *supra*, § 533. In *State v. Kirk*, 46 Conn. 395, it was contended that custom, usage, or common understanding of the members as to the time and place of meeting was sufficient to dispense with the service of notice, but the court held that, conceding this to be so, the custom or understanding must be known to *all* the members, and for lack of such knowledge on the part of one of the members, it was held that the proceedings of the meeting were invalid.

³ *State v. Kirk*, 46 Conn. 395; *Russell v. Wellington*, 157 Mass. 100, 106; *Lord v. Anoka*, 36 Minn. 176; *London & N. Y. Land Co. v. Jellico*, 103 Tenn. 320, citing text; *Knoxville v. Knoxville Water Co.*, 107 Tenn. 647, citing text. *Legal impracticability to give notice* of a special meeting held to exist where the member was out of the State and his exact whereabouts unknown. *State v. Kirk*, 46 Conn. 395; *Knoxville Water Co. v. Knoxville*, 107 Tenn. 647. So held, also, where he had left Massachusetts on an extended trip to California. *Russell v. Wellington*, 157 Mass. 100.

⁴ *Kleimenhagen v. Dixon*, 122 Wis. 526. Where the statute directed that special meetings of the city council should be called by the mayor "by

§ 535 (287). **Adjournment of Meetings.** — A regular meeting, unless special provision is made to the contrary, *may adjourn to a future fixed day*; and at such meeting it will be lawful to transact any business which might have been transacted at the stated meeting, of which it is, indeed, but the continuation. Unless such be the special requirement of the charter or of a by-law, or the established or general usage, the adjourned regular meeting would not, it is supposed, be limited to completing particular items of business which had been actually entered upon and left unfinished at the first meeting; but might, if the adjournment was general, do any act which might lawfully have been done had no adjournment taken place.¹

causing notice to be left at the usual place of residence of each member," notice by mail was held sufficient when it was shown that every member capable of being notified in the statutory manner actually received notice by mail. *Russell v. Wellington*, 157 Mass. 100. By attending a special meeting and taking part in the proceedings with knowledge of the informality in the notice, objecting members of the board are estopped to contest the legality of the proceedings on the ground that the notice required by statute has not been given. *Mitchell County Supervisors v. Horton*, 75 Iowa, 271. See also *Molyneaux v. Molyneaux*, 130 Iowa, 100.

¹ *Smith v. Law*, 21 N. Y. 296; *Warner v. Mower*, 17 Vt. 385; *People v. Batchelor*, 22 N. Y. 128; *Rawlinson on Corp.* (5th ed.) 136, note; *Rex v. Harris*, 1 B. & A. 936; *Scadding v. Lorient*, 5 Eng. Law and Equity, 16; *People v. Martin*, 5 N. Y. 22; *Robin Street, Re*, 1 La. An. 412; *Hudson Co. Freeholders v. State*, 24 N. J. L. 716, 718; *New Orleans v. Brooks*, 36 La. An. 641; *Ex parte Mirande*, 73 Cal. 365; *Sommercamp v. Kelly*, 8 Idaho, 712; *Carter v. McFarland*, 75 Iowa, 196; *Durant v. Jersey City*, 25 N. J. L. 309, 312; *Staats v. Washington*, 44 N. J. L. 605, 611, citing text; *Lantz v. Hightstown*, 46 N. J. L. 102, 107; *Flood v. Atlantic City*, 63 N. J. L. 530; *Stiles v. Lambertville*, 73 N. J. L. 90; *Commonwealth v. Fleming*, 23 Pa. Super. Ct. 404; *ante*, §§ 510, 522. Adjournment by minority to day appointed for regular meeting. *People v. Rochester*, 5 Lansing (N. Y.), 142.

An adjournment is not the act of the individuals but of the body itself, and in the absence of provision there-

for, by charter, ordinance, or by-law, *less than a quorum cannot adjourn a meeting*. *Pennsylvania Co. v. Cole*, 132 Fed. Rep. 668, 678; *State v. Smith*, 22 Minn. 218. It has been held that when the statute directs a board to meet on a fixed date and then perform a certain act, *e. g.*, elect an officer, and no provision is made for re-convening on any other day, the board, having met and organized on the day fixed by statute, *may continue in session* until the business has been completed, although it may be into another day, or it seems it might *adjourn from day to day* until the duty imposed upon it is performed. *State v. Vanosdal*, 131 Ind. 388.

Members are *not entitled to notice* of an adjourned regular meeting. They are presumed to have notice. *Commonwealth v. Fleming*, 23 Pa. Super. Ct. 404. Where a charter requires that an ordinance shall not be passed unless it is introduced at a *previous* meeting of the council, it *cannot be passed at an adjourned meeting*. An adjourned meeting is a continuation of the same meeting. *Staats v. Washington*, 44 N. J. L. 605, 611; *Flood v. Atlantic City*, 63 N. J. L. 530. A city charter provided for stated meetings of the council on the first Monday of each month, and also authorized the council to call special meetings *without specifying the purpose thereof*. At special meetings any regular business might be transacted. It was the custom of the council to adjourn from week to week by resolution entered on the minutes. It was held that these additional meetings were intended to be and should be regarded as special meetings called by the council and not mere adjournments

Where the meeting, if a regular one, can only act upon a specific matter, or, if a special one, can only act upon matters of which notice has been given to the members, while it is competent in either case to adjourn, the adjourned meeting is in both cases limited, equally with the first meeting, to the specified matters.¹

or continuances of the stated meetings, and that an ordinance introduced at a stated meeting and passed at a meeting held a week later was *not to be regarded as passed at the same meeting* at which it was introduced. *State v. Ross*, 46 Wash. 28; 89 Pac. Rep. 158.

The only power which a presiding officer has to declare a meeting adjourned of his own initiative and without putting a motion to the meeting is as a last resort, when disorder becomes so great that business cannot be transacted and the chairman cannot enforce order. *Attorney-General v. Remick*, 73 N. H. 25.

Where there is no quorum it is sufficient that the presiding officer or the clerk, if the former is not present, should declare, without putting the question, that the assembly stands adjourned until the next sitting day and a provision of the statute requiring the clerk to continue all business where no quorum is present does not require the clerk to adjourn the meeting by directing him to continue the business. *Fitzgerald v. Pawtucket Street R. Co.*, 24 R. I. 201. After a final adjournment of a meeting of the board, the members have no power to assemble, or to transact business required to be transacted in session, until the next regular meeting, unless they be convened in the meantime in special session in the manner prescribed by law. *Scott v. Union County*, 63 Iowa, 583, 588.

¹ *Scadding v. Lorant*, 5 Eng. Law and Equity, 16; 17 Law T. 225. In this case the statute (a local act) required notice to be given of a meeting of vestrymen to be held for the purpose of making a rate for the relief of the poor. Such notice was given, specifying the purpose of the meeting; the meeting was held accordingly on the 12th of August, when it was resolved that a rate should be made; but as the details could not be completed, the meeting was adjourned, and at an adjourned meeting the matter of the rate was completed; but the notice for

the adjourned meeting contained no mention of the purpose for which the meeting assembled. And the question which the House of Lords put to the judges in reference to the adjourned meeting, was: "Supposing the rate to be otherwise valid, was it invalid by reason of the notice not stating the purpose for which the [adjourned] meeting assembled?" The judges answered: "We are unanimously of opinion that the rate was not rendered invalid by reason of the alleged defect in the notice of the adjourned meeting. It was sufficient to give notice [as required by the act] on the church door, of the purpose for which the first meeting was to be held, and, that notice having been duly given, we think that the notice so given extended to all the adjourned meetings, such adjourned meetings being held for the purpose of completing the unfinished business of the first meeting, and being in continuation of that meeting." And such was the judgment of the House of Lords. See also *Rex v. Harris*, 1 Barn. & Ad. 936. "Meetings may be adjourned, but nothing may be transacted at any adjourned meeting save the unfinished business of the former meeting." *Brice's Ultra Vires*, Green's Am. ed. 534, citing *Reg. v. Grimshaw*, 10 Q. B. 747, which holds that at an adjourned quarterly meeting notice must be given of any business not actually begun at the quarterly meeting, but of business actually begun no notice is necessary. The text, § 535, states the rule as it seems to be understood in this country, viz., that under the conditions stated in the text the adjourned meeting may transact any business which might have been transacted by the regular meeting. *Presumptions as to regularity of adjournment*, see post, § 538.

A special meeting may be adjourned to a fixed date by a quorum, and when so adjourned, the adjourned meeting will be treated as a continuation of the one which was adjourned. Any business which could have been brought before the original special meeting may

§ 536 (288). **Mode of Proceeding when convened.** — After a meeting of the council is duly convened, *the mode of proceeding is regulated* by the charter or constituent act, by ordinances passed for that purpose, and by the general rules, so far as in their nature applicable, which govern other deliberative and legislative bodies.¹ A *city council has*, as a legislative or deliberative body, the *inherent power* by ordinance to *provide for and establish rules* for its own procedure, and the rules thus adopted will not be interfered with or set aside by the courts, unless they are directly or by necessary implication in conflict with some requirement of the statute.² If the council consists of two boards, the concurrence of both is essential to valid legislation, and this concurrence must be by simultaneously existing bodies.³ The rule of legislative bodies consisting of two branches, that unfinished business at the end of a session is discontinued, and must be afterwards taken up anew, if at all, was considered applicable to the legislative acts of the common council of New York, composed of a board of aldermen and a board of assistant aldermen.⁴

§ 537 (289). **Committees of Council.** — The council *may ascertain facts through the medium of a committee*, and the members of the council may, where they know the facts of their personal knowledge, act without further inquiry.⁵ As a public corporation may

properly be considered at the adjourned session. *Moore v. Perry*, 119 Iowa, 423, 427. See also *State v. Smith*, 22 Minn. 218; *Magneau v. Fremont*, 30 Neb. 843.

¹ Where an ordinance is enacted in accordance with the provisions of a statute, the fact that in its passage a parliamentary rule was violated, will not render it invalid. *McGraw v. Whitson*, 69 Iowa, 348. Where the mayor has the right to vote only in case of a tie, he may lawfully exercise the power when one-half the members of the council have voted and the other half have abstained from voting. *Launtz v. People*, 113 Ill. 137; *ante*, §§ 511, 527, 528.

² *State v. Dunn*, 76 Neb. 155; 107 N. W. Rep. 236; *Landes v. State*, 160 Ind. 479, 489. But a *city council is not bound to act* only in accordance with its rules of procedure or by-laws. It has the power to waive compliance with them. *Bennett v. New Bedford*, 110 Mass. 433; *Holt v. Somerville*, 127 Mass. 408, 411; *Sedalia v. Scott*, 104 Mo. App. 595; 78 S. W. Rep. 276; *Ex*

parte Albany, 23 Wend. (N. Y.) 277, 280.

³ *Wetmore v. Story*, 22 Barb. (N. Y.) 414.

⁴ *Wetmore v. Story*, 22 Barb. (N. Y.) 414. A subsequent council is bound by knowledge duly communicated to a previous council. *Alexandria Bank v. Seton*, 1 Pet. (U. S.) 299. In *Commonwealth v. Lancaster*, 5 Watts (Pa.), 152, *Gibson, C. J.*, expressed his opinion to be that, notwithstanding a by-law or rule requires certain corporate acts to be in a given form, and that alterations of such by-law or rule shall only be made by a vote of two-thirds of the members, yet that a majority may repeal the by-law or rule, and may, without such repeal, do valid acts, not in the prescribed form, by a majority vote.

⁵ *Bissell v. Jeffersonville*, 24 How. (U. S.) 287, 296, *per Clifford, J.*; *Commonwealth v. Pittsburgh*, 14 Pa. St. 177; *Main v. Ft. Smith*, 49 Ark. 480. Council may order sewer to be built by a committee. *Collins v. Holyoke*, 146 Mass. 298; *Dorey v. Boston*, 146 Mass.

entirely revoke the powers of a committee it has appointed, so it may control the execution of those powers by increasing the number of the committee. If the new members, either by design or mistake, are excluded from acting, the proceedings of the others will be irregular.¹

§ 538. **Presumption of Regularity.**—The *presumption of regularity* which attaches to the acts of public officers extends to and includes corporate meetings.² Thus, if it appears that a *special meeting* of the city council has been held, it will be presumed, in the absence of proof to the contrary, that it was regularly called.³ A

336, 339, and cases cited. As to power of council to appoint officers, and when it may delegate its powers to a committee. *Ib.*; *Preble v. Portland*, 45 Me. 241; *Salmon v. Haynes*, 50 N. J. L. 97; *ante*, §§ 244, 377, 519, 522, note. The English Municipal Corporations Act 1882, § 22, provides that "the council may appoint out of their own body such and so many committees as they think fit, for any purposes which in the opinion of the council would be better regulated and managed by means of such committees; but the acts of every such committee shall be submitted to the council for their approval."

¹ *Damon v. Granby*, 2 Pick. (Mass.) 345. In this case it was further held, where the agents of a town contracted with the plaintiff "to erect a meeting-house on a place to be designated by a committee of the town," that the town might disagree to the selection, and "designate the place for themselves, at any time before the ground was prepared," on indemnifying the plaintiff for any extra labor or expense which their fluctuating proceedings may have occasioned. A notice to appear before a committee to whom a matter, as, for example, the laying out or altering of a street, has been duly referred, is equivalent to a notice to appear before the city council, as, for this purpose, the committee represent the council. *Preble v. Portland*, 45 Me. 241.

² *Duniway v. Portland*, 47 Oreg. 103. If the minutes merely show that a resolution was adopted without stating by what majority, it will be presumed that it was carried by the requisite majority in the absence of a statutory requirement that the record show the ayes and noes, or the vote. *State v.*

Vail, 53 Iowa, 550; *infra*, § 540. Presumption in favor of legality of town meeting after lapse of long time. *Peterborough v. Lancaster*, 14 N. H. 382, 392. See also *South School Dist. v. Blakeslee*, 13 Conn. 227.

³ *Hanna v. Wright*, 116 Iowa, 275; *Wallace v. First Parish in Townsend*, 109 Mass. 263; *Brigins v. Chandler*, 60 Miss. 862; *Corburn v. Crittenden*, 62 Miss. 125; *Tierney v. Brown*, 65 Miss. 563; *Rutherford v. Hamilton*, 97 Mo. 543; *Staats v. Washington*, 45 N. J. L. 318; *Rome v. Whitestown Water Works Co.*, 113 N. Y. App. Div. 547, *aff'd*, 187 N. Y. 542. See also *Lewick v. Glazier*, 116 Mich. 493; *Thayer v. Stearns*, 1 Pick. (Mass.) 109. But compare *Harding v. Bader*, 75 Mich. 316.

"The minutes of a special meeting are not required to contain the proofs that the meeting was regularly called. If it purports to be, it will be presumed to be regularly called. It will not devolve on the corporation to establish its regularity until there is some proof of irregularity." *Per Magie, J.*, in *Staats v. Washington*, 45 N. J. L. 318, 323. Where there was *no evidence of notice*, a special meeting of a council was presumed to have been attended by all the members in the absence of any proof to the contrary. *State v. Smith*, 22 Minn. 218. The fact that the record of a special meeting of a board, from which one member was absent, fails to show that he was notified of the meeting, will not invalidate the proceedings of the meeting in the absence of proof that no notice was in fact given, or that actual proof of notice did not exist *aliunde*. *Boyce v. Auditor-General*, 90 Mich. 314. When proof of the service of notice of a special meeting

similar presumption attaches to the proceedings of *adjourned* meetings. To support the proceedings thereat, it will be presumed that the stated or original meeting was rightly adjourned and the adjourned meeting duly convened.¹

§ 539 (290). **Right to rescind Previous Acts.** — At any time before the *rights of third persons* have vested, a council or other corporate body may, if consistent with its charter and rules of action, *rescind previous votes and orders.*² Thus a vote levying a tax, so

of a board is *not required by statute to be recorded*, but may be filed in the office of the clerk, when so filed, it constitutes a part of the public records, and may be resorted to to supply any omissions in the records of the proceedings. *Boyce v. Auditor-General*, 90 Mich. 314.

¹ *Hudson County Freeholders v. State*, 24 N. J. L. 716, 718; *Duniway v. Portland*, 47 Oreg. 103. See also *Citizens' Mut. F. Ins. Co. v. Sortwell*, 8 Allen (Mass.), 217; *State v. Jersey City*, 25 N. J. L. 309. A meeting of a city council at which less than a quorum were present, adjourned to a day certain, at which time another adjournment was had. It was held that while the first adjournment was irregular, because of the absence of a quorum, it would be presumed, in the absence of any showing to the contrary, that a quorum were present at the second meeting, and that a regular adjournment was then had. *Moore v. Perry*, 119 Iowa, 423.

² *Bigelow v. Hillman*, 37 Me. 52, 58; *Reiff v. Conner*, 10 Ark. 241; *State v. Hoyt*, 2 Oreg. 246; *ante*, § 113; *Road Case*, 17 Pa. St. 71, 75; *New Orleans v. St. Louis Church*, 11 La. An. 244; *Hough v. Bridgeport*, 57 Conn. 290; *Mitchell County Supervisors v. Horton*, 75 Iowa, 271, 279, citing text; *Wingert v. Snouffer*, 134 Iowa, 97; 108 N. W. Rep. 1035; *Baker v. Cushman*, 127 Mass. 105; *Putnam v. Langley*, 133 Mass. 204; *Wood v. Cutter*, 138 Mass. 149; *Reed v. Deerfield*, 176 Mass. 473; *Adkins v. Toledo*, 27 Ohio Cir. Ct. 417; 17 Ohio Cir. Dec. 417.

Reconsideration at subsequent meeting. *Locke v. Rochester*, 5 Lansing (N. Y.), 11; *Sank v. Philadelphia*, 1 Pa. Leg. Gaz. Rep. 259. "The right of *reconsidering* lost measures [at the same meeting, or pursuant to its rules] inheres in every body possessing legis-

lative powers." *Per Whelpley, C. J.*, *Jersey City v. State*, 30 N. J. L. 521, 529; *Red v. Augusta*, 25 Ga. 386. Right to reconsider a vote or order at the *same* meeting sustained. *State v. Foster*, 7 N. J. L. 101; *Jersey City v. State*, 30 N. J. L. 521, 529; *Whitney v. Van Buskirk*, 40 N. J. L. 463, 467; *Stiles v. Lambertville*, 73 N. J. L. 90. A vote or resolution may be reconsidered at the *next* meeting. *Red v. Augusta*, 25 Ga. 386; *Mitchell County Supervisors v. Horton*, 75 Iowa, 271, 279. It may be considered at *any subsequent meeting*, so long as no vested rights have accrued. *Adkins v. Toledo*, 27 Ohio Cir. Ct. 417, 17 Ohio Cir. Dec. 417. But where the original vote requires for its adoption a specified proportion of the council, *e. g.*, three-fifths or three-fourths, the same proportion is necessary to carry a motion to reconsider. *Whitney v. Hudson*, 69 Mich. 189; *Beach v. Kent*, 142 Mich. 347. As to the power of the city council or a municipal board to *reconsider votes in elections to office*, see *ante*, §§ 526, 529, note.

"All deliberative assemblies, during their session, have a right to do and undo, consider and reconsider, as often as they think proper, and it is the *result* only which is done." *Per Kirkpatrick, C. J.*, in *State v. Foster*, 7 N. J. L. 101, 107. See also *State v. Jersey City*, 27 N. J. L. 536. While public money is in the possession of the proper officer, the proper authorities have entire control over it, and they may, so far as the officer holding it is concerned, rescind a prior order (not yet complied with) to pay money to an individual. *Tucker v. Justices*, 13 Ire. (N. Car.) Law, 434; *Dey v. Lee*, 4 Jones (N. Car.) Law, 238. A resolution is not invalid because passed upon a reconsideration of a negative vote moved by one who voted originally with the minority. *Locke v.*

long as it rests in mere resolution, and has not been acted upon, may be reconsidered, and, if rescinded, the collector cannot legally proceed to collect the tax.¹

§ 540 (291). **Charter Requirement of Vote by Ayes and Nays.** —

A provision of a city charter, that the *ayes and nays shall be called* and published whenever the vote of the common council shall be taken on any proposed improvement involving a tax or assessment upon the citizens, was considered, by two of the three of the members of the Supreme Court of New York, notwithstanding the use of the word "*shall*," to be directory merely, "the essential requisite being the determination of the corporation, and not the form or manner of expressing that determination."² But an *opposite view*

Rochester, 5 Lansing (N. Y.), 11. But in *Sank v. Philadelphia*, 8 Phila. Rep. (by Wallace) 117, a *nisi prius* decision of the Supreme Court, it was held that the city councils, having once voted to sustain the mayor's veto of an ordinance passed by them, could not reconsider this vote, nor take any further action on the measure. 6 Am. Law Rev. 720.

The vote of a *town meeting rescinding its former action* in authorizing a subscription in aid of a railroad held to be lawful, no rights of third parties having vested, and nothing having been done under the authority to subscribe. *Estey v. Starr*, 56 Vt. 690. A vote ratifying a contract made by town officers without due authority cannot be rescinded so as to affect the validity of the contract. *Brown v. Winterport*, 79 Me. 305.

¹ *Stoddard v. Gilman*, 22 Vt. 568; *Pond v. Negus*, 3 Mass. 230.

² *Striker v. Kelly*, 7 Hill (N. Y.), 9, 24 (*Bronson*, J., dissenting); s. c. in error 2 Denio (N. Y.) 323; *Matter of Mt. Morris Square*, 2 Hill (N. Y.), 14, 20. See also *Elmendorf v. New York City*, 25 Wend. 693. These cases all involved proceedings for opening streets or making improvements where both the power of eminent domain and the power of taxation were concerned. It is doubtful whether they are any longer authoritative. In *Matter of Carlton St.*, 16 Hun (N. Y.), 497, the charter of Buffalo required that resolutions authorizing the condemnation of lands should be "adopted by a vote of two-thirds of its members." The charter also contained a provision that when

by its terms a vote of more than a majority was required "it shall be taken by the yeas and nays which shall be entered on the journal." The court held that as the proceeding involved the exercise of the right of eminent domain under a delegation thereof to a municipality, the provisions of the statute, by which the power is delegated, must in all respects be complied with, and that no presumptions of regularity are to be made respecting such proceedings, but they must conform in all things, at least substantially, to the act of the legislature; and that as the resolution did not appear by the journal of the council to have been taken by yeas and nays the proceedings of the council were invalid, saying, "The statute, in order to render this matter certain, has provided that in such case the vote shall be taken by yeas and nays, and that such votes shall be entered on the journal, and unless this thing is done, the proceeding is void, and the only legal evidence that the resolution was passed by the requisite vote is the record of the proceedings of the council kept according to law." This decision was affirmed by the Court of Appeals *sub nom.* *Matter of Buffalo*, 78 N. Y. 362. To the same effect, see also *Matter of South Market Street*, 76 Hun (N. Y.), 85.

A requirement that the vote "shall in all cases be taken by ayes and noes" held not to apply to votes on *motions to adjourn*. *Green Bay v. Brauns*, 60 Wis. 204. It has been held that a provision in the organic act of a city, that "on the passage of every by-law or

has elsewhere, as we think properly, been taken of similar provisions, the courts regarding the requirement that votes shall in such cases be entered at large on the minutes, as intended to accomplish an important public purpose, and therefore consider the provision as mandatory, and its observance essential to valid corporate action, and also, as a necessary result, that the legal evidence that the requirements of the statute or charter have been complied with is the record of the proceedings of the common council kept according to law.¹ The proper remedy for the council in the case of an omission from or defect in the record is to cause a *nunc pro tunc* entry to be made.² This it has power to

order to enter into a contract by the council the ayes and nays shall be called and recorded," prescribes how the order to contract shall be made and evidenced when directed by the council, but it is not a limitation on the power of authorized agents to make a contract by parol. *Indianola v. Jones*, 29 Iowa, 282; *Baker v. Johnson Co.* (parol contract), 33 Iowa, 151.

The decision or determination of a question by a town meeting or common council should be, and probably must be, by a formal vote or resolution. *People v. Adams*, 9 Wend. (N. Y.) 333; *Denning v. Roome*, 6 Wend. (N. Y.) 651.

¹ *Steckert v. East Saginaw*, 22 Mich. 104, where the purpose of the requirement is well expounded; *Coffin v. Portland*, 43 Fed. Rep. 411; *Cutler v. Russellville*, 40 Ark. 105; *Los Angeles Gas Co. v. Toberman*, 61 Cal. 199; *Durango v. Pennington*, 8 Colo. 257, 262; *Sullivan v. Leadville*, 11 Colo. 483; *Spangler v. Jacoby*, 14 Ill. 297; *Schuyler County Supervisors v. People*, 25 Ill. 181; *Schofield v. Hudson*, 56 Ill. App. 191; *Boyd v. Chicago, B. & Q. R. Co.*, 103 Ill. App. 199; *Delphi v. Evans*, 36 Ind. 90; *Olin v. Meyers*, 55 Iowa, 209; *Markham v. Anamosa*, 122 Iowa, 689; *State v. Nebraska Tel. Co.*, 127 Iowa, 194; *Cook v. Independence*, 133 Iowa, 582; 110 N. W. Rep. 1029; *Morrison v. Lawrence*, 98 Mass. 219; *McCormick v. Bay City*, 23 Mich. 457; *Pontiac v. Axford*, 49 Mich. 69; *In re Ryan*, 79 Neb. 414; 112 N. W. Rep. 599; *Hicks v. Long Branch Com'rs*, 69 N. J. L. 300; *O'Neil v. Tyler*, 3 N. Dak. 47; *Pickton v. Fargo*, 10 N. Dak. 469, citing text. See also *Chicago & N. R. R. Co. v. Chicago*, 174 Ill. 439, 445; *McDowell v. People*, 204 Ill. 499; *Solo-*

mon City v. Hughes, 24 Kan. 211; *Young v. St. Louis*, 47 Mo. 492, 495; *St. Louis v. Foster*, 52 Mo. 513; Index, *Records and Documents*.

Accordingly a provision of statute that no ordinance for the improvement of a street should be adopted, except upon the report and recommendation of the city board of improvements, and requiring that such report be recorded in its proceedings, is mandatory, and the report and recommendation were held jurisdictional, and not provable by parol evidence. *Reynolds v. Schweinefus*, 1 Sup. Court, Cin. (Ohio) Rep. 215.

Where a general law required the yeas and nays to be called and recorded on the passage of all ordinances, it was held by the Supreme Court of *Colorado* that when the record failed to show such calling and recording as to an ordinance concerning misdemeanors, the ordinance was a nullity and a conviction under it void. *Tracey v. People*, 6 Colo. 151.

Where a local improvement is proposed, and it is not petitioned for by a majority of the owners of property to be assessed, the charter declares that it shall be ordered *only* by the vote of at least three-fourths of all the aldermen present, such vote to be by *ayes* and *nays* on the record of the common council; if, when the record is presented, it does not appear that the improvement was ordered by a vote of three-fourths of the aldermen present, by vote entered by ayes and nays, the ordinance is void, and judgment for a sale of the property to pay the local assessment cannot rightfully be entered. *Rich v. Chicago*, 59 Ill. 286.

² *Logansport v. Crockett*, 64 Ind. 319; *Mayhew v. Gay Head*, 13 Allen,

do.¹ But the proceedings of the common council will not be held to be invalid upon technical grounds founded upon the fact that the minutes of the council have not been kept with that precision and regularity which is desirable, if it fairly appears from an examination of the record of the meeting that the statute has been complied with. Thus the fact that the record does not disclose the individual votes of the members in detail is not sufficient to render the proceedings of the council invalid, *if it fairly appears from the record that the vote was taken by yeas and nays*, and if the manner in which each member of the council voted also appears therefrom.²

§ 541 (292). **Acts by Less than Quorum Void.** — Acts done *when less than a legal quorum* is present, or which were not concurred in by the requisite number, are void.³ This is a fundamental rule in

129; *Steckert v. East Saginaw*, 22 Mich. 104; *Delphi v. Evans*, 36 Ind. 90; *Lowndes County Com'rs Ct. v. Hearne*, 59 Ala. 371; *Musselman v. Manly*, 42 Ind. 462; *Vawter v. Franklin College*, 53 Ind. 88; *Chamberlain v. Evansville*, 77 Ind. 542, 548; *Everett v. Deal*, 148 Ind. 90; *Pineville v. Burchfield*, 19 Ky. Law Rep. 984; 42 S. W. Rep. 340, citing text. See also *New Albany v. Endres*, 143 Ind. 192; *Becker v. Henderson*, 100 Ky. 450.

¹ See preceding note.

² *Goodyear Rubber Co. v. Eureka*, 135 Cal. 613; *Bayard v. Baker*, 76 Iowa, 220; *People v. Raims*, 20 Colo. 489; *New Albany Gaslight & Coke Co. v. Crumbo*, 10 Ind. App. 360. See also *Preston v. Cedar Rapids*, 95 Iowa, 71; *Brophy v. Hyatt*, 10 Colo. 223; *Solomon v. Hughes*, 24 Kan. 211; *Blair v. Cary*, 24 Ohio Cir. Ct. 560; 14 Ohio Cir. Dec. 560.

The journal of the council stated that one member (who was named) was absent, and contained an entry that an ordinance was *unanimously* adopted. It was held that the showing of the journal was a sufficient compliance with a statute requiring the yeas and nays to be taken and recorded. *Barr v. Auburn*, 89 Ill. 361. See also *Chicago Tel. Co. v. Northwestern Tel. Co.*, 199 Ill. 324, 340. The clerk merely noted that of the eleven members of the council present, nine voted in favor of the ordinance and two against it, giving the names of the two who voted against it. The minutes showed the names of the members present. It was held that the record showed with

reasonable certainty the names of those who voted yea and nay, and was sufficient. *Becker v. Henderson*, 100 Ky. 450. The minutes of the meeting of the council showed who were present; that the roll was called, and that the vote was unanimous in the affirmative. It was held that this was tantamount to saying that each member present voted yea, and that none voted nay, and was a sufficient compliance with the requirements of the statute. The court said that where all vote one way the record imparts no further information when the names are given in connection with the vote than where the result of the vote is stated as was done in this case. *Marion Water Co. v. Marion*, 121 Iowa, 306. But in *Cook v. Independence*, 133 Iowa, 582; 110 N. W. Rep. 1029, the record did not show the names of those present, and did not show that the roll was called, although it stated that all present voted yea. It was held that the requirements of the statute had not been complied with.

Although the yeas and nays on a vote appointing a person to office have not been taken and recorded as required by statute, the appointee, after he assumes and exercises the office, is an officer *de facto* whose title cannot be collaterally attacked. *Hallgren v. Campbell*, 82 Mich. 255.

³ *Ferguson v. Chittenden County*, 6 Ark. 479; *McCracken v. San Francisco*, 16 Cal. 591; *Pimental v. San Francisco*, 21 Cal. 351; *Price v. Grand Rapids & I. R. Co.*, 13 Ind. 58; *Logansport v. Legg*, 20 Ind. 315; *State v.*

the law of corporations; but whether, in favor of the holder of negotiable securities issued, or purporting to be issued, under authority conferred by the legislature, the corporation might not, in some cases, be estopped to show that a quorum was not present or that the requisite number did not concur in the act, is a question which remains, perhaps, to be settled.¹ It is clear that members of a council cannot properly act upon questions in which *their own pecuniary interest* is directly and specially involved.² But it has been held in Michigan that proceedings on the part of a municipal corporation ordering a paving improvement are not rendered invalid on the ground that two of the aldermen who formed part of the quorum of the common council which ordered the improvement, and without whose presence there would have been no quorum, were petitioners for the improvement and owners of property liable to assessment therefor. It might be otherwise, the court concede, if the common council acted as commissioners of apportionment in making the assessment upon the property that was to bear the burden, or on the confirmation of a report in which the interest of these aldermen was directly involved.³

Porter, 113 Ind. 79, citing text; Somerset v. Smith, 105 Ky. 678; Somerset v. Somerset Banking Co., 109 Ky. 549; State v. Wilkesville, 20 Ohio St. 288; Benwood v. Wheeling R. Co., 53 W. Va. 465. *Number present and acting, how proved.* Price v. Grand Rapids & I. R. Co., 13 Ind. 58. Presence of quorum, when presumed. Citizens' Mut. F. Ins. Co. v. Sortwell, 8 Allen (Mass.), 217. *As to presumptions of regularity, see ante, § 538.*

¹ See ante, § 237; post, chapters on Contracts and on Municipal Bonds; Index, *Estoppel*. Construction of charter provision requiring *unanimity*, post, § 579.

² Members of a municipal board are disqualified to vote therein on propositions in which they have a direct pecuniary interest adverse to the municipality they represent. Oconto County Sup. v. Hall, 47 Wis. 208; Pickett v. School Dist., 25 Wis. 551; Coles v. Williamsburgh Trs., 10 Wend.

(N. Y.) 658, 659; Walworth County Bank v. F. L. & T. Co., 16 Wis. 629; United Brethren Church v. Van Dusen, 37 Wis. 54. See also post, chapter on Contracts, § 772. There is an express provision to this effect in the English Municipal Corporations Act of 1882, § 22.

³ Steckert v. East Saginaw, 22 Mich. 104, where the reasons for the distinctions taken are clearly stated by Cooley, J. In the same State it was also held that the mayor of a city, who was a practising lawyer, might lawfully be employed, when there was no collusion or fraud, and no doubt as to the necessity and value of his services, by a resolution of the council to appear and defend a suit against the city, and that he could recover the value of his services. Niles v. Muzzy, 33 Mich. 61.

Right of corporation to contract with its officers or councilmen. See post, chapter on Contracts, §§ 772, 773.

CHAPTER XIV

CORPORATE RECORDS AND DOCUMENTS — CUSTODY — RIGHT
OF INSPECTION

	Section		Section
Power to appoint Clerk <i>pro tem.</i>	550	<i>Mandamus</i> to enforce Delivery of	
Amendment of Record	551, 552	Corporate Books and Records;	
Right of Clerk to amend Records		Replevin	559
<i>ex parte</i>	553	Inspection of Records and	
When Record Amended, and by		Papers	560
whom	554	Records as Evidence for the Cor-	
When Parol Evidence Admissible,		poration	561
and when not	555, 556	Evidential Force of Committee's	
Proof of Omitted Facts by		Report	562
Parol	557, 558		

§ 550 (293). **Power to appoint Clerk *pro tem.*** — Corporations have the *incidental power*, if the regular clerk is temporarily absent, to appoint a private person a clerk *pro tem.*, for the purpose of making the entries of what is transacted at the corporate meeting. His entries, made by the direction of the corporate authorities, or entries made by the regular clerk from memoranda furnished by the clerk *pro tem.*, are competent evidence of the proceedings of the meeting.¹

¹ Hutchinson v. Pratt, 11 Vt. 402. See also Rex v. Mothersell, 1 Stra. 93, also referred to *infra*. Where the statute provided that, in the absence of the clerk, a member of the council should be appointed to act as clerk *pro tem.*, it was held that where, in the absence of the village clerk, the minutes of a meeting of the council were authenticated by the president and a clerk purporting to have been appointed by the council and to have acted *pro tem.*, the clerk cannot raise the question as to whether the clerk *pro tem.* was present in the meeting, his duty being to enter the record subject to correction by the council itself. It is always within the province of the council to correct any errors that have occurred, and therefore the proper proceeding was for the clerk to enter the record furnished to him, leaving it to the council to determine as to its accuracy. People v. Ihnken, 129 Mich. 466.

Board of public works of a city is a quasi corporation, and the nature of its duties, laying out streets, establishing grades, sewers, &c., requires it to keep a record of its proceedings, although no such record is in terms provided for. Larned v. Briscoe, 62 Mich. 393. *Sufficiency of memoranda.* Louisville v. McKegney, 7 Bush (Ky.), 651. Failure of clerk to take *oath of office* does not invalidate his record. Stebbins v. Merritt, 10 Cush. (Mass.) 27; Attorney-General v. Remick, 73 N. H. 25, 31, citing text; *ante*, § 394. *Signature of chairman* to minutes affixed at a day subsequent to the meeting held sufficient, under a statute requiring the minutes of corporate meetings to be signed by the chairman. Miles v. Bough, 3 Gale & D. 119; Inglis v. Great Northern R. Co., 16 Eng. Law & Eq. 55. Where the statute directed the chairman of the board to sign the minutes of the proceedings, it was held

§ 551 (294). **Amendment of Record.** — The clerk or officer of a New England town,¹ *who has made an erroneous record*, may, while in office (but not afterwards), or after a re-election to the same office, *amend the same according to the truth*, being liable, like a sheriff who amends his return, for any abuse of the right; as, where he makes a fraudulent or untruthful amendment, the town *is not concluded or bound by an erroneous record*, whether made by design or accident, unless when it would on general principles be estopped.²

that the person who acted as chairman might sign them, although he had ceased to be chairman. *Locke v. Commonwealth*, 15 Ky. Law Rep. 840. See also *ante*, chapters relating to Corporate Meetings and Corporate Officers; *post*, § 603; *Logansport v. Crockett*, 64 Ind. 319, citing text.

¹ *Ante*, §§ 41, 42, as to New England towns. *New Haven, M. & W. R. Co. v. Chatham*, 42 Conn. 465. Speaking of the records of the town of Concord, Massachusetts, Ralph Waldo Emerson in his Concord Address says: "I have read with care the town records themselves. They exhibit a pleasing picture of a community almost exclusively agricultural, where no man has much time for words, in his search after things; of a community of great simplicity of manners, and of a manifest love of justice. I find our annals marked with a uniform good sense. The tone of the record rises with the dignity of the event. These soiled and musty books are luminous and electric within. The old town clerks did not spell very correctly, but they contrive to make intelligible the will of a free and just community." *Mandamus* will not issue directing the clerk of a village to attend the next meeting of the village council. *People v. Ihnken*, 129 Mich. 466, citing *Fitzgerald v. Whipple*, 41 Mich. 548.

² *Cass v. Bellows*, 31 N. H. 501; *Harris v. Canaan School District*, 28 N. H. 58, 66; *Gibson v. Bailey*, 9 N. H. 168; *Whittier v. Varney*, 10 N. H. 291; *Welles v. Battelle*, 11 Mass. 477; *Low v. Pettengill*, 12 N. H. 340; *Pierce v. Richardson*, 37 N. H. 306; *Scammon v. Scammon*, 28 N. H. 429; *St. Charles v. O'Malley*, 18 Ill. 407; *Mott v. Reynolds*, 27 Vt. 206; *Boston Turnpike Co. v. Pomfret*, 20 Conn. 590; *Ryder's Estate v. Alton*, 175 Ill. 94; *Halleck v. Boylston*, 117 Mass. 469; *Judd v. Thompson*, 125 Mass. 553; *Wheeler v. Carter*, 180 Mass. 382, 388; *Chippewa*

Bridge Co. v. Durand, 122 Wis. 85; compare *Covington v. Ludlow*, 1 Met. (Ky.) 295, below cited.

The necessity and reasonableness of the doctrine stated in the text are thus expounded by *Parker, C. J.*, in *Welles v. Battelle*, 11 Mass. 477, 481: "We have had frequent occasion to perceive the great irregularity which prevails in the records of our towns and other municipal corporations; and the courts have always been desirous to uphold these proceedings, where no fraud or wilful error was discoverable. Too much strictness on subjects of this nature would throw the whole body politic into confusion (*Kellar v. Savage*, 17 Me. 444). For it cannot be expected that, in all corporations, persons will be every year selected who are capable of performing their duty with the exactness which would be useful or convenient. . . . The first entry made by the clerk here [that an officer was sworn into office] was certainly defective, but the defect is properly cured by the subsequent entry of the existing clerk, he being the same person that officiated at the time of the first entry. He will be sufficiently watched by interested parties, to render a deviation from truth neither safe nor easy." The doctrine of the case in 11 Mass. 477 was followed and applied in *Chamberlain v. Dover*, 13 Me. 466, where it was further held that the municipal body was not bound by an erroneous record of a clerk, even though the plaintiffs, confiding in its correctness, had made a building contract with the "contracting and building committee" named in the record. The meeting in this case, which attempted to confer this power upon the committee, was not a legal one, because not held at the time and place appointed; and it was considered by the court that the plaintiff's remedy was against the committee, and not against the town, if the former acted without authority. See further as to correcting

§ 552 (295). **Same Subject.** — In a case in Vermont, the clerk of the town, *pending the trial, amended the record* by adding his signature as clerk to the record of the warning for the meeting in question. His right to do so, though he had meantime been out of office, but was again restored, was sanctioned by the Supreme Court, Redfield, C. J., remarking: "We think, in general, it must be regarded as the right of the clerk of a town or other municipal corporation, while having the custody of the records, to make any record according to the facts. His having been out of office, and restored again, could not deprive him of that right. But even an officer could not alter or amend a record upon the testimony of third persons ordinarily, and ought not to do it upon his own recollection, unless in very obvious cases of omission or error, of which the present might fairly be regarded as one, probably. Such amendments should ordinarily be made by the original documents or minutes."¹

§ 553 (296). **Right of Clerk to amend Records ex parte.** — The right of the clerk *ex parte* to amend the records of the proceedings of

and amending records, *Williams v. Lunenburg School District*, 21 Pick. (Mass.) 75, holding that where two different but not contradictory records were made up by the clerk from memoranda taken at the meeting, both were originals and competent testimony.

Clerk cannot amend records after he is out of office. *Stoughton School District v. Atherton*, 12 Met. (Mass.) 105; *Hartwell v. Littleton*, 13 Pick. (Mass.) 229, 232. *Contra*, to the effect that he may amend, though out of office at the time, see *Gibson v. Bailey*, 9 N. H. 168; *Gibson v. Bailey*, followed in *Missouri* in *Kiley v. Cranor*, 51 Mo. 541, 543. But may, while he is *in office*. *Bishop v. Cone*, 3 N. H. 513; *Hoag v. Durfey*, 1 Aiken (Vt.), 286; *Chamberlain v. Dover*, 13 Me. 466. That successor cannot make the amendment. *State v. Williams*, 25 Me. 555, 561; 29 Me. 523; *Taylor v. Henry*, 2 Pick. (Mass.) 397. But the corporation might, in proper cases, authorize the successor to supply the omitted, or correct the erroneous, entry. *Hutchinson v. Pratt*, 11 Vt. 402, 419. Bonds of a city which by statute are directed to be signed by the mayor, but which were in fact signed by the ex-mayor, were held to be void even in the hands of a *bona fide* holder for value. *Coler v. Cleburne*, 131 U. S. 162.

In *New Hampshire*, it is the practice to allow these amendments only upon the order of the Supreme Court or Court of Common Pleas by the officer by whom they were made, even after he has ceased to hold the office. A clear case must be made out. The courts do not permit any erasures or interlineations of the original record, but require the amendment to be written upon a separate piece of paper, signed by the proper officers, and with it a copy of the order allowing the amendment; and this paper is annexed to the original record. *Pierce v. Richardson*, 37 N. H. 306, 311, *per Bell, J.* But where the record of a previous meeting was read and corrected and disposed of at a subsequent meeting of the council, it was held that the clerk had no further right or duty of correction, and that *mandamus* would not lie to compel him to correct the record. *McClain v. McKisson*, 15 Ohio Cir. Ct. 517.

¹ *Mott v. Reynolds*, 27 Vt. 206, 208. Amendments in open court of town record by clerk of the town, pending trial to which the clerk is a party, and to meet a particular decision of the court, disregarded. *Hadley v. Chamberlain*, 11 Vt. 618, commented on and distinguished. *Mott v. Reynolds*, 27 Vt. 206.

town corporations was very thoroughly considered in a case in Connecticut.¹ The statute of that State requires town clerks to keep the record books of their respective towns, and to enter truly all the votes and proceedings of the town. The town clerk made an entry showing that at a town meeting held in 1843, the town assumed to the plaintiff a liability to commence January 1, 1844. If the time thus stated was the true time, the plaintiff had a cause of action against the town. In 1849 the clerk, not upon his own personal knowledge, or upon any written memorandum, but on the information of others (with the correctness of which, however, he was perfectly satisfied), amended the record so as to show that the liability of the town was not, by the vote, to commence until April 1, 1844. If this was the true time, the plaintiff had no cause of action. The majority of the court (three judges against two) held that the clerk, still continuing in office, was competent to amend the record; that *this power is derived solely from his official character* and does not depend on the permission of the court in which the record is offered as an instrument of evidence, nor on inquiry into the truth of it as originally made, or as amended, and that such a record is, in such an action, conclusive evidence of its own truth. The dissenting judges, without denying the power of amendment in all cases, were of opinion that, in view of the lapse of time and the absence of written memoranda or personal recollection by the clerk, the clerk had no authority to make the amendment, and that the correct course would have been to make application to the proper court by legal process, *e. g.*, *mandamus*, to correct the mistake in the record, if one existed, and thus give the opposite interested party an opportunity to show that the record was already right. It would seem,

¹ *Boston Turnpike Co. v. Pomfret*, 20 Conn. 590. The subject of amendments of the records of the proceedings of a common council in *Connecticut*, when it can be made by the clerk and when by order of court upon *mandamus*, is considered in *Samis v. King*, 40 Conn. 298. Parties to *mandamus* to compel the clerk of a city to amend record. *Farrell v. King*, 41 Conn. 448; *Logansport v. Crockett*, 64 Ind. 319. In *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, citing text, it was held that *the clerk had authority to amend his record on his own motion* before approval of the defective record by the council, and probably thereafter, and in any event it was competent for him by direction of the council to correct the record in conformity to the facts at any time, and that *mandamus* would lie to compel him to do so.

An amendment made by the clerk must conform to the truth. Where a council designated for the publication of a resolution of award of a contract a paper other than the official newspaper and the deputy clerk after publication in the official newspaper erased the designation and interlined the name of the official newspaper, the change not being in accordance with the truth, a succeeding council cannot ratify the alteration, so as to injuriously affect intervening rights or validate an assessment of the previous council which was void for want of jurisdiction to make it. *California Improvement Co. v. Moran*, 128 Cal. 373, citing text.

under the special circumstances, that the dissenting view was the better one.

§ 554 (297). **When Record Amended, and by whom.** — Where the clerk makes up the record of the proceedings of the council, and it is read and approved at the same or at a subsequent meeting, the author doubts the authority of the clerk, on his own motion, to amend it afterwards without the direction of the council.¹ The council, unless private rights have attached, may, doubtless, order the record of its own proceedings, even after it has once been approved, to be corrected according to the facts.² But if third parties have acted in reliance upon the record, and private rights have accrued thereunder, the record cannot be amended.³ The Court of Appeals of Kentucky, without determining the extent of the power of the same council at a subsequent meeting to correct errors and omissions in the journal entry of proceedings at a previous meeting, decided that this could not be done by an entirely new board in respect to the official action of their predecessors; and it was accordingly held that where the records, as kept, showed only that in August, 1854, an ordinance was reported, a new council could not, in 1856, add to the records words showing that the ordinance had passed, nor could the fact of its passage be shown by extrinsic evidence.⁴

¹ After the council has passed upon its minutes and approved of them, the clerk has no power to correct them of his own motion. *McClain v. McKisson*, 15 Ohio Cir. Ct. 517. But the Supreme Court of Wisconsin has said that even after approval by the council the clerk probably has authority of his own motion to correct the record to conform to the fact. *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, cited *supra*.

² *White v. Clarksville*, 75 Ark. 340, citing text; *Ohio & M. R. Co. v. People*, 119 Ill. 207; *Glencoe Board of Education v. School Trustees*, 174 Ill. 510; *Ryder's Estate v. Alton*, 175 Ill. 94, 97; *Tod v. Crisman*, 123 Iowa, 693, 707; *Andover v. Essex County Com'rs*, 5 Gray (Mass.), 393; *Gloucester v. Essex County Com'rs*, 116 Mass. 579; *Foster v. Boston Park Com'rs*, 131 Mass. 225; *Leominster v. Conant*, 139 Mass. 384; *Stratton v. Lowell*, 181 Mass. 511; *State v. Central Pac. R. Co.*, 17 Nev. 259.

³ *California Imp. Co. v. Moran*, 128 Cal. 373, 379; *Sawyer v. Manchester & K. R. Co.*, 62 N. H. 135, 153. If the record is in fact amended after parties have

acted on the faith of it, the town is estopped to take advantage of the amendment if it is to the prejudice of the parties. *New Haven, M. & W. R. Co. v. Chatham*, 42 Conn. 465.

⁴ *Covington v. Ludlow*, 1 Met. (Ky.) 295. See also *Lexington v. Headley*, 5 Bush (Ky.), 508; *Locke v. Commonwealth*, 15 Ky. Law Rep. 840; *Graham v. Carondelet*, 33 Mo. 262; *State v. Jersey City*, 30 N. J. L. 93, 148, and *ante*, chapters on Corporate Meetings and Ordinances; *post*, § 579; *ante*, § 539. A public corporation may, like every court of record, amend its records *nunc pro tunc*. *Lowndes County Com'rs v. Hearne*, 59 Ala. 371; *Musselman v. Manly*, 42 Ind. 462; *Vawter v. Franklin College*, 53 Ind. 88; *Logansport v. Crockett*, 64 Ind. 319; *Mayhew v. Gay Head*, 13 Allen (Mass.), 129; *Steckert v. East Saginaw*, 22 Mich. 104; *Pontiac v. Axford*, 49 Mich. 69; *Delphi v. Evans*, 36 Ind. 90; *Chamberlain v. Evansville* (*nunc pro tunc* entry supplying clerical omission), 77 Ind. 542, citing text; *Terre Haute & L. R. Co. v. Flora*, 29 Ind. App. 442; *Rensselaer v. Leopold*, 106 Ind. 29; *Holland v. Spell*, 144 Ind.

§ 555 (298). **When Parol Evidence Admissible, and when not.** — *Parol evidence* may, if necessary, be admitted to *apply a resolution or recorded vote of a town to its proper subject-matter*,¹ but not, in general, to *explain, enlarge, or contradict its terms or meaning*, in respect to matters (as, for example, laying out a highway or street) regularly within the jurisdiction of the town or its officers, and where the entry of record is made in pursuance of statute requirement.² Where the record of a meeting states that "the inhabitants met and ad-

561; *Everett v. Deal*, 148 Ind. 90; *Mann v. Le Mars*, 109 Iowa, 251, citing text.

¹ *Baker v. Windham*, 13 Me. 74. In this case the town of Windham entered upon its records the following: "Voted to indemnify *Benj. Baker* in his costs in the action against *A. Small*, which have or may arise in the same on account of *Gray line*." In an action by *Baker* against the town to recover costs of a suit which he had brought against *Small*, parol evidence was adjudged to have been rightly admitted to show that *Baker* brought the action in his name against *Small*, on account of the *Gray line*, at the request of the selectmen of *Windham*, for the purpose of settling a disputed line between that and the adjoining town, with the express agreement that the town should pay all costs, and to show that these facts were before the town when the vote was passed, and also to show that the suit so instituted was conducted under the advice and direction of the authorities of the town.

² *Manning v. Gloucester Fifth Parish*, 6 Pick. (Mass.) 6; *Wild v. Deig*, 43 Ind. 455; *Crommett v. Pearson*, 18 Me. 344. See *Leavitt v. Eastman*, 77 Me. 117; *Covington v. Ludlow*, 1 Met. (Ky.) 295; *Cabot v. Britt*, 36 Vt. 349; *Lexington v. Headley*, 5 Bush (Ky.), 508; *Galbraith v. Littlech*, 73 Ill. 209; *Pittsburgh v. Cluley*, 74 Pa. St. 262; *post*, § 579; *ante*, § 540; *Paxton v. Bogardus*, 201 Ill. 628, 635, citing text; *Terre Haute & L. R. Co. v. Flora*, 29 Ind. App. 442; *Kidson v. Bangor*, 99 Me. 139; *Andrews v. Boylston*, 110 Mass. 214; *Halleck v. Boylston*, 117 Mass. 469; *Montana Ore Purchasing Co. v. Maher*, 32 Mont. 480, 489; *Bloomfield v. Middlesex County*, 74 N. J. L. 261; 65 Atl. Rep. 890; *Fogg v. Ocean City Sewer Co.*, 72 N. J. Eq. 736; 66 Atl. Rep. 609; *People v. Zeyst*, 23 N. Y. 140; *People*

v. York, 78 N. Y. App. Div. 432, *aff'd* 174 N. Y. 533; *Kerr v. Corsicana* (Tex. Civ. App.), 35 S. W. Rep. 694; *Chippewa Bridge Co. v. Durand*, 122 Wis. 85.

Parol evidence is not admissible where no sufficient reason is shown for not producing the record of proceedings, which is the primary evidence. *Aurora v. Fox*, 78 Ind. 1. *Parol evidence cannot be received* to show that the next annual town meeting was in fact appointed, by a majority of the voters, to be held at a different place from that stated in the minutes of the meeting. *People v. Zeyst*, 23 N. Y. 140. A school district having voted to appropriate money to light its school-house, parol evidence is not admissible to prove that the true purpose of the vote was to confer a private advantage on a corporation occupying part of the building. *Brooks v. Franconia School Dist.*, 73 N. H. 263. When an officer of a municipal corporation, having charge of the records, produces the same as the record, it can only be attacked for fraud. *Ryder's Estate v. Alton*, 175 Ill. 94.

In *Phillips v. Welts*, 40 Wash. 501, it was held that the *minutes of a board of county commissioners do not constitute the exclusive evidence* of their official acts, and that parol evidence was admissible to show that a sale of county property at public auction was made subject to the approval of the board, though the minutes did not contain the condition. But it may be doubted whether this ruling was necessary under the facts of the case; inasmuch as the condition was for the benefit of the county, a purchaser having made the purchase subject to it was surely estopped from attacking its validity, and the report further shows that the record of the board was amended so as to insert the condition.

journed the meeting," *parol evidence may be admitted to show* when and where the meeting was held, how many were present, and how many afterwards came, and, finding no meeting, went home.¹

§ 556 (299). **Same Subject.**— *Parol evidence in a collateral action* cannot be received *to contradict the records* of a public corporation, required by statute to be kept in writing, or to show a *mistake* in the matters as therein recorded.² Thus, if the records of a school district show that the district voted to authorize their clerk to call and warn "their *annual* meetings," parol evidence in an action by the district is not admissible to prove that the real vote of the district was to authorize the clerk to call and warn *all* district meetings.³ So, where the record of a town stated the warning to have been on the 17th, and the meeting to have been held on the 19th of January, parol evidence cannot be admitted to show that, by mistake, the clerk inserted the "19th" instead of the "29th." The remedy is, to have him correct the record, if in office, according to the truth.⁴

¹ Chamberlain v. Dover, 13 Me. 466. But parol evidence of an adjournment to another day cannot be given so as to validate acts done on the day adjourned to. Taylor v. Henry, 2 Pick. (Mass.) 397; Andrews v. Boylston, 110 Mass. 214; Chippewa Bridge Co. v. Durand, 122 Wis. 85. Where a statute requiring a record to be made of the persons sworn into office is directory, if the record is not made, the fact may be shown by parol or other competent evidence. Kellar v. Savage, 17 Me. 444. In Meth. Chapel Corp. v. Herrick, 25 Me. 354, it was held that to establish a resulting trust in the corporation [with respect to lands], it could not prove by parol evidence the authority of the committees to act for it; the authority should appear, and could only be shown by its records.

Further, as to what facts may be shown by parol, West Bath v. Co. Com'rs, 36 Me. 74; 35 Me. 373; Smith v. Cumberland County Com'rs, 42 Me. 395; Leavitt v. Eastman, 77 Me. 117; Long v. Battle Creek, 39 Mich. 323; Kohlhepp v. West Roxbury, 120 Mass. 596; Oliphant v. Atchison County Com'rs, 18 Kan. 386; Austin v. Allen, 6 Wis. 134; Anderson v. Hamilton County Com'rs, 12 Ohio St. 635; Gurnsey v. Edwards, 26 N. H. 224; Lewis, Em. Dom. § 605, and cases; ante, § 509 and note; post, § 579; Index, Evidence.

² Mathis v. Runnels County, 30 U. S. App. 20; Gaither v. Green, 40 La. An. 362; State v. Simmons, 40 La. An. 758; Bartlett v. Eau Claire County, 112 Wis. 237, 242.

³ Stoughton School District v. Atherton, 12 Met. (Mass.) 105; Morrison v. Lawrence, 98 Mass. 219; Mayhew v. Gay Head, 13 Allen (Mass.), 129. The cases are not uniform on the subject of the collateral impeachment of the record of public boards and bodies. See Lewis, Em. Dom. chap. xxvi. and cases.

⁴ Durfey v. Hoag, 1 Aiken (Vt.), 286. That the remedy is by *mandamus* to compel correction, see Gaither v. Green, 40 La. An. 362, 365, quoting text. Where the record recited that the rules were suspended, without showing by what vote, it was conclusively presumed in a collateral proceeding to be correct, and oral evidence to prove otherwise was rejected. Eldora v. Burlingame, 62 Iowa, 32. So in Connecticut, if a town corporation makes an erroneous record of its proceedings, this cannot be contradicted in a collateral action. In such an action the record is conclusive. If false, and the corporation will not correct the record, a party interested may, by *mandamus*, compel it to make the correction. Boston Turnpike Co. v. Pomfret, 20 Conn. 590. Upon this point, all the judges,

§ 557 (300). **Proof of Omitted Facts by Parol.** — But a *distinction* has sometimes been drawn between evidence *to contradict facts* stated on the record and evidence *to show facts omitted* to be stated upon the record. Parol evidence of the latter kind is receivable unless the law expressly and imperatively requires all matters to appear of record, and makes the record the only evidence.¹ Thus,

though differing on other points, seemed to agree. So, on an appeal from an assessment for a city street, held that *parol evidence was not admissible* to prove that the common council agreed to an arrangement proposed by the appellant and recommended by the committee on streets, that in consideration of his opening and grading certain streets without expense to the city, he should not be called on to pay any assessment when the street in question should at some future time be laid out. It seems that such an agreement, however proved, would be of no validity. *Gilbert v. New Haven*, 40 Conn. 102; see *Nichols v. Bridgeport*, 23 Conn. 189; *post*, chap. xxviii; *supra*, § 552.

Purchasers of such paper [bonds issued by cities for stock in railroads] look at the form of the paper, the law which authorized it to be issued, and the *recorded* proceedings on which it is based. Therefore, as against purchasers, the record cannot be contradicted by parol evidence. *Per Clifford, J.*, in *Bissell v. Jeffersonville* (action on municipal bonds), 24 How. (U. S.) 287, 298. See chapter on Municipal Bonds, *post*, as to the rights of holders of such securities.

¹ *Denver v. Spencer*, 34 Colo. 270, citing text; *Locke v. Commonwealth*, 15 Ky. Law Rep. 840, 843, citing text; *Langedale v. Bonton*, 12 Ind. 467; *Indianapolis v. Imberry*, 17 Ind. 175, 179; *Delphi v. Evans* (referring to previous cases), 36 Ind. 90; *Moor v. Newfield*, 4 Me. 44; *Stoughton School District v. Atherton*, 12 Met. (Mass.) 105, 113; *Bigelow v. Perth Amboy*, 25 N. J. L. 297; *Gearhart v. Dixon*, 1 Pa. St. 224; *Duluth, S. S. & A. R. Co. v. Douglas County*, 103 Wis. 75, 78, citing text; *Nehrling v. Herold Co.*, 112 Wis. 558, 566, citing text; *Chippewa Bridge Co. v. Durand*, 122 Wis. 85; *Bridgford v. Tuscumbia*, 4 Woods, 611; s. c. 16 Fed. Rep. 910.

"The only legal mode of proving facts on record is by the record itself, or by an attested copy of it." *Moor v. New-*

field, 4 Me. 44, *per Mellen, C. J.* Where the law or charter *requires* the clerk to keep a *journal* of all of the acts and proceedings of the city council, that, or a copy, is the proper evidence of the official doings of the body. *Lowell v. Wheelock*, 11 Cush. (Mass.) 391; *Harris v. Whitcomb*, 4 Gray (Mass.), 433; *Morrison v. Lawrence*, 98 Mass. 219; *Louisville v. McKegney*, 7 Bush (Ky.), 651; *post*, § 579.

The Supreme Court of *Kansas*, advertent to the distinction in the text, sustained under the circumstances stated below the introduction of *parol testimony as a means of establishing in part the passage of an ordinance*. *Troy v. Atchison & N. R. Co.*, 13 Kan. 70; s. c. 11 Kan. 519. The exact point decided appears from the syllabus settled by the judges, which is as follows: Where a city fails to provide any book for the record of its ordinances, but its ordinances, after their passage and approval, are placed and kept on file in the office of the city clerk, and a third party obtains a duly certified copy of an ordinance so placed and kept on file, and acts in good faith upon such ordinance, and is induced partly thereby to make large expenditure of money, in a subsequent controversy between the city and such third parties or their assigns the rule of equitable estoppel will apply to the city, and the due passage and existence of said ordinance may be shown by parol testimony. *Troy v. Atchison, &c. Railroad Co.*, 13 Kan. 70; *post*, §§ 579, 648.

In a case where the authority for grading a street was in question, *parol testimony was held properly admitted to show that a clause in an ordinance granting the authority had been struck out before its passage, and had been reinstated by a clerk*, by whose direction it was printed, and a printed copy thus altered placed by him in the record book. *Dyer v. Brogan*, 70 Cal. 136. *Proof of establishment and change of grade of streets*, see *post*, chap. xxxii.

in a well-considered case in the Supreme Court of the United States,¹ it was held that the acts of a corporation might be proved otherwise than by its records or some written document, even although it was its duty "to keep a fair and regular record of its proceedings." The statute did not prescribe that nothing but a recorded vote or written document should bind the corporation or be received as evidence. Such written evidence was not deemed indispensable unless positively required. The direction to keep a record was regarded as directory.²

¹ *Bank of United States v. Dandridge*, 12 Wheat. (U. S.) 64. Delivering the opinion of the court, Mr. Justice Story, *arguendo*, makes these important observations: "Would the omission of the corporation to record its own doings have prejudiced the rights of the party relying upon the good faith of an actual vote of the corporation? If such omission would not be fatal to the plaintiff in suits against the corporation (as, in our opinion, it would not be), it establishes the fact that acts of the corporation, not recorded, may be established by parol proofs, and, of course, by presumptive proofs. In reason and justice, there does not seem any solid ground why a corporation may not, in case of the omission of its officers to preserve a written record, give such proofs to support its rights as would be admissible in suits against it to support adverse rights. The true question in such case would seem to be, not which party was plaintiff or defendant, but whether the evidence was the best the nature of the case admitted of, and left nothing behind in the possession or control of the party higher than secondary evidence. . . . We do not admit, as a general proposition, that the acts of a corporation are invalid merely from an omission to have them reduced to writing, unless the statute creating it makes such writing indispensable as evidence, or gives to them an obligatory force. If the statute imposes such restriction, it must be obeyed." (12 Wheat. 69, 74.) This was the case of a private corporation.

The same principle was applied, in the case of the *United States v. Filibrown*, 7 Pet. (U. S.) 28, to the acts of boards of public agents or officers, and it was in that case accordingly held that the board of commissioners of the navy hospital fund, not being required by law to reduce its proceedings to

writing in order to make them binding, oral evidence of such proceedings (no record having been made) was competent. See *Langsdale v. Bonton*, 12 Ind. 467.

In a case in *Vermont* in respect of a town which is required to keep a record, it is said that it "appears to us that in the absence of all record, it might be competent for the defendants (trustees and collector of the corporation justifying under its proceedings) to show, by parol, the proceedings of the meeting. Where there is a record, it cannot be added to or varied by parol. *Taylor v. Henry*, 2 Pick. (Mass.) 397, 403. But where there is an omission to make records, the rights of other persons, acting under or upon the faith of a vote not recorded, ought not to be prejudiced. And it would seem that the right in such a case is reciprocal in the corporation and in those who claim adversely to it." *Per Williams, C. J., Hutchinson v. Pratt*, 11 Vt. 402, 421. But compare *Stevens v. Eden, &c. Society*, 12 Vt. 688; 16 Vt. 439; 17 Vt. 337.

The rights of creditors or of third persons cannot be prejudiced by the neglect of the council to keep proper minutes; against the corporation, what the council in fact did may be shown by evidence *aliunde* the record kept by it. *Bigelow v. Perth Amboy*, 25 N. J. L. 297; *San Antonio v. Lewis*, 9 Tex. 69.

Proof of the action and orders of a municipal board of health, see chapter on Ordinances, *post*, § 681, note.

² Text cited and approved, *Bohan v. Avoca Borough*, 154 Pa. St. 404, 410. But in *Kidson v. Bangor*, 99 Me. 139, where the plaintiff sued to recover damages of a city for failing to maintain and repair a public sewer, the court held that the plaintiff must establish that the sewer in question was a public sewer, *i. e.*, one legally estab-

§ 558 (301). **Same Subject.** — Where the records of a municipal corporation have been so carelessly and imperfectly kept as not to show the adoption of a resolution or other acts of the city council, and there is no written evidence in existence, *parol testimony* may be admitted, *e. g.*, to show that certain work was done by authority of the city, by proving the passage of a resolution of the council, the appointment of a committee to make the expenditure, their report after the work was done, and its adoption by the council.¹

§ 559 (302). **Mandamus to enforce Delivery of Corporate Books and Records; Replevin.** — *Mandamus* is an appropriate remedy for the duly elected and authorized officer of a public or municipal corporation to compel the *delivery to him* by his predecessor, or by an usurper, of the books, papers, records, and seal pertaining to the office.²

lished by act of the municipal officers, and that such fact could duly be proved by proof of a record laying out the sewer and could not be established by parol proof, and as there was no record on the books of the city, the plaintiff could not recover. *Peabody, J.*, said: "Judicial acts of such boards as municipal officers or county commissioners, which might result in taking for public use the property of individuals, as in laying out highways, streets, and sewers, must be done with due formality and entered of record; the record by presumption of law shows the full proceedings; and parol evidence cannot supply, extend, or modify the record, and is inadmissible to prove the action of these boards." (Citing cases.)

¹ *Ross v. Madison*, 1 Ind. 281; *Langsdale v. Bonton*, 12 Ind. 467; *Indianapolis v. Imberry*, 17 Ind. 175, 179; *Delphi v. Evans* (reviewing previous cases), 36 Ind. 90; *Weatherhead v. Cody* (Ky.), 85 S. W. 1099, quoting text; *Taymouth v. Koehler*, 35 Mich. 22; *Wheat v. Van Tine*, 149 Mich. 314. In *Indiana*, however, county commissioners and township trustees are required by law to keep a true record of their proceedings, and it was held, under the circumstances appearing in the cases below cited, that they "can only speak by their record" when legally assembled. *Fayette County Com'rs v. Chitwood*, 8 Ind. 504, 507; *Harmony Tp. v. Osborne*, 9 Ind. 458. So, in *Maine*, "school districts are required by law to keep an account of their proceedings by a sworn clerk,

and such proceedings can be proved only by the record or a copy thereof duly authenticated." *Jordan v. Lisbon School District*, 38 Me. 164.

The records of public or quasi corporations are not, in *Ohio*, considered to be "of that absolute verity that any person shall be estopped to show the truth, in consequence of any matter which they contain," or omit to contain; and it was accordingly adjudged that the fact whether an official bond was received or refused and rejected may be shown by *parol* evidence, on which point the record was silent. *Westerhaven v. Clive*, 5 Ohio, 136, as to records of township trustees. See *Greene v. State*, 8 Ohio, 310, in which it was queried whether the county commissioners could appoint an agent by *parol* or only by record. In *Iowa*, it has been held that where no record entry is made, such an appointment may be shown by *parol* testimony, and that the agent acted accordingly. *Poweshiek County v. Ross*, 9 Iowa, 511; *Athearn v. Millersburg Indep. District*, 33 Iowa, 105; and see acc. *Ross v. Madison*, 1 Ind. 281; compare *Meeker v. Van Rensselaer*, 15 Wend. (N. Y.) 397. Where recording is not required by charter or law, resolutions of a council are admissible in evidence, although not recorded. *Darlington v. Commonwealth*, 41 Pa. St. 68. See *post*, § 579; *Louisville v. McKegney*, 7 Bush (Ky.), 651, construing charter as to requisites of the journal required to be kept by each board of the council.

² *St. Luke's Church Prop. v. Slack*, 7 Cush. (Mass.) 226, 239; *Common-*

And such a corporation, it has been held (though the cases are conflicting), *may maintain replevin* in its name for the possession of its record; and this action is maintainable against a stranger or any officer or person not legally entitled to the custody of the records.¹

§ 560 (303). **Inspection of Records and Papers.** — Concerning the right to *inspect corporate documents and papers*, the following points have been ruled as stated by Mr. Willcock: Every *corporator has a right to inspect* all the records, books, and other documents of the corporation, upon all proper occasions; and if, upon application for that purpose, the officer who has the custody refuse to show them, the court will grant a *mandamus* to enforce his right.² One

wealth v. Athearn, 3 Mass. 285; Rex v. Wildman, 2 Strange, 879; King v. Ingram, 1 W. Bl. 50; King v. Round, 4 Ad. & El. 139; Crawford v. Powell, 2 Burr. 1013; Rex v. Clapham, 1 Wils. 305; 3 Bl. Com. 310; Kimball v. Lamprey, 19 N. H. 215, where the above authorities are cited and digested by Gilchrist, C. J.; Taylor v. Henry, 2 Pick. (Mass.) 397; Sudbury First Parish v. Stearns, 21 Pick. (Mass.) 148, 156; Bates v. Plymouth, 14 Gray (Mass.), 163; Perkins v. Weston, 3 Cush. (Mass.) 549.

The following points have been ruled in respect to corporations in England: If the custody of their documents belong to one of their officers in virtue of his office, the corporation cannot compel him to deliver them up, but may require that he submit them to their inspection whenever they think proper. Reg. v. Ipswich Bailiffs, 2 Ld. Raym. 1232, 1238; Rex v. Pigram, 2 Burr. 767; Willc. 345; Glover, 260. Sometimes the custody of these documents is entrusted to the town clerk or other officer, merely as the servant of the corporation, in which case they may appoint another to receive them; and if they are not delivered over after demand, the corporation may obtain possession of them by an action of *detinue*, or the court will compel a delivery by *mandamus*. *Ib.* If the predecessor in office, or, he being dead, his personal representative, or another person having possession of corporate documents under him, refuse to deliver them over to the successor or the corporation, on a proper application, the court will grant a *mandamus* to compel him to do so. Rex v. Nottingham, 1 Sid. 31; Anonymous, 1 Bar-

nard. 402; Willc. 345; Glover, 260. This writ is said, indeed, to lie to any person, whether stranger or corporator, who happens to be in possession of the books of a corporation, and who refuses to deliver them up. St. Luke's Church Prop. v. Slack, 7 Cush. (Mass.) 226, *per Fletcher, J.*; Rex v. Ingram, 1 W. Bl. 50; Willc. 246; Glover, 231; *post*, chapter on *Mandamus*; Index, *Evidence*.

¹ Sudbury First Parish v. Stearns, 21 Pick. (Mass.) 148; Sanford School District v. Lord, 44 Me. 374 (replevin for records of district). The court, holding that *replevin* would lie, say: "The action is, therefore, rightfully brought, and may be maintained if the defendant was not the legal clerk of the district." *Per Rice, J.*, 44 Me. 374, 384. The *right or title of an office* cannot be determined by a civil action between the respective claimants, as by an action of *replevin* for the official books and papers, and until the issue as to the right is determined, by *quo warranto* or other proper proceeding, no suit in *replevin* can be maintained by one claimant against the other for the possession of the appurtenances of the office. Desmond v. McCarty, 17 Iowa, 525. In *La Grange v. State Treasurer*, 24 Mich. 466, the court decided that *replevin* does not lie for papers filed in a public office. *Post*, § 1505.

² Rex v. Shelley, 3 Term R. 142; Rex v. Babb, 3 Term R. 579, 580; Harrison v. Williams, 3 Barn. & Cress. 162; Rogers v. Jones, 5 D. & R. 484; Willc. 347; Glover, 262. *Any person sufficiently interested* is entitled to inspect entries in books of public corporations relating to public matters of the cor-

who has a *prima facie* title to a corporate office has a right to inspect such documents as relate to that title, and may obtain a *mandamus* for this purpose before any suit has been instituted.¹ A corporator has a *right* to inspect these documents, to obtain information as to his rights, whether in dispute with a stranger or the corporation itself, or any of its members.² When the corporator's application to inspect is founded on his general right, he has a *mandamus*, but when it is founded on a suit pending, he obtains a rule.³ In an action by one corporation against another, rules were made absolute for each corporation to inspect so much of the books and records as related to the subject in dispute.⁴ The *motion for the rule to inspect* and to have copies should be supported by affidavits showing the foundation of the claim, the application, the proper officer, and his refusal. The rule will require the expense attending obedience to be borne by the applicant, and will, in proper cases, allow the officer a remuneration for his trouble. If the officer disobey, without sufficient reason, the rule to allow an inspection or to give copy of, or to produce corporate documents, the court will grant an attachment against him.⁵

§ 561 (304). **Records as Evidence for the Corporation.** — A public or municipal corporation, required by law to keep a record of its

poration, where the evidence is required in a civil action. *Grant*, Corp. 311. In *People v. Cornell*, 47 Barb. (N. Y.) 329, it is held that a corporator without any special or private interest has the right to inspect and take copies of all public documents and records, under reasonable restrictions to secure the safety of the originals.

¹ *Rex v. Newcastle*, 2 Stra. 1223; *Rex v. Lucas*, 10 East, 235; *Rex v. Purnell*, 1 Wils. 242; *Rex v. Bridgman*, 2 Stra. 1203; *People v. Mott*, 1 How. Pr. (N. Y.) 247; *Cockburn v. Bank*, 13 La. An. 289; *People v. Walker*, 9 Mich. 328; *People v. Cornell*, 47 Barb. (N. Y.) 329; *post*, chapter on *Mandamus*.

² *Edwards v. Vesey*, Cas. Temp. Hardw. 128; *Rex v. Babb*, 3 Term R. 579, 580; *Rex v. Bridgman*, 2 Stra. 1203; *Grant* on Corp. 312.

In England the right to inspect the auditor's report extended to "any inhabitant or ratepayer." The difference between an inhabitant and a ratepayer is that "inhabitant" means a resident, whether a ratepayer or not, and that a "ratepayer" is a person who pays taxes, whether a resident or

not. *King v. North Curry*, 4 Barn. & Cress. 959, 961. Mere colorable residence is insufficient to constitute a person an inhabitant. *King v. Sargent*, 5 Term R. 466; *King v. Richmond*, 6 Term R. 560; *Bruce v. Bruce*, 2 B. & P. 229, note; *King v. Mitchell*, 10 East, 511; *Whithorn v. Thomas*, 7 M. & G. 1. The English Municipal Corporations Act, 1882, § 233, provides that any burgess may inspect the proceedings of the council on payment of a fee of one shilling, and may make copy thereof; may also inspect the treasurer's accounts and Freeman's Roll. In this country statutory provisions frequently exist respecting the right to inspect corporate records and to demand copies thereof.

³ *Rex v. Shelley*, 3 Term R. 142.

⁴ *London v. Lynn Regis*, 1 H. Bl. 206; *Southampton v. Graves*, 8 Term R. 592.

⁵ *Willc.* 352, 353; *Grant*, 311 *et seq.* See also *People v. Mott*, 1 How. Pr. (N. Y.) 247; *Cockburn v. Bank*, 13 La. An. 289; *People v. Walker*, 9 Mich. 328.

public, or official proceedings, *may itself use such records as evidence* in suits to which it is a party; but the records must first be properly authenticated.¹ Indeed, in actions generally, including actions against agents or officers of the corporation, as individuals, the *original minutes or records* of the corporation are competent evidence of the acts and proceedings of the corporation. *Duly authenticated copies* have often been received in evidence where the original document or proceeding was of a public nature.²

¹ *South School District v. Blakeslee*, 13 Conn. 227; *Denning v. Roome*, 6 Wend. (N. Y.) 651; *Wood v. Jefferson County Bank*, 9 Cow. (N. Y.) 194, 205; *State v. Van Winkle*, 25 N. J. L. 73; *McFarlane v. Triton Ins. Co.*, 4 Denio (N. Y.), 392; *Highland Turnp. Co. v. McKean*, 10 Johns. (N. Y.) 154. See also *O'Mally v. McGinn*, 53 Wis. 353, 357. *Denning v. Roome*, above cited, holds that the *original minutes or records* of the corporation of a city were competent evidence of corporate acts, without further proof of their verity. Records of corporation held admissible, though not required by law to be kept, and, where defective, explainable by parol evidence. *Gearhart v. Dixon*, 1 Pa. St. 224; *Adams v. Mack*, 3 N. H. 493, 499, *per Richardson, C. J.*

The following points have been decided respecting English corporations: Where charters or corporation books are to be given in evidence, being records or instruments of a *public nature*, they may themselves be produced; and examined copies of their contents may also be given in evidence. The Court of King's Bench will not make a rule to produce the originals, unless it be shown by affidavit that a new entry, erasure, or some other circumstance, renders an inspection necessary. To give books this public character, it must appear, if they be questioned, that they have been publicly kept, and that entries have been made by the proper officer; not but that entries made by other persons may be good, if the town clerk be sick or refuses to attend — which, however, must be proved, and the reason why they were not made by the proper officer shown. *Rex v. Mothersell*, 1 Stra. 93; *Brocas v. London*, 1 Stra. 307; *Rex v. Gwyn*, 1 Stra. 401; *Willc. 343*; *Glover*, 258; *Rex v. Smith*, 1 Stra. 126; *Grant*, 318. Whoever produces the book must establish its authority before he delivers

it in, and may be required to show where it has been kept, and how it came into his possession. *Rex v. Mothersell*, 1 Stra. 93; *Rex v. Thetford*, 12 Vin. Abr. 90, p. 16; *Willc. 344*; *Glover*, 258. A book containing minutes of some corporate acts which occurred ten years ago, entirely written by the relator's clerk, who was not an officer of the corporation, and appearing never to have been kept among, or esteemed as, one of the corporate documents, or even seen before the present application for an information, is not admissible as a corporate document. *Rex v. Mothersell*, 1 Stra. 93. Nor is the copy of a letter made fifty years ago and found in the corporation chest; but the original must be first accounted for, as though it had been found in the possession of a private person. *Rex v. Gwyn*, 1 Stra. 401. Nor are entries of a *private nature*, in the public books of a corporation, evidence for the corporation in support of a right which they claim, for this were allowing the party to fabricate evidence for themselves. *Rex v. Debenham*, 2 B. & Ald. 187; *Marriage v. Lawrence*, 3 B. & Ald. 144; *Grant on Corp.* 318, 319, and cases; 2 Phil. Ev. 122; *Angell & Ames Corp.* § 679; *Willc. 344*; note cited in *Darlington v. Atlantic Trust Co.*, 68 Fed. 849; 25 U. S. App. 354, 362, holding that a private entry in the books of a municipal corporation cannot be given in evidence for the corporation. The *English Municipal Corporations Act*, 1882, § 22, provides that "a minute of the proceedings at a meeting of the council," duly signed as specified in the act, "shall be received in evidence without further proof"; and are presumed to be regular and valid, "until the contrary is proved." How such proof must be made, see *Reg. v. Thomas*, 8 A. & E. 183.

² *Denning v. Roome*, 6 Wend. (N. Y.) 651; citing *Owings v. Speed*, 5 Wheat.

§ 562 (305). **Evidential Force of Committee's Report.** — An admission by a corporation of a fact or of a liability, duly and properly made, is, of course, evidence against it. But a municipal corporation, by *accepting*, that is, *receiving the report of a committee of inquiry*, does not admit the truth of the facts stated therein; and such a report, though accepted by a vote of the corporation, is not admissible in evidence against it.¹ In an action of *assumpsit* against

(U. S.) 420, 424; *Rex v. Mothersell*, 1 Stra. 93; 12 Vin. Abr. 90, pl. 16. See also *People v. Adams*, 9 Wend. (N. Y.) 333; *Wood v. Jefferson County Bank*, 9 Cow. (N. Y.) 194, 205; *Angell & Ames on Corp.* § 679; *Highland Turnpike Co. v. McKean*, 11 Johns. (N. Y.) 154; *People v. Murray*, 57 Mich. 396; *O'Mally v. McGinn*, 53 Wis. 353. In *Denning v. Roome*, *supra*, the defendant was sued in his *individual capacity* for removing, by order of the city council, a certain fence erected by the plaintiff. The defendant (although it was argued that, being the agent of the corporation, the latter should be considered as the *party* and its own records as incompetent in its own favor to justify its acts) was allowed to show by the records of the corporation that the fence was on a portion of the public street.

The clerk of a city or town is, by law, the proper certifying officer to authenticate copies of the votes and ordinances thereof. Such copies are admissible in evidence without preliminary proof, as in ordinary instruments, of the genuineness of the clerk's signature, but are, of course, only *prima facie* evidence; and they may be shown to be inaccurate, false, or forged. *Commonwealth v. Chase*, 6 Cush. (Mass.) 248.

Where the original document is of a public nature, and would be evidence if produced, it is not necessary to show the document itself, for it may be required at many places at the same time; for that reason an *immediate sworn copy*, made by the proper officer, will be admitted. *Rex v. Lord George Gordon*, Doug. 593; 1 Phil. Ev. 405; Willc. 344; *Glover*, 259. Grant, 318, lays down the rule generally, that sworn copies of public entries in books of public corporations are admissible wherever the originals would be, and the corporation will not be compelled to produce their books in court except for reasons shown. It

has, however, been held that *the by-laws of a corporation*, in the absence of special provision, must be proved by the production of the by-laws themselves, as these are the primary evidence. *Lumbard v. Aldrich*, 8 N. H. 31; *Moor v. Newfield*, 4 Me. 44; *Hal-lowell & A. Bank v. Hamlin*, 14 Mass. 178. So, of the *votes* of a corporation, the record is the best evidence. *Haven v. Asylum*, 13 N. H. 532. See also *Manning v. Gloucester Fifth Parish*, 6 Pick. (Mass.) 6; *Taylor v. Henry*, 2 Pick. (Mass.) 397, 403; *Green v. Indianapolis*, 25 Ind. 490. It may be remarked that there are statutes in various States under which certified copies would be receivable in evidence instead of the originals. Licenses from a city or town authorizing persons to pursue particular employments, &c., need not be in writing. *Boston v. Shaffer*, 9 Pick. (Mass.) 415. An ordinance of a city of *another State* may be proved by producing the book in which it is recorded, or by a sworn copy. *Louisville, N. A., & Chic. Ry. Co. v. Shires*, 108 Ill. 617.

¹ *Dudley v. Weston*, 1 Met. (Mass.) 477; followed by *Collins v. Dorchester*, 6 Cush. (Mass.) 396; and both relating to defective highways. In *King v. Hardwick*, 11 East, 578, a rated parishioner made a confession, which was admitted in evidence against the parish, on the ground that the parish was an aggregate corporation or company, of which he was a member; compare *Mayor, &c. of London v. Long*, 1 Camp. 22. But this is not the law in this country, and it may be safely laid down that the admission of a corporator cannot be received against the body. *Hartford Bank v. Hart*, 3 Day (Conn.), 493, denying *King v. Hardwick*, *supra*; *Osgood v. Manhattan Co.*, 3 Cow. (N. Y.) 612, 623. But the admission of an officer when made in the ordinary course of his official duty, and within the scope of his powers, may be admissible against the corporation.

a town corporation, to support his cause of action, the plaintiff produced the books of the corporation, by which it appeared that the sum demanded in the declaration had been allowed by the council to the plaintiff on the 5th of September, on final settlement, at which time the plaintiff was present and assented to the settlement. The defendant contended that the resolution had been passed by mistake, and offered to show, by the same books, the passage, *three days afterwards*, in the plaintiff's absence, of a resolution rescinding the amount of the plaintiff's account. It was held that the subsequent resolution was not competent evidence, the court basing this opinion on the proposition that the books of a corporation are evidence against it, but not in its favor, in an action against the corporation by a stranger.¹

Peyton v. St. Hospital, 3 C. & P. 363; *Angell & Ames on Corp.* § 309; *Ib.* § 659; *ante*, § 435, note, and cases.

Notice to corporator or member is not notice to the corporation; it should be formally given as such to the authorized head or proper officer. *Powles v. Page*, 3 Com. B. 31; *Edwards v. Grand Junc. Railroad Co.*, 1 Myl. & Cr. 650, 659; *Grant Corp.* 315. *Lancey* brought an action for *libel* against the mayor and clerk of the city of Bangor for the following statement contained in their annual report: "Balance due from John Lancey, Collector, \$6,004.50." The balance was shown to be less. It was held that there was no presumption of law that the officers of a city or town knew the contents of the city records, and no rule of law obliging them to be acquainted therewith; and unless the defendants made the

publication maliciously they were entitled to a verdict. *Lancey v. Bryant*, 30 Me. 466; *ante*, §§ 436-444.

Where the officers or agents of a public corporation have no powers or duties with respect to a given matter, their individual knowledge, or the individual knowledge of the inhabitants or voters, does not bind or affect the corporation. *Harrington v. Berkshire School District*, 30 Vt. 155. The mayor is chief executive officer of the city, and notice to him of a nuisance is sufficient, when it would not be to the clerk, who is only a recording officer not authorized to act upon the notice. *Nichols v. Boston*, 98 Mass. 39.

¹ *Tuskaloosa v. Wright*, 2 Port. (Ala.) 230, citing 1 Stark. Ev. 292; but is not the proposition too broadly stated?

CHAPTER XV

ORDINANCES AND BY-LAWS

	Section		Section
Definition	570	Must not contravene Common Right	596, 597
Resolutions and Ordinances distinguished	571	Ordinances conferring Discretionary Powers on City Officers	598
When an Ordinance is Necessary	572	Validity is for the Court, and not the Jury, to determine	599
Authority delegated to Municipalities; Nature of Ordinances	573	Legislative Authority to adopt what would otherwise be Unreasonable Ordinances	600
Authority of Boards of Health and other Administrative Boards to adopt Rules and Regulations	574	Must be Consistent with Public Legislative Policy	601, 602
Ordinances must be adopted by Proper Body and in the Prescribed Mode	575	When Publication is required	603
Mandatory Requirements as to Procedure	576	Alternate Modes of Publication	604
"Only One Object which shall be expressed in the Title"	577	Time and Method of Publication	605
Approval of Mayor	578	Proof of Publication	606
Evidence of Adoption of Ordinances	579	Signing and recording Ordinances	607
Motives for adopting Ordinances not Subject to Judicial Inquiry	580, 581	Common-Law Principles adopted Statutory Regulation of Fines and Penalties under Ordinances	608
Jurisdiction of Equity to enjoin Enactment of Invalid Ordinances	582	Implied Power to annex Pecuniary Penalties	609
Legislative Officers are not personally Liable for Adoption of Ordinances	583	Charter Mode governs	610, 611, 612
Duration and Repeal of Ordinances	584	Penalty may be within fixed Limits	613
Mode of conferring the Power; Construction of Grants of Authority	585	Single Offence cannot be made Double	614
Special and General Grants of Authority	586	Limitation of Amount of Penalties	615, 616
Ordinances cannot enlarge or change the Charter or Statute	587	Power of Forfeiture must be expressly conferred	617
Ordinance need not recite Authority to pass it	588	Power to fine does not include Power to Forfeit	618
Must be Reasonable and Lawful	589, 590	Judicial Procedure Necessary in Some Instances	619
When Ordinance will be deemed Unreasonable	591	Forfeiture of Animals at Large; Notice; Legal Proceedings	620, 621
Must not be Oppressive	592	Same Subject. Notice	622, 623
Must be Impartial, Fair, and General	593	Equity will not ordinarily relieve against Valid Forfeiture	624
May regulate, but not restrain, Trade	594	Power to enforce by Imprisonment must be expressly given	625
Customs in Restraint of Trade	595	Power to impose Costs as Part of Penalty	626
		Who bound	627, 628
		Notice	629
		Distinction between Laws and By-Laws; Concurrent Prohibitions, &c.	630, 631

	Section		Section
Author's Conclusions	632	Mode of Procedure, Defences, Evidence, &c.	643
Ordinances denouncing Statutory Offences	633	Corporate Existence not to be questioned in such Actions	644
In England; Civil Actions and Complaints	634, 635	Ratification of Illegal Ordinances by Legislature	645
Same Subject. In America	636	Ordinances to be construed reasonably	646
Nature of Proceeding, Civil or Criminal	637	Ordinances Void in Part	647
Same Subject. In Massachusetts	638	Proof of Ordinances	648
Mode of pleading Ordinances	639	Presumption of Validity	649
Requisites of Complaints	640, 641	Injunction against Enforcement of Ordinances	650
Action in Corporate Name; Prescribed Method to be strictly followed; Demand; Notice	642		

Definition, General Nature, and Common-Law Requisites of Ordinances

§ 570 (307). **Definition.**— Under the general term of “ordinances” have been sometimes included all the regulations by which a corporation is itself governed, including special charter or statute regulations, as well as by-laws. In this country, the term “ordinance” is not usually applied, if ever, to charters, or acts of the legislature respecting municipal corporations regulating their powers and mode of action, but is limited in its application to the acts or regulations in the nature of local laws passed by the proper assembly or governing body of the corporation.¹ Indeed, in general and professional use the term “ordinance” is almost, if not quite, equivalent in meaning to the term “by-law,” and is the word most generally used to denote the by-laws adopted by municipal corporations. According to Lord Coke, the word “by” or “bye” signifies a habitation; and thence a by-law in England, and a by-law or ordinance in this country, may be defined to be the law of the inhabitants of the corporate place or district, made by themselves or the authorized body, in distinction from the general law of the country or the statute law of the particular State.²

¹ *Shuttuck v. Smith*, 6 N. Dak. 56, 72, quoting text.

² *Wille*, 73; 2 *Kyd*, 95, 98; *Nat. Bank of Commerce v. Grenada*, 44 Fed. Rep. 262, 263; *Chicago & N. P. R. Co. v. Chicago*, 174 Ill. 439, 445; *Crichfield v. Bermudez Pav. Co.*, 174 Ill. 466, 479; *State v. Swindell*, 146 Ind. 527, 532, quoting text; *State v. Omaha & C. B. R. & Co.*, 113 Iowa, 30, 33, quoting text; *State v. Lee*, 29 Minn. 445, 451, citing text; *Taylor v. Lambertville*, 43 N. J. Eq. 107, 112, citing text.

Definition and Nature of Ordinances or By-Laws. In a case in *Massachu-*

setts, denying to towns in that State power under the statute to prohibit by ordinance the sale of intoxicating liquor, Mr. Chief Justice *Shaw* observed that the term “by-law” has a limited and peculiar meaning, and is used to designate such ordinances or regulations which a corporation, as one of its legal incidents, has power to make with respect to its own members and its own concerns. In respect to municipal and quasi corporations this meaning has been somewhat extended, but even here the word is used to designate such ordinances and regulations as have ref-

§ 571. **Resolutions and Ordinances distinguished.** — It has been said that a *resolution* is an order of the council of a special and temporary character, while an *ordinance* prescribes a permanent rule of conduct or government.¹ This statement of the character-

ence to legitimate and proper municipal or corporate purposes. There is a broad distinction between the power of a public corporation to make "by-laws" and the general power to make "laws": authority to make the former does not include the power to legislate upon general subjects. *Commonwealth v. Turner*, 1 Cush. (Mass.) 493. See also *Taylor v. Lambertville*, 43 N. J. Eq. 107. A *municipal by-law*, according to the definition of a distinguished English judge, is a rule obligatory over a particular district, not being at variance with the general laws of the realm, and being reasonable and adapted to the purposes of the corporation; and any rule or ordinance of a permanent character which a corporation is empowered to make, either by the common or statute law, is a by-law. *Per Parke, B., Gosling v. Veley*, 19 L. J. (N. S.) Q. B. 135.

The word "ordinance," in its usual and primary sense, means a local law, — a rule of conduct prospective in its operation, and applying generally to the persons and things subject to the local jurisdiction. *Oakland v. Oakland Water Front Co.*, 118 Cal. 160, 193. "The ordinances of a city council are the legislative acts of a subordinate law-making power." *Per Gaines, C. J.*, in *San Antonio v. Berry*, 92 Tex. 319, 324. "The word 'ordinance' is a term of settled meaning. It means a local law, prescribing a general and permanent rule." *Per Elliott, J.*, in *Citizens' Gas & Min. Co. v. Elwood*, 114 Ind. 332, 336. "The words 'ordinance' and 'by-law' are used interchangeably in the statute, and they are synonymous." *Per Olds, J.*, in *Bills v. Goshen*, 117 Ind. 221, 225. The terms "ordinances," "rules," and "regulations," when used in a statute prescribing the powers of a municipality, are identical in meaning. *Chicago & N. P. R. Co. v. Chicago*, 174 Ill. 439, 447; *Taylor v. Lambertville*, 43 N. J. Eq. 107, 112; *State v. Lee*, 29 Minn. 451, 453; *Rutherford v. Swink*, 96 Tenn. 564, 567.

But the *rules* adopted by a municipal body for its procedure cannot be deemed ordinances. *Armatage v. Fisher*, 74 Hun (N. Y.), 167, 172. *Pul-*

nam, J., said: "The word 'ordinance,' as applicable to the action of a municipal corporation, should be deemed to mean the local laws passed by the governing body. The legislature of the State passes laws and makes rules for the government of its procedure. So a municipal corporation passes laws called 'ordinances' and enacts rules. The same distinction that exists between laws and rules made by the legislature should be held to exist between ordinances and rules enacted by a municipal corporation." See to the same effect, *Kepner v. Commonwealth*, 40 Pa. St. 124, 130, *per Lourie, C. J.* But see *Swindell v. State*, 143 Ind. 153; and *State v. Swindell*, 146 Ind. 527, where, on the facts of the case, a contrary conclusion appears to have been reached.

¹ *Creighton v. Manson*, 27 Cal. 613, 629; *Pensacola v. Southern Bell Tel. Co.*, 49 Fla. 161; *Chicago & N. P. R. Co. v. Chicago*, 174 Ill. 439, 445, *per Magruder, J.*; *Paxton v. Bogardus*, 201 Ill. 628, 640; *McDowell v. People*, 204 Ill. 499, 502; *Blanchard v. Bissell*, 11 Ohio St. 96, 103, *per Scott, J.*; *Campbell v. Cincinnati*, 49 Ohio St. 463, 470; *Shaub v. Lancaster City*, 156 Pa. 362; *Galveston v. Morton*, 58 Tex. 409, 414. See also *Tracey v. People*, 6 Colo. 151, 153. "An ordinance is the form proper for the city legislation and requires the concurrence of the executive head of the municipal government. An order or resolution is the form proper for such acts of councils as are temporary or ministerial in character and do not require executive approval." *Per Williams, J.*, in *Shaub v. Lancaster City*, 156 Pa. 362, 365. The act of levying taxes, by whatever name it may be called, is properly in the nature of a resolution. It is of a temporary character and prescribes no permanent rule of government. In the absence of a statutory requirement to the contrary, the levy may be made by resolution. *Blanchard v. Bissell*, 11 Ohio St. 96, 103. To the same effect, *Shuttuck v. Smith*, 6 N. Dak. 56, 73; *People v. Lee*, 112 Ill. 113, 119.

A resolution is sufficient to authorize the payment of the improvement of a

istics of resolutions and ordinances points out generally the proper province of these forms of municipal action. But in practical operation the distinction between a resolution and an ordinance depends upon the formalities attending the adoption of the respective acts. A resolution properly so called becomes, when not controlled by statute or charter, operative by mere adoption by the council, whilst an ordinance usually depends for its validity upon approval by the municipal executive, followed, when required, by recording and publication. Of the two methods of evidencing a municipal act the ordinance is the more deliberate and attended with greater solemnity.¹ But *mere form will not affect* the validity of the action of the council if its adoption be attended by all the

street out of the general fund. *Shelby v. Burlington*, 125 Iowa, 343. *Deemer*, C. J., said: "The legislature having given the power, and there being no purpose of assessing the cost against abutting property, we think the act is so largely ministerial in character, so evidently intended for the special occasion, so largely declaratory simply of the will of the corporation, that the act need not be evidenced by a formal ordinance. A resolution, duly passed, is in itself sufficient. There was no thought of adopting a permanent policy in passing this resolution. It had reference to a special situation, and was declaratory of the will of the city council in a given matter, and was largely ministerial in character. It was simply a carrying out in the particular instance of a power expressly granted by the legislature. In such cases an ordinance is not generally necessary."

A verbal motion that the council adopt the report of a committee recommending that the city make a street lighting contract is, when made and carried, a "resolution" of the council within the meaning of a statutory provision giving the mayor veto power over "all ordinances and resolutions." *El Paso Gas, E. L. & P. Co. v. El Paso*, 22 Tex. Civ. App. 309, criticising *Galveston v. Morton*, 58 Tex. 409.

¹ *State v. Bayonne*, 35 N. J. L. 335. "According to ordinary parliamentary practice, a resolution is a very different thing from a law or an ordinance. A resolution is merely a suggestion or direction in writing, concurred in by the two houses of the assembly, if there be two houses, or passed by one house, if there be but one, and not submitted

to the executive for his approval. A resolution is ordinarily passed without the forms and delays which are generally required by constitutions and municipal charters as pre-requisites to the enactment of valid laws or ordinances. It need be read but once, and may be passed by a *viva voce* vote, without calling for the ayes and noes, whereupon, when engrossed, it becomes operative." *Per Thompson, J.*, in *Cape Girardeau v. Fougeu*, 30 Mo. App. 551. In *People v. Mount*, 186 Ill. 560, it is said: "The wise and salutary provision of the statute which clothes the mayor with the veto power may be defeated by a city council by the simple election on its part to change the form of its legislative acts into resolutions, instead of embodying them in ordinances, if it be true that municipal legislation can be accomplished by resolution." So, in *London Mills v. White*, 208 Ill. 289, 302, aff'g 105 Ill. App. 146, *Magruder, J.*, said: "The mayor cannot exercise his supervisory power over the action of the council, if important municipal legislation takes the form of a resolution. The responsibility to the people can be less easily evaded in the case of an individual than in the case of a body of men. Where so important an act is done by the common council as the granting of the use of the public streets to a corporation, the mayor should have the power to veto such act if, in his judgment, the granting of the privilege or franchise is unwise and against the interests of the people. This supervisory power of the mayor is apt to be defeated where the result is accomplished by a mere resolution instead of an ordinance."

solemnities which the law requires in the case of an act complying with the prescribed form. Thus, when the statute declares that the action of the council shall be evidenced by a resolution, the fact that it is embodied in an ordinance does not affect its validity. The ordinance has all the essential elements of the resolution, and, in addition, is adopted by a more formal and deliberative procedure than a resolution.¹ And a resolution concerning a subject which is inherently legislative in its character and for which an ordinance is required, will, if adopted with all the formalities required in the case of an ordinance, be regarded as an ordinance and given effect accordingly. The substance, and not the form, of the corporate act is what governs.² But if the charter requires the act to be done by ordinance, a resolution cannot receive effect as an ordinance if

¹ *Los Angeles v. Waldron*, 65 Cal. 283; *Hellman v. Shoulters*, 114 Cal. 136, 157. In *Central R. Co. v. Bayonne*, 52 N. J. L. 503, the charter provided that when lands were dedicated for a street, the council might, by *resolution*, without other proceeding, accept the dedication. It was held that the adoption of the more formal and deliberate procedure by ordinance did not affect the validity of an acceptance of dedicated lands. *Magie, J.*, said: "When the charter requires *action by ordinance* which is more formal and must be preceded by notice, then action by the more speedy and less formal resolution will not be sufficient. But when the council, authorized to act by simple resolution, adopt the more formal mode of expressing their resolves, which is called an ordinance, and thus accept a dedication, the action would, in my judgment, satisfy the requirements of the statute."

² *Alma v. Guaranty Sav. Bank*, 60 Fed. Rep. 203; *Crebs v. Lebanon*, 98 Fed. Rep. 549; *Tipton v. Norman*, 72 Mo. 380; *Springfield v. Knott*, 49 Mo. App. 612; *San Antonio v. Micklejohn*, 89 Tex. 79, 81. In *Pennsylvania*, the word "ordinance" when used in a statute includes a resolution of the city council on a subject matter which is legislative in its nature. A resolution is but another name for an ordinance; and if it be a legislative act, it is immaterial whether it be called a resolution or an ordinance. But while legislation by the council may be by ordinance or resolution, the requirements which are essential to the validity of an ordinance must be observed

in the passage, approval, recording, and publication of the resolution, where the act of the council is legislative. But a direction that enactments, regulations, ordinances, and other formal laws shall be recorded and advertised does not apply to all acts of council. It does not include resolutions which are not in their nature legislative and which do not take the place of ordinances. *Howard v. Olyphant*, 181 Pa. 191, 197. See also *Ake v. Mason*, 101 Pa. 17, 21.

Resolution directing the opening of a street held to require recording and publication as an ordinance, and to be invalid for failure to comply therewith. *Sower v. Philadelphia*, 35 Pa. St. 231. Similarly a resolution by the city council to revoke a contract for grading streets and to enter into a new contract must be adopted with all the formalities applicable to ordinances. *Marshall v. Allegheny City*, 59 Pa. 455. Also a resolution instructing the suspension of the work of constructing a sewer. *Waln v. Philadelphia*, 99 Pa. 330.

Where the power to make ordinances and by-laws is general, and no form in which these shall be enacted or passed is prescribed, it was held that an ordinance regulating the city markets, and containing a prohibition and annexing a penalty was valid, notwithstanding it purported by its terms to be a *resolution*. In substance it was an ordinance or regulation, and the form in which it was passed did not make it void. *Municipality No. 1 v. Cutting*, 4 La. An. 335.

it is not affirmatively established that it was passed with all the formalities and published in the same manner as an ordinance.¹

§ 572. **When an Ordinance is Necessary.** — The general rule has been laid down by many decisions that when the charter commits the decision of a matter to the council, and *is silent as to the mode*, — neither expressly nor by necessary or clear implication requiring the action of the council to be in the form of an ordinance, — the decision of the council may be evidenced by resolution, and need not necessarily be by ordinance.² This rule has been laid down without any qualification restricting it to those acts and decisions which are of a special and temporary nature and which do not involve any permanent rule of conduct or government. But when the statute requires that an act of a municipality be done in the form of an ordinance, or if such requirement is implied by necessary or clear inference, the act can only be done in that form, or perhaps its legal equivalent, and a resolution, especially if not adopted with

¹ *Wheeler v. Poplar Bluff*, 149 Mo. 36, 43; *Dalton v. Poplar Bluff*, 173 Mo. 39, 47; *Cape Girardeau v. Fougeu*, 30 Mo. App. 551.

² *Atchison Board of Education v. De Kay*, 148 U. S. 591, 598 (consent to issue of city bonds by board of education); *Alma v. Guaranty Sav. Bank*, 60 Fed. Rep. 203 (submission of bond issue to electors); *Illinois Sav. & Trust Co. v. Arkansas City*, 76 Fed. Rep. 171 (contract for construction of water works); *Roberts v. Paducah*, 95 Fed. Rep. 62 (refunding indebtedness of city); *Ogden City v. Weaver*, 108 Fed. Rep. 564 (contract for construction of water works and for water supply); *Los Angeles Gas Co. v. Toberman*, 61 Cal. 199 (contract for street lighting); *Pollok v. San Diego*, 118 Cal. 593 (employment of special counsel); *National Tube Works Co. v. Chamberlain*, 5 Dak. 54 (contract for construction of water works); *Quincy v. Chicago, B. & Q. R. Co.*, 92 Ill. 21 (grant of right to lay railroad track in street); *Crawfordsville v. Braden*, 130 Ind. 149 (erection of plant for electric light); *Merchants Union B. Wire Co. v. Chicago, B. & Q. R. Co.*, 70 Iowa, 105 (grant of right of way for street railway); *Smalley v. Yates*, 36 Kan. 519; s. c. 41 Kan. 550 (agreement to execute and deliver water works bonds to purchaser); *Carleton v. Washington*, 38 Kan. 726 (contract to purchase hook and ladder); *McGavock v. Omaha*, 40 Neb. 64 (fixing grade of street); *Lincoln St. R. Co. v. Lincoln*, 61 Neb. 109, 144; *State v. Jersey City*, 27 N. J. L. 493 (construction of sewer); *Green v. Cape May*, 41 N. J. L. 45 (purchase of fire engine); *Burlington v. Dennison*, 42 N. J. L. 165 (purchase of fire engine); *Butler v. Passaic*, 44 N. J. L. 71 (grading and flagging street); *Courter v. Newark*, 54 N. J. L. 325; *Avis v. Vineland*, 55 N. J. L. 285, 287 (repair and improvement of streets); *Brady v. Bayonne*, 57 N. J. L. 379 (contract for water supply); *Halsey v. Rapid Transit St. R. Co.*, 47 N. J. Eq. 380, 391 (consent to street railroad); *Waco v. Prather*, 90 Tex. 80 (contracting for paving street); *Green Bay v. Brauns*, 50 Wis. 204 (fixing salary of city treasurer); *Porch v. St. Bridget's Congregation*, 81 Wis. 599 (statutory consent to cemetery within corporate limits). Where a city has power, by charter, to make "ordinances, rules, resolutions, and by-laws," which are required to be passed by the vote of a majority of the council and signed by the mayor, any form of procedure may be adopted if it appears upon the record in a permanent form, — as, by a record in the minutes of an oral motion with the vote thereon. *Green Bay v. Brauns*, 50 Wis. 204.

all the formalities of an ordinance, is not sufficient.¹ But the question whether an ordinance is required by necessary or clear implication is one which is by no means free from doubt. The charter of a city, or the statutes under which it is organized, usually contain an express grant of powers which the legislature deems essential to the government of the municipality. There is usually also a grant authorizing the council to enact all ordinances which may be necessary to carry these powers into effect, and it is frequently declared in addition that the legislative power of the municipality shall be vested in the council. Under a grant of powers so framed is it necessarily implied that the acts of the council in the execution of the powers so conferred shall be by ordinance? From a consideration of charter authority of this nature some courts seem to hold that the council can only act by resolution in the case of acts which are merely administrative and of a temporary nature, *i. e.*, in the transaction of ordinary business of an executive or administrative character, and that in the case of all acts of a permanent nature involving a rule of conduct or permanently affecting the government and welfare of the city, the corporation must, of necessity, evidence its action by an ordinance adopted with all the formalities prescribed by the charter or by statute.² But the rule

¹ *Nat. Bank of Commerce v. Grenada*, 44 Fed. Rep. 262; *Morristown v. East Tennessee Tel. Co.*, 115 Fed. Rep. 304, 307; *Holst v. Savannah Elect. Co.*, 131 Fed. Rep. 931, 942; *Pensacola v. Southern Bell Tel. Co.*, 49 Fla. 161; *Carlyle v. Clinton*, 140 Ill. 512; *East St. Louis v. Albrecht*, 150 Ill. 506; *Chicago & N. P. R. Co. v. Chicago*, 174 Ill. 439, 446; *People v. Mount*, 186 Ill. 560, 573; *Bills v. Goshen*, 117 Ind. 221, 227; *State v. Newton County Com'rs*, 165 Ind. 262, 270; *Newman v. Emporia*, 32 Kan. 456; *Trenton v. Coyle*, 107 Mo. 193; *Cape Girardeau v. Fougau*, 30 Mo. App. 551, 557; *Westport v. Mastin*, 62 Mo. App. 647; *Lincoln St. R. Co. v. Lincoln*, 61 Neb. 109, 144; *State v. Bergen*, 33 N. J. L. 39; *State v. Hoboken*, 35 N. J. L. 205; *State v. Bayonne*, 35 N. J. L. 335; *Hunt v. Lambertville*, 45 N. J. L. 279; *Paterson v. Barnet*, 46 N. J. L. 62; *Vanderbeck v. Ridgewood*, 50 N. J. L. 514; *Halsey v. Newark*, 54 N. J. L. 102; *Avis v. Vineland*, 55 N. J. L. 285; *West Jersey Traction Co. v. Shivers*, 58 N. J. L. 124; *Conover v. Long Branch Commission*, 65 N. J. L. 167; *Sproul v. Stockton*, 73 N. J. L. 158; *Cross v. Morristown*, N. J. Eq. 305; *Taylor v. Lambertville*, 43 N. J. Eq. 107, 111; *Packard v. Bergen Neck R. Co.*, 48 N. J. Eq. 281; *Noel v. San Antonio*, 11 Tex. Civ. App. 580. A decision of the council to construct sewers and drains is a legislative act which must be evidenced by an ordinance under a charter provision requiring any legislative act of the council to be by ordinance. *Paterson v. Barnet*, 46 N. J. L. 62. The word "ordinance" is inapt to signify the election of an officer, and it will not be construed to apply thereto in the absence of an express requirement. *Volk v. Newark*, 47 N. J. L. 117, 122.

² *California*. In *Creighton v. Manson*, 27 Cal. 613, 629, where the validity of a street improvement was involved, *Rhodes, J.* said: "It is a general rule that the legislative department of the city government can act only through the medium of an ordinance, unless the organic law specially provides another mode."

Colorado. In *Central City v. Sears*, 2 Colo. 588, it is said that when power is expressly conferred to enact ordinances for the purpose of carrying

which excludes the adoption of a resolution in acts of a legislative nature or which permanently affect the government and welfare of

into effect the charter powers, the authority conferred on the council should generally be exercised in that way. The court held that under express power to fix the compensation of officers, a resolution was insufficient.

Florida. When the statute makes no provision for the passage of resolutions by cities, and only mentions ordinances, an exercise of legislative power must be by ordinance. Resolutions can only be adopted for the transaction of ordinary business of a temporary or ministerial character. *Pensacola v. Bell Southern Tel. Co.*, 49 Fla. 161.

In *Illinois*, the rule seems to have been adopted that legislative acts must be by ordinance only, and the court seems to found this rule on two features, viz.: (1) the power to enact ordinances and (2) charter powers conferred upon the common council. Thus, in *Chicago & N. P. R. Co. v. Chicago*, 174 Ill. 439, 446, where these elements concurred, *Magruder, J.*, said: "Acts of the city which have for their object the carrying into effect of charter powers thus granted [by enumeration of the powers which the city council may exercise] are legislative in their character, and it is well settled that acts of municipal corporations which are legislative in their character must be put in the form of ordinances and not of mere resolutions." To the same effect, *Clafin v. Chicago*, 178 Ill. 549; *Altamont v. Baltimore & O. S. W. R. Co.*, 184 Ill. 47 (requiring flagman at railroad crossing); *People v. Mount*, 186 Ill. 560, 571; *McDowell v. People*, 204 Ill. 499, 502; *London Mills v. White*, 208 Ill. 289, 297, aff'g 105 Ill. App. 146.

Iowa. In *McManus v. Hornaday*, 99 Iowa, 507, the action was brought to establish and foreclose the lien of a street paving assessment. The defence was that the grade had not been changed by ordinance. The plaintiff relied on a resolution as sufficient. The city charter authorized the council to make such ordinances as might be necessary "to provide for the safety, . . . and improve the . . . comfort and convenience of the city." Power was also conferred on the council to regulate the grade of streets and alleys, but

there was no express provision as to the form in which this power should be exercised. It was held that the grading of streets was included in the general power to pass ordinances to improve the comfort and convenience of the city; that authority to pass ordinances on that subject required the power to be exercised in that mode; and that, on a subject so important to the property owners as fixing or changing the grade of a street, the statute, by implication, if not expressly, required a change of grade to be made by ordinance. In *Cascaden v. Waterloo*, 106 Iowa, 673, a taxpayer sought to restrain the creation of a new ward in a city. The statute expressly authorized the council to create and change the city wards, but was silent on the subject of the manner in which it should be done. It was given express power to make ordinances "for carrying into effect and discharging the powers, and duties conferred" on it. It was held that a change of wards was a permanent matter affecting the government of the city, and could only be effected by ordinance. In *Martin v. Oskaloosa*, 126 Iowa, 680, 685, the court recognized and reaffirmed these decisions, saying: "Under our statutory provisions, it may perhaps very properly be said that the general authority to provide how a power conferred by the legislature shall be exercised, should be by ordinance rather than by a resolution." But in this case the court also introduced a further distinction, and held that where the statute specifies the procedure to be followed, leaving nothing to be determined by general ordinance, all that the city is required to do is to take the steps provided by statute, and a resolution adopted for that purpose is sufficient in the absence of an express requirement of an ordinance.

Pennsylvania. In *Kepner v. Commonwealth*, 40 Pa. St. 124, the court used language importing that ordinances or resolutions adopted with all the formalities of ordinances are necessary in all legislative matters. The council passed a resolution directing the mayor to sign certain coupon bonds in renewal of a loan on slightly different terms. The court held that it was

the municipality does not prohibit the adoption of resolutions in connection with those details incident to a legislative matter which

in effect an ordinance which required the approval of the mayor and recording to give it validity. *Lowrie, C. J.*, after referring to the resolution itself as "of very little importance," said with reference to charter authority to the council to make "by-laws, ordinances, resolutions, and regulations" and a charter provision requiring "by-laws and ordinances" to be submitted to the mayor: "Certainly there is some distinction between these words in ordinary usage. *Regulation* is the most general of them all, meaning any rule for the ordering of affairs, public or private; and it thus becomes the generic term from which all the others are defined, specified, or differentiated. *Ordinance* is the next most general term, including all forms of regulation by civil authority, even acts of parliament. With us its meaning is usually confined to corporation regulations. Ordinances are all sorts of rules and by-laws of municipal corporations. Ordinary usage shows this. . . . *Resolution* is only a less solemn or less usual form of an ordinance. It is an ordinance still, if it is anything intended to regulate any of the affairs of the corporation. If the word 'ordinances' in the Act of Assembly does not include such resolutions, the law that requires ordinances to be submitted to the mayor for his approval is of no force at all, because it allows its substantial purpose to be defeated by giving to ordinances the form of resolutions. . . . *Ordinance*, then, is the generic term for acts of council affecting the affairs of the corporation; and we can make no difference founded on the difference of degree in which they affect these affairs." In keeping with the views expressed in the foregoing case, the courts of *Pennsylvania* strictly limit the province of resolutions to acts of administrative or executive nature and construe statutory grants of authority in such manner as to limit the power of the council to act by resolution to acts of a temporary or administrative character, unless the statute expressly authorizes its adoption in other cases. In *Shaub v. Lancaster City*, 156 Pa. 362, it was held that a statute which provides that "any order or resolution" of either branch of the council, or to which the concurrence of both branches is required, need not be submitted to the mayor for approval, and that "the councils may transact business by order or resolution," is intended to apply only to temporary or ministerial acts, and does not include legislative acts. The reasons influencing the court in reaching this decision were that the use of the words "order and resolution" necessarily implied acts of a temporary or administrative character, and that this meaning was emphasized by the use of the words "transact business" in the second clause of the statute quoted above. *Williams, J.*, said: "There is a well-marked distinction between acts that are legislative and that lay down a rule of action for the citizen or the city, and acts that relate to the daily administration of municipal affairs. The latter may well be described as 'business' to be transacted by councils and may properly be left to them to dispose of by order or resolutions." In *Jones v. Schuylkill Light, H. & P. Co.*, 202 Pa. 164, the court had under consideration the provision of the borough statute which requires that "every ordinance and resolution which shall be passed by council" shall require the approval of the chief burgess, or shall be passed over his veto, and shall be recorded and advertised; and it held that these requirements applied to all acts of the council by ordinance or resolution which are of a legislative character, but not to those which are merely ministerial or executive. It declared that generally under the first class are permanent regulations for the government of the borough, the granting of privileges to occupy streets, and the creation of liability by contract; whilst under the second are the transaction of current business, the ordinary administration of municipal affairs, and the awarding of contracts, which have been previously authorized by ordinance. See also *Commonwealth v. Diamond National Bank*, 9 Pa. Super. Ct. 118. Hence, it was further held in *Jones v. Schuylkill Light, H. & P. Co.*, 202 Pa. 164, *supra*, that a resolution of the borough council awarding a contract for lighting the streets for a term of five years must be submitted to the chief burgess for his approval

are of a purely business and executive character. Thus, if an ordinance has been adopted respecting the matter, the executive details required to apply the ordinance to matters arising subsequent to its enactment may, in some instances at least, be authorized by resolution.¹ It is also generally laid down that when an ordinance has been enacted by the municipality it cannot be amended, repealed, or suspended by a resolution. That can only be done by ordinance enacted with all due formality.²

when no ordinance or resolution duly submitted to him and advertised and recorded has previously been adopted providing for the manner of lighting and authorizing the making of the contract. But when an ordinance has been adopted for that purpose, a resolution awarding a contract for lighting streets is not a legislative, but a ministerial act in the nature of a business transaction relating to the business affairs of the municipality, and does not require to be recorded and published as an ordinance. *Seitzinger v. Edison El. Ill. Co.*, 187 Pa. 539 (as explained and qualified in *Jones v. Schuylkill Light, H. & P. Co.*, 202 Pa. 164); *Landsdowne v. Citizens' El. L. & P. Co.*, 206 Pa. 188. Similarly when the sale of city lands has been duly authorized by ordinance, and the officers have been directed as to the manner of making the sale, &c., an acceptance of an offer therefor is a merely ministerial act which may be by resolution. *Straub v. Pittsburgh*, 138 Pa. 356. The payment of the debts of the municipality lawfully incurred in the daily administration of its affairs is purely ministerial, and may be directed by order or resolution. *Commonwealth v. Diamond National Bank*, 9 Pa. Super. Ct. 118.

But a statute which provided that "the city council may by ordinance prescribe general rules" as to the materials to be used and the mode of executing the work under all future contracts was construed to be permissive only and not mandatory, and it was held that the city council might adopt plans and specifications for a street improvement by resolution merely. *Santa Cruz Rock Pav. Co. v. Heaton*, 105 Cal. 162. See also *Haughwout v. Raymond*, 148 Cal. 311.

¹ *Seitzinger v. Edison El. Ill. Co.*, 187 Pa. 539 (as explained and qualified in *Jones v. Schuylkill Light, H. & P.*

Co., 202 Pa. 164); *Landsdowne v. Citizens' El. L. & P. Co.*, 206 Pa. 188; *Straub v. Pittsburgh*, 138 Pa. 356. When the making of a contract by certain committees is authorized by ordinance, "subject to confirmation by the common council," confirmation by resolution is sufficient. A further ordinance is not required. *San Francisco Gas Co. v. San Francisco*, 6 Cal. 190. Where a board of health has express power to adopt ordinances, and pursuant to such power it has passed a general ordinance regulating the removal and disposition of night-soil, providing among other things that it should not be deposited on any grounds "unless pursuant to a special permit from the board," the permit may be by simple resolution. The requirement of an ordinance does not include the issuance of a permit after an ordinance regulating the matter has been adopted. *Courter v. Newark*, 54 N. J. L. 325.

² *Jones v. McAlpine*, 64 Ala. 511; *Hibbard v. Chicago*, 173 Ill. 91; *People v. Mount*, 186 Ill. 560; *Paxton v. Bogardus*, 201 Ill. 628, 640; *American Hide & L. Co. v. Chicago*, 203 Ill. 451; *Hope v. Alton*, 214 Ill. 102, aff'g 116 Ill. App. 116; *Bloomington & N. R. Co. v. Bloomington*, 123 Ill. App. 639, 645; *Hearst's Chicago American v. Spiess*, 117 Ill. App. 436; *Bills v. Goshen*, 117 Ind. 221; *Swindell v. State*, 143 Ind. 153; *State v. Swindell*, 146 Ind. 527; *Chicago, I. & L. R. Co. v. Salem*, 166 Ind. 71; *Cascaden v. Waterloo*, 106 Iowa, 673, 681; *Ryce v. Osage*, 88 Iowa, 558; *Cape Girardeau v. Fougau*, 30 Mo. App. 551, 557; *Hisey v. Charleston*, 62 Mo. App. 381; *San Antonio v. Micklejohn*, 89 Tex. 79. That a by-law or ordinance can only be repealed by the same body by and in the same manner in which it was enacted, see *Biggar's Mun. Manual* (Canada, 1900), 85.

§ 573 (308). **Authority delegated to Municipalities; Nature of Ordinances.** — Although the proposition that the legislature of a State is alone competent to make laws is true, yet it is also settled that it is competent for the legislature to delegate to municipal corporations the power to make by-laws and ordinances,¹ with appro-

¹ *Perdue v. Ellis*, 18 Ga. 586; *St. Paul v. Colter*, 12 Minn. 41; *Commonwealth v. Duquet*, 2 Yeates (Pa.), 493; *Hill v. Decatur*, 22 Ga. 203; *State v. Clark*, 28 N. H. 176; *Milne v. Davidson*, 5 Martin, n. s. (La.) 409; *Markle v. Akron*, 14 Ohio, 586, 590; *New Orleans v. Morgan*, 7 Martin, n. s. (La.) 1, *per Martin, J.*; *Trigally v. Memphis*, 6 Coldw. (Tenn.) 382; *Metcalf v. St. Louis*, 11 Mo. 103; *New Orleans Water Works v. New Orleans*, 164 U. S. 471, 481; *Portland v. Cook*, 48 Ore. 550; *State v. Milwaukee Superior Court*, 105 Wis. 651, approving text; *State v. Nohl*, 113 Wis. 15, approving text. "Without such delegation of [legislative] power, the legislature alone could exercise it." *Per Knapp, J.*, in *Paterson v. Barnet*, 46 N. J. L. 62, 66.

In *California*, the Constitution has, by direct grant, vested in counties, cities, and towns plenary power to provide and enforce such police, sanitary, and other local regulations as they may determine shall be necessary for the health, peace, comfort, and happiness of their inhabitants, provided such regulations do not conflict with general laws. Const. art. xi, § 11. The legislature has no authority to limit the exercise of the power thus conferred. *Ex parte Ackerman*, 6 Cal. App. 5; 91 Pac. Rep. 429.

That a power to make by-laws and ordinances may be delegated to municipal corporations is admitted even in those States which deny the validity of what are known as *Local Option Laws*. *Wall, In re*, 48 Cal. 279; *ante*, § 69, note; *Gloversville v. Howell* (local option as to sale of intoxicating liquors), 70 N. Y. 287; *Gilbert Elevated Railway Co., In re*, 70 N. Y. 361; *Covington v. East St. Louis*, 78 Ill. 548. In *Strauss v. Pontiac*, 40 Ill. 301, the Supreme Court held that a provision in a town charter forbidding any person to do a certain act, fixing the amount of fine and prescribing the penalty, was a complete enactment of itself; that an ordinance to the same effect was void; and that a party could be prosecuted only under the

charter, and not under the ordinance. In view of the general authority given in the same charter to make all ordinances necessary to carry into effect the powers granted in the charter, the correctness of this decision may admit of fair debate, although it is undoubtedly true that no ordinance is necessary where the prohibition in the charter is complete, the penalty fixed, and the remedy prescribed. *Ashton v. Ellsworth*, 48 Ill. 299.

The subject of the power of the legislature to delegate the legislative function to municipalities was considered in an able opinion by Chief Justice Doe in *State v. Hayes*, 61 N. H. 264, 314, in which he reviews the authorities *in extenso*. The facts, briefly stated, were that the legislature had submitted a proposition as to whether an act authorizing shareholders in corporations to cast all their votes for one candidate for director or to distribute them among two or more candidates, should become a law, to the vote of the people of the State, voting in their several towns and wards. The election having been held and the law having been declared adopted and put into effect, the validity of the proceeding was tested by *quo warranto* proceedings against one who had been declared elected a director of a railroad company. It was held that the act was intended to be a delegation of legislative power, and that, while the principle of local government authorizes the grant of limited powers of local legislation to municipalities, the power of general State legislation cannot be so delegated. See also *Bowles v. Landaff*, 59 N. H. 164, and *Gould v. Raymond, Ib.* 260. Council may order sewer to be built by a committee. *Collins v. Holyoke*, 146 Mass. 298. See *Dorey v. Boston, Ib.* 336, 339, and cases *ante*, §§ 245, 537.

But while the State may delegate to municipal authorities the power to enact ordinances under the police power, it cannot surrender or relinquish to a city the power to enact laws to punish crimes or misdemeanors under general laws embracing all the people

prate sanctions, which, when authorized, have the force, in favor of the municipality and against persons bound thereby, of laws passed by the legislature of the State.¹ A penalty imposed by an ordinance

of the State. This is so although the city may be created by or organized under a constitutional provision giving it the power to frame its own charter. *Keefe v. People*, 37 Colo. 317. Index, *Freeholders Charters*.

¹ *Heland v. Lowell*, 3 Allen (Mass.), 407; *Brick Presb. Church v. New York City*, 5 Cow. (N. Y.) 538; *St. Louis v. Boffinger*, 19 Mo. 13, 15, *per Gamble, J.*; *St. Louis v. Manufactures' Savings Bank*, 49 Mo. 574; *Jones v. Fireman's Fund Ins. Co.*, 2 Daly (N. Y.), 307; *McDermott v. Metropolitan Board of Police*, 5 Abb. Pr. (N. Y.) 422; *Mason v. Shawneetown*, 77 Ill. 533; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505, citing text; *State v. Tryon*, 39 Conn. 183; *Indianapolis v. Indianapolis Gas Co.*, 66 Ind. 396, citing text; *Bearden v. Madison*, 73 Ga. 184; *St. Johnsbury v. Thompson*, 59 Vt. 300; *Starr v. Burlington*, 45 Iowa, 87; *New Orleans Water Works v. New Orleans*, 164 U. S. 471, 481; *Mahoning County v. Young*, 16 U. S. App. 253; *Pittsburg, &c. Co. v. Hood*, 94 Fed. Rep. 618, approving text; *Cooke v. Loper*, 151 Ala. 546; 44 So. Rep. 78, citing text; *San Luis Obispo v. Fitzgerald*, 126 Cal. 279; *Tudor v. Chicago & S. S. R. T. R. Co.*, 154 Ill. 129; *Hope v. Alton*, 214 Ill. 102; *Commonwealth Electric Co. v. Rose*, 214 Ill. 545; *Swindell v. State*, 143 Ind. 153, 168, citing text; *State v. Nicholas*, 109 La. 84; *Taylor v. Carondelet*, 22 Mo. 105; *Fath v. Tower Grove & L. R. Co.*, 105 Mo. 537, 548; *State v. Walbridge*, 119 Mo. 383, 393, citing text; *Anderson v. State* (Neb.), 96 N. W. Rep. 149; *Bradshaw v. Camden*, 39 N. J. L. 416, 419; *Hicks v. Long Branch Com'rs*, 69 N. J. L. 300, citing text; *Polinsky v. People*, 73 N. Y. 65, 69; *Carthage v. Frederick*, 122 N. Y. 268, 271; *Rochester v. Simpson*, 134 N. Y. 414; *Buffalo v. New York L. E. & W. R. Co.*, 152 N. Y. 276; *Griffin v. Gloversville*, 67 N. Y. App. Div. 403; *People v. Health Department*, 117 N. Y. App. Div. 856, 875; *State v. Milwaukee Superior Court*, 105 Wis. 651, quoting and approving text; *Biggar's Mun. Manual* (Canada, 1900), 327.

A city council is "a miniature general assembly, and their authorized or-

dinances have the force of laws passed by the legislature of the State." *Per Scott, J.*, *Taylor v. Carondelet* (forfeiture clause in lease), 22 Mo. 105; *St. Louis v. Foster*, 52 Mo. 513. In *Hopkins v. Swansea*, 4 M. & W. 621, 640, Lord Abinger said: "The by-law has the same effect within its limits, and with respect to the persons upon whom it lawfully operates, as an act of parliament has upon the subjects at large." Valid ordinances of corporations are as binding on the corporators and inhabitants of the place as the general laws of the State upon the citizens at large. *Milne v. Davidson*, 5 Martin, n. s. (La.) 409. And therefore it has been held that contracts between the inhabitants of a city, in violation of the express provisions of a valid ordinance of a municipal corporation, are illegal, and cannot be enforced. *Milne v. Davidson* (lease of house for private hospital), 5 Martin, n. s. (La.) 409; *Heland v. Lowell*, 3 Allen (Mass.), 407; but compare *Baker v. Portland*, 58 Me. 199. And see also *Heeney v. Sprague*, 11 R. I. 456, holding that no private action for damages impliedly exists in favor of a person injured by a breach of duty imposed by a municipal by-law against the person who violated the by-law. A distinction between by-laws and statutes suggested and discussed by *Durfee, C. J.*; see *Johnson v. Simonton*, 43 Cal. 342.

The jurisdiction of every council is not only to be confined to the municipality the council represents, but is to be exercised, when not otherwise provided for, by by-law. When a corporation is duly erected, the law tacitly annexes to it the power of making by-laws or private statutes. This power is included in every act of incorporation; for, as is quaintly observed by Blackstone, "as natural reason is given to the natural body for the governing it, so by-laws or statutes are a sort of political reason to govern the body politic." 1 Bl. Com. 476. Though the power to make by-laws is unquestionably an incident of every corporation, it is rarely left to implication but is usually conferred by the express terms of the act of parliament. A by-law is a rule obligatory over a particular dis-

authorized by the legislature for the doing of certain specified acts amounts to a prohibition, and the prohibited acts become thereby unlawful.¹

§ 574. **Authority of Boards of Health and other Administrative Boards to adopt Rules and Regulations.** — The city council elected by and representative of the members of the municipal corporation is the natural recipient of a delegated legislative authority to adopt ordinances and by-laws. But this body is not the only body upon which power to adopt rules and regulations, having within the limits of the municipality the force of statutes, may, in the absence of constitutional restriction, be conferred by the legislature. The legislature may confer power to adopt reasonable rules, by-laws, and regulations on other boards and bodies created or organized for more limited purposes, *e. g.*, boards of health, tenement-house departments, and other similar bodies. The power granted to administrative boards of the nature of boards of health, &c., to adopt rules, by-laws, and regulations, reasonably adapted to carry out the purposes or objects for which they are created, is not an improper delegation of legislative authority within the meaning of the constitutional inhibition, express or implied, against delegating the law-making power. When these boards pursuant to statutory authority duly adopt reasonable rules, regulations, or by-laws, such rules, regulations, and by-laws within the respective jurisdictions have the force and effect of a law of the legislature, and like an ordinance or by-law may be said to be in force by authority of the State.² It is important to observe that the rules, regulations, and

strict, not being at variance with the general laws, and being reasonably adapted to the purposes of the corporation. *Gosling v. Veley*, 19 L. J. (N. S.) Q. B. 135; *Hopkins v. Swansea*, 4 M. & W. 621; *Queen v. Osler*, 32 Upper Can. Q. B. 224. The courts upon general principles recognize judicially what municipal councils are competent to do, and hold that it is not necessary for them to recite in a by-law all that is requisite to show that they have proceeded regularly in passing it. *Grierson v. Ontario*, 9 Upper Can. Q. B. 623; *King v. Harrison*, 3 Burr. 1328; *Methodist Prot. Church v. Baltimore*, 6 Gill (Md.), 391, 394; *Stuyvesant v. New York*, 7 Cow. (N. Y.) 588; *Biggar's Mun. Manual* (Canada, 1900), 334, citing *Fisher v. Vaughan*, 10 Upper Can. Q. B. 492; *In re Cameron*, 13 Upper Can. Q. B. 190; *In re Gibson*, 20 Upper Can. Q. B. 111; *In re Croome*, 6 Ont. Rep. 188; *Tylee v. Waterloo*, 6 Upper Can. Q. B. 588, 590. ¹ *Johnson v. Simonton* (swill milk ordinance of San Francisco), 43 Cal. 342. Thus a city ordinance, duly authorized, imposing a penalty for feeding distillery slops to cows, and also for vending the milk of cows so fed, amounts to an authoritative prohibition in both respects; and the acts thus prohibited are illegal. *Ib.* ² *Blue v. Beach*, 155 Ind. 121, 130, 133; *Commonwealth v. Plaisted*, 148 Mass. 375, 383; *People v. Justices*, 7 Hun (N. Y.), 214; *Board of Health v. Heister*, 37 N. Y. 661; *Health Dept. v. Knoll*, 70 N. Y. 530; *Polinsky v. People*, 73 N. Y. 65; *People v. Cronin*, 82 N. Y. 318, 323; *People v. Vande-*

by-laws of such bodies are in general subject to the same conditions and qualifications as municipal ordinances strictly so-called. Such rules, regulations, and by-laws must be reasonable.¹ The boards adopting them cannot enlarge or vary, by the operation of the rules and regulations so adopted, the powers conferred upon them by the legislature, and any rule or by-law which is in conflict with the organic law of the State, or antagonistic to the general law, or opposed to the fundamental principles of justice, or inconsistent with the powers conferred upon the board adopting it, is invalid.²

§ 575 (309). **Ordinances must be adopted by Proper Body and in the Prescribed Mode.** — Ordinances being among the most important and solemn acts of a corporation, it is essential to their validity that they shall be *adopted by the proper body*, duly assembled, and in the manner prescribed by the charter.³ What is necessary to constitute a valid corporate meeting, and the manner of performing valid corporate acts, are subjects treated of in another chapter.⁴ When the *mode of enacting ordinances* is prescribed, it must be pursued. The charter of a city bears the same general relation to the ordinances thereof that the constitution of the State bears to its statutes. Hence a city ordinance which is contrary to the charter

carr, 175 N. Y. 440, 444; Cartwright v. Cohoes, 39 N. Y. App. Div. 69, 72; People v. Timmerman, 79 N. Y. App. Div. 565, 567; People v. New York Health Dept., 117 App. Div. 856, 870.

¹ Blue v. Beach, 155 Ind. 121, 131.

² *Ibid.*

³ Rutgers College Athletic Assoc. v. New Brunswick, 55 N. J. L. 279, 284, citing text; Campbell v. Cincinnati, 49 Ohio St. 463. A city will not be allowed to attack its own ordinance collaterally for irregularity in enactment after the object of the ordinance has been completely accomplished, the ordinance being one which the city was authorized to pass. Clark v. Elizabeth, 61 N. J. L. 565. Where the minutes of the council showed the adoption of a motion to reduce certain licenses, and stated that "the mayor was instructed to prepare an ordinance covering said changes," it was held, on an application for a *mandamus* to compel the issue of a license at the reduced rate, that the record did not show a complete legislative act, and that the resolution did not effect a change in the rate of license. Jones v. McAlpine, 64 Ala. 511.

⁴ *Ante*, chap. xiii.

Under a provision that no act or or-

dinance of any board of trustees of a town should be valid until the certificates of their election should be filed, the filing to be within ten days after the election, it was held that the effect of filing the certificates a year or more after the election was to legalize and validate ordinances previously made for street improvements, and to authorize the recovery of assessments provided for by them. Jennings v. Fisher, 103 Ind. 112, overruling Ligonier v. Ackerman, 46 Ind. 552, and Pratt v. Luther, 45 Ind. 250. Where the statute authorized an ordinance prohibiting the erection of wooden buildings in any block, *upon the petition of two-thirds* of the property owners thereon, an ordinance adopted without a petition being first made was declared void. Des Moines v. Gilchrist, 67 Iowa, 210; compare Keokuk v. Scroggs, 39 Iowa, 447. Where, under a rule of a city council, a councilman was not allowed to vote upon questions in which he was directly interested, an ordinance passed by the lowest number necessary, of which one vote was cast by an interested councilman, was declared invalid. Buffington Wheel Co. v. Burnham, 60 Iowa, 493.

provisions is as invalid as a statute which does not conform to the requirements of the constitution.¹

Municipal ordinances, otherwise valid, may, like an act of the legislature, be adopted *to take effect in future* and upon the happening of a contingent event.² The *ordaining clause of an ordinance* has been held, under the circumstances stated in the note, not to be essential to its validity, although the charter contains a provision requiring such a clause and prescribing the form, the court considering the provision to be directory only.³

§ 576. **Mandatory Requirements as to Procedure.** — It may be laid down as a general rule, *that all charter or statutory requirements as to the method in which an ordinance shall be introduced, and the manner in which it shall be considered, are, when reasonably calculated to induce deliberation, mandatory in their nature, and*

¹ *Jacksonville v. Ledwith*, 26 Fla. 163, 212; *People v. Mount*, 186 Ill. 560, 568; *Quinette v. St. Louis*, 76 Mo. 402. See also *Biggar's Mun. Manual* (Canada, 1900), 46.

² *Baltimore v. Clunet*, 23 Md. 449; *Northern C. R. Co. v. Baltimore*, 21 Md. 93; *State v. Kirkley*, 29 Md. 85; *Rushville v. Rushville Nat. Gas Co.*, 132 Ind. 575, 579, quoting text; *Bradley-Ramsey Lumber Co. v. Perkins*, 109 La. 317, quoting text; *ante*, § 69. See *Troy v. Atchison, &c. Railroad Co.*, 13 Kan. 70; *ante*, § 557, note. Another common but erroneous belief is, that a municipal council can by order or resolution do that which, if done through a by-law or ordinance, would be illegal. This it cannot do. No municipal council can do that informally which it has no power to do directly and formally. *Daniels v. Burford*, 10 Upper Can. Q. B. 478. A by-law, order, or resolution which revives an illegal by-law is of course itself illegal. *Canada Co. v. Oxford*, 9 Upper Can. Q. B. 567. An order or resolution duly signed and sealed is virtually a by-law or ordinance, but many orders and resolutions pass by mere vote, without being thus authenticated. The municipal rules of proceeding generally require more formal steps to be taken, in passing a by-law or ordinance, than in adopting an order or resolution. Municipal corporations, however, may become liable as wrongdoers for things done by direction of the councils without by-laws. *Croft v. Peterborough*, 5 Upper Can. C. P. 35; *Nevill v. Ross*, 22 Upper Can. C. P. 487;

Darby v. Crowland, 38 Upper Can. Q. B. 338; *Lewis v. City of Toronto*, 39 Upper Can. Q. B. 343. The power to make by-laws or ordinances necessarily supposes the power to enforce them by pecuniary penalties, competent and proportionable to the offence. In construing a by-law, &c., the court will look at the whole of it, to ascertain its meaning, and construe one part with another or other parts, so as, if possible, to give full effect to the whole. *Cameron and East Nissouri, In re*, 13 Upper Can. Q. B. 190; *Biggar's Mun. Manual* (Canada, 1900), 32.

³ *St. Louis v. Foster*, 52 Mo. 513. The Supreme Court of *Missouri* having decided in the *Pacific Railroad v. Governor Price*, 23 Mo. 353, and *Cape Girardeau v. Riley*, 52 Mo. 424, that the validity of a statute, duly authenticated, could not be impeached by showing a departure from the forms prescribed in the Constitution in the passage of laws, applied the same principle to the passage of ordinances. Therefore, although the charter required that the style of ordinances shall be, "Be it ordained," &c., yet this is directory; and omitting the enacting clause or using an imperfect enacting clause, does not invalidate the ordinance. *St. Louis v. Foster, supra*. To same effect, *People v. Murray*, 57 Mich. 396. *Infra*, § 576. As to the conflicting decisions in respect to whether the forms prescribed in Constitutions to be observed in the enactment of laws are imperative or directory only, see *Cooley, Const. Lim.*, chap. vi.

must be complied with. Among statutory requirements of this nature are provisions that all ordinances shall be read three times before their final passage, and that no ordinance shall pass at the same meeting at which it is introduced. These provisions are mandatory, and an ordinance which is passed without complying with them is void.¹ Under a requirement that no by-law or ordinance

¹ *Swindell v. State*, 143 Ind. 153; *Horner v. Rowley*, 51 Iowa, 620; *New Orleans v. Brooks*, 36 La. An. 641; *State v. Bergen*, 33 N. J. L. 39; *Cowen v. Wildwood*, 60 N. J. L. 365; *Danville v. Shelton*, 76 Va. 325. When the charter of a city does not regulate the mode of procedure to be observed in the adoption of an ordinance by the council, but has committed the power or authority so to do to the council itself, which, pursuant thereto, has prescribed by ordinance an essential and salutary rule as to the procedure, mandatory and prohibitory in its provisions, such as one requiring three readings before passage, that no ordinance shall be passed at the same meeting at which it was introduced, and that these rules can only be suspended by a two-thirds vote, an ordinance passed without compliance with the rules, and without suspension thereof by the necessary vote, is void, in the same manner as if the charter had prescribed these requirements. *Swindell v. State*, 143 Ind. 153, 169. Under the statutory requirement that ordinances shall be read three times before passage, it is not necessary that the ordinance should be read at length three separate times. It may be read by its title for at least one of the three readings. The court reached this conclusion by analogy to the practice in the legislature. *Anderson v. Camden*, 58 N. J. L. 515, 519. But if the title does not fairly express the subject matter of the ordinance, it is not a sufficient compliance with the statutory requirement to read it the first time by its title. *Bill Posting Sign Co. v. Atlantic City*, 71 N. J. L. 72. Where the law required the reading of the ordinance on three different days, a third reading, after the annual election and the entrance to office of a new mayor and four new aldermen, was held to be a sufficient compliance with it. *McGraw v. Whitson*, 69 Iowa, 348.

On the question whether the separate readings may be at adjourned meetings the decisions are not harmonious. It has been held that the separate read-

ings may be at adjourned meetings and that three general meetings of the council are not intended. *Cutcomp v. Utt*, 60 Iowa, 156. But, on the other hand, following the rule that an adjourned meeting is only a continuation of the stated meeting of which it is an adjournment, it has been held that when the statute provides that the ordinance cannot be passed at the same meeting at which it is introduced, it cannot be passed at an adjourned session of such meeting. *Flood v. Atlantic City*, 63 N. J. L. 530. See further, *Index, Corporate Meetings*.

When the charter provided that "no ordinance shall pass both boards on the same day," it was held that the passage of ordinance by both houses on same day did not render it invalid, if it was reconsidered and again passed in house where it originated on subsequent day. *Specht v. Louisville*, 22 Ky. Law Rep. 699; 58 S. W. Rep. 607; *Oswald v. Gosnell*, 21 Ky. Law Rep. 1660; 56 S. W. Rep. 165.

Under a statutory requirement that a proposed ordinance shall be referred to a committee before consideration by the council, a reference of a proposed ordinance to the "committee of the whole," and consideration by the council sitting as such committee, section by section, is sufficient. *Hallock v. Lebanon*, 215 Pa. 1.

Statutory requirements that there shall be three readings of proposed ordinances on different days, and other provisions of a similar nature, are frequently directed against ordinances of a "general" and "permanent" nature. It has been held that an ordinance granting a franchise to construct and operate a street railroad is a "by-law of permanent nature" within the meaning of a statute regulating the enactment and publication of by-laws. *State v. Omaha & C. B. R. & B. Co.*, 113 Iowa, 30. An ordinance to condemn property for the opening and extension of a street is also to be regarded as an ordinance of a permanent nature. *Campbell v. Cincinnati*, 49 Ohio St. 463.

shall be passed at the same meeting at which it is introduced, it has been held that an ordinance introduced at a previous meeting cannot be amended in substantial and material respects and adopted at the same meeting at which it was materially amended. An ordinance when put on its final passage should be the same in substance as that introduced or considered at the previous meeting.¹ When the statutory provision that ordinances shall be read on three different days permits the members of the council to dispense with the rule upon a specified vote, the *rule can only be dispensed with* by a strict compliance with the statutory authority.² Thus, where two ordinances were reported for passage and the requisite number voted in favor of *suspending the rule for readings on different days*, and the ordinances were respectively passed, it was held that the statute required a separate vote to suspend the rules as to each ordinance, that the vote suspending the rules as adopted applied only to the first ordinance, and that the second was not legally adopted.³ Another statutory requirement as to the manner in which ordinances shall be considered and adopted which is mandatory in its nature is the requirement that *before adoption the ordinance shall be published*.⁴

But a *resolution* declaring a street improvement to be necessary, required to be published and adopted as a preliminary to an ordinance directing the improvement to be made, makes no provision for the future, prescribes no rule of conduct or duty, and simply declares an existing fact, and is not of a general or permanent nature, within the meaning of a statute requiring three separate readings of such ordinances. *Uppington v. Oviatt*, 24 Ohio St. 232.

So. Jersey Tel. Co. v. Woodbury, 73 N. J. L. 276; *Cowen v. Wildwood*, 60 N. J. Law, 365; *State v. Bergen*, 33 N. J. L. 39 (distinguished from *State v. Jersey City*, 26 N. J. L. 444, 448, where the variance was immaterial); *State v. Jersey City*, 34 N. J. L. 390; *People's Gaslight Co. v. Jersey City*, 46 N. J. L. 297. But *quære* as to the rule stated in the text where the amendment is germane to the original ordinance and does not change its purpose or object.

¹ *Horner v. Rowley*, 51 Iowa, 620; *Griffin v. Messenger*, 114 Iowa, 99; *Swindell v. State*, 143 Ind., 153; *New Concord Board of Education v. Best*, 52 Ohio St. 138, 152.

² *Bloom v. Xenia*, 32 Ohio St. 461; *Campbell v. Cincinnati*, 49 Ohio St. 463. A provision of a city charter prohibit-

ing the passage of any ordinance at the same session at which it is introduced, *except by the unanimous consent* of all the members of the council present, held to require only a unanimous consent to a vote upon its passage, and not a unanimous vote in favor of the ordinance. *State v. Priester*, 43 Minn. 373. In *North Platte v. North Platte Water Works Co.*, 56 Neb. 403, the court construed a statutory provision that ordinances should be read on three different days, *unless three-fourths of the council should dispense with the rule*, as requiring merely the consent of three-fourths of the quorum of the council present and acting. Accordingly where the council provided for by charter consisted of six members, of whom one had resigned and another was absent, it was held that a vote of the remaining four to suspend the rule was sufficient. See also to the same general effect, *Atkins v. Phillips*, 26 Fla. 281.

³ *State v. Hoboken*, 38 N. J. L. 110; *Rutgers College Athletic Assoc. v. New Brunswick*, 55 N. J. L. 279; *In re Douglass*, 46 N. Y. 42; *In re Phillips*, 60 N. Y. 16; *In re Little*, 60 N. Y. 343; *In re Anderson*, 60 N. Y. 457; *Quint v. Merrill*, 105 Wis. 406; *Herman v. Oconto*, 100 Wis. 391. Construction

§ 577. "Only One Object which shall be expressed in the Title." — We have seen above that a *constitutional prohibition against the enactment of special legislation* only restricts the legislature in the enactment of laws affecting municipal affairs and in nowise affects the municipality in exercising or not exercising the power with which it is lawfully invested by the enactment of ordinances or otherwise.¹ Constitutional provisions that "no bill shall contain more than one object which shall be clearly expressed in its title" are also limited to State legislation and have no application to municipal ordinances.² But although the constitutional provision does not apply to or affect the enactment of ordinances, a requirement in the same language is frequently imposed by statutory enactment. This *statutory requirement is mandatory* in its nature and must be complied with.³ But although this requirement is mandatory in its

of statutory provision requiring previous publication. *Douglass, In re*, 46 N. Y. 42; *N. Y., &c. School, In re*, 47 N. Y. 556; *Dubuque v. Wooton*, 28 Iowa, 571.

Where a statute required publication of the ordinance between the second and third readings, it was held that the ordinance could not be amended in a material respect after publication, and then passed without republication; the statute contemplates publication substantially in the form in which the ordinance is finally enacted, and if amended in a material respect, after it has been published, it must be republished before adoption. *State v. Newark*, 30 N. J. L. 303. See also *Rutgers College Athletic Assoc. v. New Brunswick*, 55 N. J. L. 279. But compare *East Orange v. Richardson*, 71 N. J. L. 458. Where a statute required that no vote shall be taken upon an assessment ordinance, or resolution until it has been published three days, a resolution passed without such prior publication was held illegal and the assessment voted upon it void. *In re Smith*, 52 N. Y. 526. When publication has in fact been duly made, the fact that the council had no proof of the publication and made no record thereof when it passed the ordinance does not affect its validity in the absence of any statutory requirement of such proof or record. The publication can be proved *aliunde* the record in the absence of a charter provision to the contrary. *Barr v. New Brunswick*, 58 N. J. L. 255, 260. A charter provision that notice of the introduction of an or-

dinance "shall be published at least as many as ten days before the adoption of such ordinance" held to be complied with by one publication at least ten days prior to adoption. *Smith v. Atlanta*, 123 Ga. 877. See Index, *Elections; Notice*.

¹ *Ante*, § 166.

² *Ex parte Haskell*, 112 Cal. 412; *Scanlon v. Denver*, 38 Colo. 401; *Chicago Union Traction Co. v. Chicago*, 207 Ill. 544; *Harris v. People*, 218 Ill. 439; *Green v. Indianapolis*, 25 Ind. 490; *Humboldt v. McCoy*, 23 Kan. 249; *Topeka v. Raynor*, 61 Kan. 10; *Tuggles v. Commonwealth (Ky.)*, 100 S. W. Rep. 235; *St. Louis v. Weitzell*, 130 Mo. 600. See Index, *Charter; Title*.

³ *Stebbins v. Mayer*, 38 Kan. 573; *Missouri Pacific R. Co. v. Wyandotte*, 44 Kan. 32. In *Ohio*, it has been pointed out that although the courts of that State construe the constitutional requirement that each statute shall embrace but one subject which shall be expressed in its title to be directory only, yet inasmuch as municipal corporations are the creatures of legislative enactment and have no authority outside of that expressly conferred on them or necessarily implied, a statutory requirement that an ordinance shall embrace but one subject, which shall be expressed in its title, is mandatory and must be complied with. *Bloom v. Xenia*, 32 Ohio St. 461; *Campbell v. Cincinnati*, 49 Ohio St. 463, 474; *Heffner v. Toledo*, 75 Ohio St. 413.

Where the title clearly indicates, and the ordinance actually contains, two separate and distinct subjects having

nature, it has also been said that sound policy and legislative convenience dictate a liberal construction of the title and subject matter of ordinances; the generality of the title is not a valid objection to the validity of the ordinance so long as it is not made to cover legislation incongruous in itself.¹ In considering whether the ordinance violates the statutory requirement, it must be examined in the light of the mischief which the statute was intended to prevent and not upon the mere form of the enactment.² This requirement, as in the case of the similar constitutional requirement, is intended to prevent the uniting in one ordinance of diverse subjects or measures and effecting its passage by uniting in its support all those in favor of any, and to prevent the adoption of ordinances by the votes of councilmen ignorant of the contents.³ Matters of detail need not be specified in the title, nor is it necessary that the title should contain a catalogue of all the powers intended to be bestowed.⁴

no necessary connection with each other, the ordinance is void *in toto*. *Missouri Pac. R. Co. v. Wyandotte*, 44 Kan. 32.

¹ *St. Louis v. Liessing*, 190 Mo. 464; *St. Louis v. Grafeman Dairy Co.*, 190 Mo. 492. See also *Bergman v. St. Louis, I. M. & S. R. Co.*, 88 Mo. 678, 684.

² *Heffner v. Toledo*, 75 Ohio St. 413.

³ *Bergman v. St. Louis, I. M. & S. R. Co.*, 88 Mo. 678; *Heffner v. Toledo*, 75 Ohio St. 413; *State v. Calloway*, 11 Idaho, 719; *Seattle v. Barto*, 31 Wash. 141.

⁴ *State v. Calloway*, 11 Idaho, 719; *Belle v. Glenville*, 27 Ohio Cir. Ct. 181, 17 Ohio Cir. Dec. 181; *Louisville v. Wehmhoff*, 116 Ky. 812. In *State v. Wells*, 46 Iowa, 662, the title of an ordinance was: "An ordinance describing and defining punishment for certain offences." The ordinance defined and prescribed the punishment for twenty-six offences, and it was contended that it had as many subjects. *Beck, J.*, said: "This is clearly a mistake. The subject of the ordinance is offences against the city. The one subject is composed of many parts." Ordinance to prevent cattle running at large in the city sustained as embracing only one subject, all the provisions being germane to the subject named. *Paducah v. Ragsdale*, 122 Ky. 425; 92 S. W. Rep. 13. A city ordinance was entitled "Sale of intoxicating liquors." The body of the ordinance embraced a provision pro-

hibiting the opening of licensed saloons on the Sabbath. It was held that the ordinance did not violate the statutory prohibition. *Duluth v. Abrahamson*, 96 Minn. 39. See further as to ordinances regulating the sale of intoxicating liquors, *St. Anthony v. Brandon*, 10 Idaho, 205. "An ordinance to prohibit the carrying or exhibiting of deadly weapons" held to embrace only one subject, which was sufficiently expressed in its title. *Ocean Springs v. Green*, 77 Miss. 472. An ordinance providing that all offences made misdemeanors under the State laws shall be violations of the municipal laws contains only one subject. *Winfield v. Jackson*, 89 Miss. 272; 42 So. Rep. 183.

In *St. Louis v. Wetzell*, 130 Mo. 600, an ordinance entitled "An ordinance regulating the keeping, storing, and handling and licensing the removal of garbage, grease, offal, and other refuse matter composed of either animal or vegetable matter," and repealing a prior ordinance on the same subject, "and prescribing penalties for the violation thereof, and fixing a licensee tax on vehicles used for the removal of garbage," was held to relate only to garbage and offal, and not to violate the statutory prohibition against a multiplicity of subjects. Ordinance held to be germane to the one subject of regulating the business of vending milk and cream and not to contravene the statutory direction. *St. Louis v. Liessing*, 190 Mo. 464. In *Weber v. Johnson*, 37 Mo. App. 601, an ordi-

§ 578. **Approval of Mayor.** — In the absence of any statutory or charter requirement, *the approval of the mayor*, or his assent or concurrence in the enactment of an ordinance, is not essential.¹ But where by the charter the mayor is part of the law-making power, his concurrence in legislative action is essential to its validity.² When the charter requires the ordinance to be submitted to the mayor for his approval or disapproval, the ordinance must either be approved by him, or passed over his veto in the prescribed manner.³

nance which provided for both the grading and paving of an alley was upheld as relating to but one subject.

In *Seattle v. Barto*, 31 Wash. 141, the ordinance was entitled "An ordinance to license and regulate certain trades and occupations in the city of Seattle, providing penalties for the violation thereof, and repealing all ordinances inconsistent therewith." The ordinance contained provisions relating to the licensing and regulating of various trades and occupations, among which were auctioneers, second-hand dealers, bill-posters, hotel runners, persons engaged in the temporary sale of goods, and pawnbrokers. It was held that it contained only one subject which was sufficiently expressed in its title.

In *Cantril v. Sainer*, 59 Iowa, 26, an ordinance was entitled "Regulating the use and sale of intoxicating liquors." In fact the subject of the ordinance was entirely prohibitory, and it was held to be invalid as violating the statutory requirement. An ordinance first vacated an alley and then granted the vacated land to a private person. It was held that the ordinance did not relate to more than one subject, its object being to transfer the title. *Dempsey v. Burlington*, 66 Iowa, 687.

¹ *McDonald v. Dodge*, 97 Cal. 112; *Jacobs v. San Francisco*, 100 Cal. 121, 131, 135; *Morton v. Broderick*, 118 Cal. 475; *Harrison v. Roberts*, 145 Cal. 173; *Becker v. Henderson*, 100 Ky. 450; *State v. Armstrong*, 54 Minn. 457; *Burlington v. Dennison*, 42 N. J. L. 165. See also *Sacramento Paving Co. v. Anderson*, 1 Cal. App. 672; *Martindale v. Palmer*, 52 Ind. 411, cited *infra*. As to signing and recording ordinances see *infra*, § 607. In *California*, a statutory enactment requiring the mayor's approval of resolutions has no application to a city which is working under a freeholder's charter. *Sacramento Paving Co. v. Anderson*, 1 Cal. App.

672. See also *Morton v. Broderick*, 118 Cal. 475.

² *Saxton v. Beach*, 50 Mo. 488; *Saxton v. St. Joseph*, 60 Mo. 153; therefore a resolution without the mayor's signature ordering local improvements is a nullity. *Ib.*; *Irvin v. Devors*, 65 Mo. 625. The act of a mayor in announcing that a motion is lost does not amount to an adjudication, so as to prevent its being attacked collaterally. *Chariton v. Holliday*, 60 Iowa, 390, 391; *ante*, § 514 *et seq.*

³ *Creighton v. Manson*, 27 Cal. 613; *Eisenhuth v. Ackerson*, 105 Cal. 87; *Pollok v. San Diego*, 118 Cal. 593; *New York & N. E. R. Co. v. Waterbury*, 35 Conn. 19; *Jacksonville v. Ledwith*, 26 Fla. 163, 195; *Pensacola v. Southern Bell Tel. Co.*, 49 Fla. 161; *Terre Haute & I. R. Co. v. Voelker*, 129 Ill. 540, 549; *Heins v. Lincoln*, 102 Iowa, 69; *Chicago, R. I. & P. R. Co. v. Council Bluffs*, 109 Iowa, 423, 428; *Stutman v. McVicar*, 111 Iowa, 40; *Altman v. Dubuque*, 111 Iowa, 105; *Moore v. Perry City Council*, 119 Iowa, 423, 428; *Breaux's Bridge v. Dupuis*, 30 La. An. 1105; *New Iberia v. Moss Hotel Co.*, 112 La. 525; *Baar v. Kirby*, 118 Mich. 392; *State v. Darrow*, 65 Minn. 419; *State v. Butler*, 178 Mo. 272, 340; *Cape Girardeau v. Fougau*, 30 Mo. App. 551; *State v. Newark*, 25 N. J. L. 399; *Booth v. Bayonne*, 56 N. J. L. 268; *Wilson v. Trenton*, 56 N. J. L. 469; *Mittag v. Park Ridge*, 61 N. J. L. 151, 153; *Pierson v. Dover*, 61 N. J. L. 404; *Hendrickson v. Point Pleasant*, 65 N. J. L. 535; *Dey v. Jersey City*, 19 N. J. Eq. 412; *People v. Schroeder*, 76 N. Y. 161; *Walcutt v. Columbus*, 27 Ohio Cir. Ct. 238; 17 Ohio Cir. Dec. 238; *Ladd v. East Portland*, 18 Ore. 87; *Babbidge v. Astoria*, 25 Ore. 417; *Kepner v. Commonwealth*, 40 Pa. St. 124; *Waln v. Philadelphia*, 99 Pa. St. 330.

It is the approval or disapproval of the mayor *in office at the time when the*

It has been said that in this country the absolute veto is unknown; the qualified or limited veto is all that an executive has.¹ In other words, the vesting of the mayor with power to disapprove an ordinance is intended to induce due consideration and to prevent haste and inconsiderate action, and upon disapproval, the council usually has the power to pass the ordinance over his veto. In approving or disapproving the ordinance, the mayor must comply with the requirements of the statute or charter.² Thus, when the statute

ordinance is passed by the council that is required. His successor in office has no authority to approve or veto the ordinance. *Altman v. Dubuque*, 111 Iowa, 105, 112. Bonds of a city signed by an ex-mayor held invalid. *Coler v. Cleburne*, 131 U. S. 162. See *post*, chapter on Municipal Bonds. Where, by mistake, the date of approval by the mayor was entered as of a day prior to the passage of an ordinance, it was held, in a suit to collect a tax under the ordinance, that as all other requisites had been complied with and no one's rights had been prejudiced, the validity of the ordinance was not affected. *Allentown v. Grim*, 109 Pa. St. 113. If the original ordinance has been lost or destroyed parol evidence is admissible to prove the signing of the ordinance. *Knight v. Kansas City, St. J. & C. B. R. Co.*, 70 Mo. 231; *Seattle v. Doran*, 5 Wash. 482. If the mayor requests the council to reconsider the ordinance, at the same time suggesting certain amendments, this request, in the absence of a statutory authority therefor, does not affect in any way or relieve him from his duty of approving or disapproving the ordinance. *Kittinger v. Buffalo Traction Co.*, 160 N. Y. 377, 383. If the mayor is absent and another is appointed acting mayor, or mayor *pro tem.*, and as such presides at the meeting of the council, the acting mayor or mayor *pro tem.* is not thereby vested with the power to approve or disapprove an ordinance in the absence of a statutory provision to that effect. *Moore v. Perry City Council*, 119 Iowa, 423, 429. See also *Leavenworth v. Douglass*, 3 Kan. App. 67; *Babbidge v. Astoria*, 25 Oreg. 417. But if the charter authorizes the president of the council to discharge all the duties of the mayor during his absence, the signature of the president is sufficient approval of the ordinance, if it appears that the mayor was out of the city when the ordinance was passed.

O'Mally v. McGinn, 53 Wis. 353; *Saleno v. Neosho*, 127 Mo. 627, 636. See also *State v. Byrne*, 98 Wis. 16, 21. Sufficiency of proof to establish authority of acting mayor to sign ordinance. *Seattle v. Doran*, 5 Wash. 482.

Injunction does not lie to prevent the mayor from signing an ordinance even when the intended ordinance is a repeal of one under which a valid contract has been entered into. *New Orleans El. R. Co. v. New Orleans*, 39 La. An. 127. See Index, *Equity; Injunction*.

¹ *Per Lathrop, J.*, in *Lowell v. Dadman*, 191 Mass. 370, 371.

² Under a statutory provision that every ordinance shall be sent to the mayor, "who shall either approve it, in which case it shall become operative and effectual, or disapprove it, in which case he shall return it," an affirmative act of approval by the mayor by written declaration over his signature is essential to the validity of the ordinance; and the fact that by custom ordinances not disapproved have been treated as approved is not sufficient to give them validity. *New York & N. E. R. Co. v. Waterbury*, 35 Conn. 19. To the same effect, *In re Standiford*, 5 Mackey (D. C.), 549.

In *Baar v. Kirby*, 118 Mich. 392, it was held that a statutory provision that the mayor should within three days "lodge in the office of the city clerk" his veto of any resolution or ordinance, was complied with by delivering it within the prescribed time to the city clerk in person for filing in his office, the clerk's office being closed at the time. It has been held that a provision that the ordinance shall be returned to the branch of the city council where it originated is only directory in its nature and that a return of the ordinance to the wrong branch with the mayor's disapproval does not affect the mayor's veto. *Commonwealth v. Fitler*, 136 Pa. 129. Where

requires the mayor, if he disapprove an ordinance, *to return it with his objections in writing*, a message returning the ordinance disapproved without stating any objection to it is not a valid exercise of the veto power.¹ Usually the mayor is required to exercise his power to approve or disapprove an ordinance *within a specified time* after the ordinance has been "presented" to him. This provision implies a personal presentation to the mayor in order to make the limit of time operative. Leaving the ordinance with a clerk in the mayor's office, in the absence of the mayor, is not a presentation to him within the meaning of this charter or statutory requirement.² If the mayor has disapproved an ordinance, *the reconsideration* which is given by the council must be of the *particular ordinance* which has been disapproved. Upon the exercise of the mayor's veto power, the council cannot pass an amended or altered ordinance. If it attempts to do so, such amended or altered ordinance must be submitted to the mayor for his approval or disapproval.³ When the statute, without further provision, simply directs that the ordinance shall be submitted to the mayor for his approval and requires that if he disapprove the same it shall be returned to the council within a specified time, the ordinance takes effect in the event of his failure to return it disapproved within the prescribed time.⁴

The power of the mayor to approve or disapprove an ordinance is

by statutory authority the ordinance was prepared by a municipal board which submitted it to the council, the ordinance does not originate in either house and may be returned by the mayor approved or disapproved to either house. *Baltimore v. Gorter*, 93 Md. 1.

¹ *Lowell v. Dadman*, 191 Mass. 370; *Truesdale v. Rochester*, 33 Hun (N. Y.), 574. "The reason why it is necessary that the objections should be stated is plain. It is that the body passing the order should have an opportunity to weigh and consider the objections and determine whether it is right or wrong." *Per Lathrop, J.*, in *Lowell v. Dadman*, 191 Mass. 370.

² *Farwell v. Boston*, 192 Mass. 15. Under a charter requirement that ordinances shall, before taking effect, be *presented to the mayor* and approved by him, or if vetoed, be passed again, and that on his failure to return them within five days, they shall become operative, a literal compliance with these provisions is essential. The ordinance should be formally presented to the mayor at the time, and in the man-

ner prescribed by the charter. The presence of the mayor during the deliberation of the common council and an examination by him of the clerk's minutes, by which he is informed of the passage of certain ordinances, is not such a presentation to him of the ordinances as the charter requires. *State v. Newark*, 25 N. J. L. 399. Where ordinances or resolutions have not been submitted to the mayor for his approval as required by statute, but have been passed and recorded in the minutes of the council and signed by the mayor therein, the legislature may validate them by enacting a statutory provision that such resolutions and ordinances shall be deemed to have been formally presented to, approved, and signed by him. *State v. Newark*, 27 N. J. L. 185, 196.

³ *People v. Geneva*, 98 N. Y. App. Div. 383; *State v. Newark*, 25 N. J. L. 399, 420.

⁴ *Doty v. Lyman*, 166 Mass. 318; *Truesdale v. Rochester*, 33 Hun (N. Y.), 574, 576; *Pennsylvania Globe G. L. Co. v. Scranton*, 97 Pa. St. 538; *Commonwealth v. Fittler*, 136 Pa. 129, 142.

entirely separate and distinct from the functions with which he may be vested as presiding officer of the common council. The fact that the mayor, as presiding officer of the council, heard the ordinance read, put the motion for its adoption, declared it adopted, and signed and approved of the journal in which it was entered, is not a compliance with a statutory requirement that the ordinance be approved by him, or passed by a specified majority over his veto, and does not dispense with his approval in the manner prescribed by the charter.¹

§ 579 (310). **Evidence of Adoption of Ordinances.** — In the absence of required *record evidence of the passage of an ordinance*, it is not competent, except possibly under peculiar circumstances, to establish its adoption by extrinsic testimony;² but where unanimity

¹ *Cordilla v. Pueblo*, 34 Colo. 293; *Pensacola v. Southern Bell Tel. Co.*, 49 Fla. 161; *Whitney v. Port Huron*, 88 Mich. 268; *State v. Dakota County Dist. Court*, 41 Minn. 518; *Graham v. Carondelet*, 33 Mo. 262. See also *Moore v. Perry City Council*, 119 Iowa, 423, 429; *State v. Newark*, 25 N. J. L. 399, cited *supra*. But see to the contrary *Woodruff v. Stewart*, 63 Ala. 206. But in *Becker v. Washington*, 94 Mo. 375, it was held that where the statute provides that no bill shall become an ordinance until signed by the president of the board and the mayor, and also that the mayor shall be *ex officio* president of the board, his signature of the ordinance *as mayor* is sufficient, although it would be more formal for him to have signed it as president, and then approved of it as mayor. In *Moore v. Perry City Council*, 119 Iowa, 423, 428, *Deemer, J.*, said: "There is a broad distinction between a requirement that the mayor shall sign ordinances simply as a means of authentication and a requirement that he shall sign as an evidence of his approval. The former requirement may well be said to be ministerial and directory only, while the latter is undoubtedly mandatory, and plainly intended as a check against hasty, unwise, and inexpedient legislation."

In *Martindale v. Palmer*, 52 Ind. 411, where it was held that under the general city law then in force the signature of the mayor was not necessary to the validity of an ordinance, the court arrived at this result from the

consideration that in this country the mayor is not an integral part of the corporation, and has only such powers as are expressly conferred upon him. Hence, although the statute required the mayor to *sign the record* of the ordinance, the court held that his failure to do so did not affect its validity. *Biddle, J.*, said: "The doctrine of the English courts as to the old corporations in that country that the mayor was an integral part of the corporation, and that the acts of the corporation in his absence were invalid, has, it is believed, no application to the office of mayor in this country. With us, the powers and duties of the mayor depend entirely upon the provisions of the charter, or the act under which the corporation is organized, and the by-laws passed in pursuance of such authority. Properly and primarily, the powers and duties of a mayor are executive and administrative, and not judicial or legislative; but other powers may be, and often are, granted to him, and other duties enjoined upon him. Whether the mayor's signature is essential to the validity of an ordinance depends upon the charter, or the act authorizing the organization of the corporation, but, unless it is made essential, it has generally been held merely directory."

² *Covington v. Ludlow*, 1 Met. (Ky.) 295; *Stewart v. Clinton*, 79 Mo. 603, 611; *Lebanon Light & M. W. Co. v. Lebanon*, 163 Mo. 254, 260, citing text. See *ante*, §§ 554, 557, note, 561, note; *post*, § 607.

is necessary to legal authority to make an order, and an order is entered, it will be presumed, when the contrary does not appear, that it was made with the required unanimity.¹

§ 580 (311). **Motives for adopting Ordinances not Subject to Judicial Inquiry.** — It is well settled that *the judicial branch of the government cannot institute an inquiry into the motives of the legislative department in the enactment of laws.* Such an inquiry would not only be impracticable in most cases, but the assumption and exercise of such a power would result in subordinating the legislature to the courts.² In analogy to this rule it is doubtless true that the courts will not, in general, inquire into the motives of the council in passing ordinances.³ But it would be disastrous, as we think, to apply the

¹ *Lexington v. Headley*, 5 Bush (Ky.), 508; *Covington v. Boyle*, 6 Bush (Ky.), 204; *McCormick v. Bay City*, 23 Mich. 457. See *Steckert v. East Saginaw*, 22 Mich. 104; *post*, § 1454. The final action of a city council, or other deliberative body, on any measure, is shown by its adjournment thereon, the public promulgation of its action, or subsequent proceedings inconsistent with a purpose to review. *State v. Van Buskirk*, 40 N. J. L. 463. In *Illinois*, a book or pamphlet containing the ordinances of a municipal corporation and purporting to be published by its authority, is evidence of the passage and contents of the ordinances contained in it, and of their legal publication. *Lindsay v. Chicago*, 115 Ill. 120; *infra*, § 606. Where a record is silent as to proceedings required by law to be taken, — as that the ayes and nays shall be called, — no presumption arises that other proceedings than those mentioned in the record took place. *Tracey v. People*, 6 Colo. 151. An ordinance will be presumed to be legally adopted unless it exceeds the legislative power of the city. *Ex parte Hinkle*, 104 Mo. App. 104. See *Index, Records and Documents*. When it is sought to impeach the validity of an ordinance on the ground that it was not adopted in the manner prescribed by law, it must appear affirmatively by the journal of the council that the mandatory requirements of the law relative to the passage of the ordinance have not been observed. *Portland v. Yick*, 44 Oreg. 439.

² *Cooley*, Const. Lim., 186, 187, where many of the cases are collected.

³ *Freeport v. Marks*, 59 Pa. St. 253; *Buell v. Ball*, 20 Iowa, 282 (collateral action between third persons); *Soon Hing v. Crowley*, 113 U. S. 703, 709; *People v. Cregier*, 138 Ill. 401, 414, citing text; *Lilly v. Indianapolis*, 149 Ind. 648, 665, citing text; *Downey v. State*, 160 Ind. 578, 583, citing text; *Coverdale v. Edwards*, 155 Ind. 374; *Schmidt v. Indianapolis*, 168 Ind. 631; 80 N. E. Rep. 632; *Crowley v. Ellsworth*, 114 La. 308; *People v. Gardner*, 143 Mich. 104; *Brown v. Cape Girardeau*, 90 Mo. 377; *Knapp v. St. Louis*, 156 Mo. 343; *Dreyfus v. Lonergan*, 73 Mo. App. 336, 346, citing text; *Philadelphia v. Randolph*, 4 Watts & S. (Pa.) 514; *Stull v. De Mattos*, 23 Wash. 71, 81, approving and following text. See also *Cronin v. People*, 82 N. Y. 318, 323; *Barhite v. Home Telephone Co.* 50 N. Y. App. Div. 25. It being well settled that the courts may decide upon the reasonableness of ordinances, they will in general judge of these, whatever their purpose, by considering their nature and effect, rather than by instituting an inquiry into the motives of the members of the council; although where the latter is material and relevant, it may in the author's judgment be done. Where power of repeal is reserved in an ordinance granting a franchise, the court will not pass upon the propriety of the ordinance of repeal; for the power of repeal does not depend upon either the necessity of it, or on the soundness of the reasons assigned for it. *Southern Bell Tel. Co. v. Richmond*, 98 Fed. Rep. 671.

analogy to its full extent. Municipal bodies, like the directories of private corporations, have too often shown themselves capable of using their powers fraudulently, for their own advantage or to the injury of others. We suppose it to be a sound proposition that their acts, whether in the form of resolutions or ordinances, *may be impeached for fraud actually consummated* at the instance of the municipality defrauded and perhaps at the instance of persons injured thereby.¹

§ 581 (312). **Same Subject.** — Accordingly, in Ohio, in a case where the legislature chartered a gas company, reserving the power of control, and subsequently empowered the city council to regulate the price of gas, the court considered the intention to be to limit the company to a fair and reasonable price, and that it must be fairly exercised; and if, in the colorable exercise of the power, a majority of the members, for a fraudulent purpose, *combined to fix the price at a rate* at which they knew it could not be made and sold without loss, their action would not bind the company, and in such a case their good faith, it was held, might be inquired into.²

§ 582. **Jurisdiction of Equity to enjoin Enactment of Invalid Ordinances.** — The courts will not, as a rule, enjoin the passage of unauthorized ordinances of a legislative character, and will ordinarily act only when steps are taken to make them available. A court of equity cannot properly interfere with, or in advance restrain the

¹ *People v. Cregier*, 138 Ill. 401, 414, citing text; *Glasgow v. St. Louis*, 107 Mo. 198, 203, quoting text; *State v. Gates*, 190 Mo. 540, 556; *Kansas City v. Hyde*, 196 Mo. 498, 506, quoting text. The ground of relief in such cases is fraud actually perpetrated, rather than an inquiry into the motives of the municipal body. See chapter on Remedies, &c., *post*. In *People v. Gardner*, 143 Mich. 104, the Supreme Court of Michigan dissented from the view of the author that an ordinance may be attacked on the ground that its passage was procured by fraud, and held that evidence was not admissible that an ordinance relating to the removal of garbage was not adopted in good faith, but for the purpose of conferring a monopoly on a concern to which was granted the exclusive right to remove garbage from the city.

² *State v. Cincinnati Gas Company*, 18 Ohio St. 262, distinguished from

Fletcher v. Peck, 6 Cranch, 87; *Dubuque Bank v. United States*, 1 G. Greene (Iowa), 553. The courts will not inquire, even on the complaint of the State, into the motives which governed members of the legislature in the enactment of a law, or allow to be shown, for the purpose of defeating the operation of the law, that it was passed by fraud, corruption, and bribery of the members. *Wright v. Defrees*, 8 Ind. 298; followed, *McCulloch v. State*, 11 Ind. 424, 431; *s. p. Sunbury, &c. Railroad Co. v. Cooper*, 33 Pa. St. 278; *Cooley, Const. Lim.*, 135, 136, 186, 208.

In such a case as that mentioned in the text, the established doctrine at the present day is that an unreasonable and confiscatory rate is unconstitutional and void, irrespective of any fraudulent purpose on the part of the members of the legislative or municipal body. See chapter on Public Utilities, *post*.

discretion of the municipal body while it is in the exercise of statutory or charter powers that are legislative in their character.¹ But

¹ *New Orleans Water Works v. New Orleans*, 164 U. S. 471, 481; *McChord v. Louisville & N. R. Co.*, 183 U. S. 483, 496; *Alpers v. San Francisco*, 32 Fed. Rep. 503; *Murphy v. East Portland*, 42 Fed. Rep. 308; *Montgomery Gas Light Co. v. Montgomery City Council*, 87 Ala. 245; *Chicago v. Evans*, 24 Ill. 52; *Sheridan v. Colvin*, 78 Ill. 237; *Stevens v. St. Mary's Training School*, 144 Ill. 336, cited *infra*, where exceptional cases are pointed out; *Roby v. Chicago*, 215 Ill. 604, 609; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505 (distinguishing *People v. Sturtevant*, 9 N. Y. 263; *Davis v. Mayor, &c. of New York*, 14 N. Y. 506); *Stubenrauch v. Neyenesch*, 54 Iowa, 567; *Harrison v. New Orleans*, 33 La. An. 222; *State v. Judges*, 35 La. An. 1075, 1082; *New Orleans El. R. Co. v. New Orleans*, 39 La. An. 127; *Albright v. Fisher*, 164 Mo. 56; *State v. Gates*, 190 Mo. 540; *Cape May & S. L. R. Co. v. Cape May*, 35 N. J. Eq. 419; *People v. Mayor, &c. of New York*, 9 Abb. Pr. (N. Y.) 253; *Whitney v. Mayor, &c. of New York*, 28 Barb. (N. Y.) 233; *People v. Mayor, &c. of New York*, 32 Barb. (N. Y.) 102; *Kadderly v. Portland*, 44 Oreg. 118; *State v. Milwaukee County Superior Ct.*, 105 Wis. 651. See *Index, Equity; Injunction; Public Utilities*.

An injunction will not be granted to restrain the mayor of a city from signing an ordinance passed by the council purporting to repeal a previous ordinance and contract under it. *Non constat* that the mayor will sign the ordinance, or that the council will pass it over his veto if returned unsigned, or that it will become executory. It is not until after such ordinance has been signed or become executory that its validity can be judicially contested and determined. *New Orleans El. R. Co. v. New Orleans*, 39 La. An. 127. A gas light company which had an unexpired exclusive franchise to use the city streets and to light the city for a term of years was held, under the principle stated in the text, not to be entitled to injunction restraining the passage of an ordinance for the granting of a conflicting franchise to another company. *Montgomery Gas Light Co. v. Montgomery City Council*, 87 Ala. 245. See also *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505.

In *Stevens v. St. Mary's Training School*, 144 Ill. 336, the court, after referring to the fact that there are cases which hold or seem to hold that where a municipal corporation is about to pass a resolution or ordinance which is void as being *ultra vires*, a court of chancery will enjoin it from so doing, and after pointing out that a large number of the decisions which uphold the right of equity to interfere with the action of municipal corporations where such action is in excess of the legal power, will be found on examination to be based upon facts which show that the injunctions were issued against the officers or agents attempting to enforce corporate resolutions, ordinances, by-laws, or orders, said: "There are many decisions which hold in express and definite terms that 'the courts will not enjoin the passage of unauthorized ordinances, and will ordinarily act only when steps are taken to make them available' (1 Dillon Mun. Corp., 4th ed., § 308, note, p. 387). There may be instances where this restriction upon the powers of the court will sometimes be disregarded, as where municipal corporations are exercising mere business or ministerial, rather than legislative, powers (*Valparaiso v. Gardner*, 97 Ind. 1; 1 Dill. Mun. Corp., 4th ed., §§ 473, 474, 927, 1048); or are wrongfully disposing of property held by them as trustees for the public (*Milhau v. Sharp*, 15 Barb. (N. Y.) 193; *Sherlock v. Winnetka*, 59 Ill. 389); or are attempting to act upon matters not by their charters or by the laws subject to their jurisdiction (*Alpers v. San Francisco*, 32 Fed. Rep. 503); or where it appears that the mere voting on and formal passage of a resolution or ordinance will instantly, without any action or attempt to enforce any right or privilege under it, effect an irremediable private injury (*Whitney v. Mayor, &c. of New York*, 28 Barb. (N. Y.) 233). The weight of authority and the tendency of the more recent decisions are in favor of the position that the restraining power of the courts should be directed against the enforcement rather than the pas-

the courts have jurisdiction, at the suit of a taxpayer on behalf of the city, or at the suit of a party specially damaged by the passage

sage of unauthorized orders and resolutions, or ordinances, by municipal corporations."

It has been said that the courts have jurisdiction to enjoin the passage of an ordinance which is not within the scope of the powers of the council, if the passage of the ordinance would work irreparable injury. *Spring Valley Water Works v. Bartlett*, 16 Fed. Rep. 615. In *Cape May & S. L. R. Co. v. Cape May*, 35 N. J. Eq. 419, it was held that injunction will not lie to restrain a city council from repealing an ordinance granting a right to use the streets of a city for railroad purposes. In delivering the opinion of the court, *Van Fleet, V. C.*, pointed out that if the defendants had admitted that the purpose of introducing the repealing ordinance was to pass it in order that they might, under its authority, tear up the complainant's track, then, inasmuch as it would clearly have appeared by the confession of the defendants that they had, in advance of the passage of the ordinance, determined to do the complainants an irreparable wrong and simply used the ordinance as a means to an unlawful end, he would not hesitate to grant an injunction. See also *Paterson & P. H. R. Co. v. Paterson*, 24 N. J. Eq. 158. But in *North Jersey St. R. Co. v. South Orange*, 58 N. J. Eq. 83, where a township ordinance granting franchises to a street railway corporation provided that the township might adjudge a breach of duties and declare a forfeiture, the court held that where the alleged cause of forfeiture was caused without any fault on the part of the railroad company, it would interfere by injunction to restrain the adoption of an ordinance by the township declaring a forfeiture of the franchise of the corporation because it did not comply with the statute of permission. This decision was rendered upon the theory that the declaration of the forfeiture was not a legislative act, but was judicial on its character, and therefore the proper subject of control by a court of equity.

In *People v. Sturtevant*, 9 N. Y. 263, it was held that the adoption of a resolution or ordinance granting a right to lay railroad tracks in a city street was not in any just sense an act of municipal legislation, but in substance

was a grant upon condition, and that even if freedom from judicial interference or restraint by injunction belonged to municipal legislation, it could not be that by giving to an act not legislative in its nature the form of an ordinance or resolution the jurisdiction of the courts could be defeated. Hence, it was held that the courts had jurisdiction to grant an injunction restraining the passage of such resolutions or ordinances and to commit the members of the council for contempt for a violation of the injunction. It is, however, to be observed that the court did not pass upon the propriety of judicial restraint of the passage of an ordinance, but only asserted that if it assumed to exercise the power it was within its jurisdiction as a court. See also *Davis v. Mayor, &c. of New York*, 14 N. Y. 506; s. c. 1 Duer (N. Y.), 451; *People v. Dwyer*, 90 N. Y. 402, cited *infra*; *post*, chapter on Streets. But in *State v. Milwaukee County Superior Ct.*, 105 Wis. 651, the Supreme Court of Wisconsin dissented from the above decisions of the New York courts and held that the court was entirely without jurisdiction to restrain the passage of an ordinance, that such an injunction, if granted, was void, and that disobedience to its provisions did not constitute contempt of court. *Quære?*

In *People v. Dwyer*, 90 N. Y. 402, statutory authority was conferred for the construction of a railroad on such streets and avenues as might be named by the mayor and common council. The common council passed a resolution naming certain streets and sent it to the mayor, who returned it with a message of disapproval. A temporary injunction was granted restraining the common council from overriding and disapproving the mayor's veto. Notwithstanding such injunction, the common council by the necessary vote passed the prohibitive resolution over his veto. It was held that the council were guilty of contempt in disobeying the injunction, and it was pointed out that whether the act so to be enjoined was or was not of a legislative character, and whether other facts justified the interposition of equity, were questions to be disposed of by the court acting on the facts; it had power to prohibit action until the court investi-

of the ordinance, or whose private rights or property are affected thereby, to restrain the enforcement of *ultra vires* and invalid ordinances and regulations.¹

§ 583 (313). **Legislative Officers are not personally Liable for Adoption of Ordinances.** — Where the officers of a municipal corporation are invested with legislative powers, they are of course exempt from individual liability for the passage of any ordinance within their authority, and their motives in reference thereto will not be inquired into; nor are they individually liable for the passage of any ordinance not authorized by their powers; for such ordinance is void, and need not be obeyed.²

gated and finally decided, and any error in its decision could only be corrected on appeal. The court also held that while it is true that equity will not ordinarily interfere with matters resting largely in the discretion of municipal authorities, yet, where the threatened action will produce an irreparable injury, and consists in a disposition of the public property by devoting it to the uses of a private corporation, or where an illegal grant is threatened, or the action attempted is corrupt and fraudulent and an abuse of trust, there is authority to sustain an interference by injunction. In *Cincinnati St. R. Co. v. Smith*, 29 Ohio St. 291, an injunction against an ordinance granting rights to street railroad was sustained after it had been passed by the council and approved by the mayor, but before it had taken effect by due publication. In *Page v. Allen*, 58 Pa. St. 338, an injunction was granted against the board of aldermen of Philadelphia to restrain them from taking action to carry into effect an unconstitutional statute. No question was raised as to the power of the court to issue the injunction or the propriety of the exercise of equitable powers. But if an ordinance be void on its face and no irreparable injury would result from its mere passage, a court of equity will not enjoin its passage. *Spring Valley Water Works v. Bartlett*, 16 Fed. Rep. 615.

¹ *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505; *Hanson v. Hunter*, 86 Iowa, 722; *New Orleans Water Works v. New Orleans*, 164 U. S. 471, 481; *Page v. Baltimore*, 34 Md. 558; *Baltimore v. Radecke*, 49 Md. 217. In *Valparaiso v. Gardner*, 97 Ind. 1, 3, it is

said, *Elliott*, C. J.: "It is true that courts will not interfere with mere municipal legislation, but when the legislation is sought to be made executory by a ministerial act, the courts will interfere in cases where the act transcends the authority of the corporate officers." In *New Jersey*, after an ordinance has been passed, the proper course to review its validity is by *certiorari*. *State v. Paterson*, 34 N. J. L. 163, 170; *State v. Jersey City*, 34 N. J. L. 33; *Gregory v. Jersey City*, 34 N. J. L. 390. See more fully chapter on *Certiorari*, *post*. The mere fact that a city has passed an ordinance without complying with the requirements of the statute for its enactment, the bill not setting up any violation of the Federal constitution, is not sufficient to give a Federal court jurisdiction as involving a question arising under the Federal constitution. *Savannah v. Holst*, 132 Fed. Rep. 901. See also *Barney v. New York City*, 193 U. S. 430. See chapter on *Public Utilities*, *post*. In *Hamilton Gas Light Co. v. Hamilton City*, 146 U. S. 258, 266, *Harlan*, J., said: "A municipal ordinance, not passed under supposed legislative authority, cannot be regarded as a law of the State within the meaning of the constitutional prohibition against State laws impairing the obligations of contracts." Citing *Murray v. Charleston*, 96 U. S. 432, 440; *Williams v. Bruffy*, 96 U. S. 176, 183; *Lehigh Water Co. v. Easton*, 121 U. S. 388, 392; *New Orleans Water Works v. Louisiana Sugar Co.*, 125 U. S. 18, 31, 38.

² *Jones v. Loving*, 55 Miss. 109; *Paine v. Boston*, 124 Mass. 486; *Freeport v. Marks*, 59 Pa. 253, 257; *Baker v. State*, 27 Ind. 485; *Anne Arundel*

§ 584 (314). **Duration and Repeal of Ordinances.** — Since a valid by-law never becomes obsolete, it remains in force until *repealed* by the legislature or the corporation.¹ The power to make includes the power to repeal without reference to the people of the municipality.²

County v. Duckett, 20 Md. 468; Weaver v. Devendorf, 3 Denio (N. Y.), 117; Pike v. Megam, 44 Mo. 491; McHenry v. Sneer, 56 Iowa, 649; Wimbish v. Hamilton, 47 La. An. 246, 253.

¹ Ryce v. Osage, 88 Iowa, 558; Hutchins v. Durham, 118 N. Car. 457.

² Kansas City v. White, 69 Mo. 261; King v. Ashwell, 12 East, 22; King v. Bird, 13 East, 367; Great Western Railway Co. and North Cayuga, *In re*, 23 Upper Can. C. P. 28; Bloomer v. Stolley, 5 McLean, 158; Santo v. State, 2 Iowa, 165; Bank of Chenango v. Brown, 26 N. Y. 467; Rice v. Foster, 4 Harring. (Del.) 479; People v. Collins, 3 Mich. 347; Greaves v. Jacksonville, 17 Fla. 174; Welch v. Bowen, 103 Ind. 252, 256, citing text; Ross v. Stackhouse, 114 Ind. 200, 203; Greenwood v. State, 159 Ind. 267, 269; Biggar's Mun. Manual (Canada, 1900), 85. An ordinance will only *repeal an earlier ordinance by implication* when the provisions of the later ordinance are necessarily or plainly inconsistent with and repugnant to those of the earlier. Repeals by implication are not favored; and, if possible, construction will be adopted by which both ordinances may stand. Chicago v. Quimby, 38 Ill. 274; People v. Harrison, 185 Ill. 307; *Ex parte* Ackerman, 6 Cal. App. 5; 91 Pac. Rep. 429. Thus an ordinance is not repealed by a subsequent ordinance relating to the same subject matter which without altering the provisions of the earlier ordinance provides regulations in regard to the subject matter which are not inconsistent with the first ordinance. *Ex parte* Hinkle, 104 Mo. App. 104; For example, where the first ordinance required a license to be obtained for dram-shops, and the second ordinance merely specified the requirements which should be complied with by applicants for licenses, it was held that the earlier ordinance was not repealed. *Ex parte* Hinkle, 104 Mo. App. 104. But a provision in an ordinance which is plainly repugnant to an ordinance previously adopted repeals the earlier ordinance to the extent of the conflict between them.

Ex parte Wolf, 14 Neb. 24; Burlington v. Eastlow, 43 N. J. L. 113.

A *general ordinance* held to be repealed by a subsequent *special ordinance* inconsistent therewith. Budd v. Camden Horse R. Co., 61 N. J. Eq. 543, aff'd 63 N. J. Eq. 804. A special ordinance granting a particular person permission to store oil was held to be repealed by a general ordinance repugnant thereto, making the storage of oils a criminal offence. Crowley v. Ellsworth, 114 La. 308. An ordinance is repealed by implication where a subsequent ordinance *revises it, and covers the same subject matter*. Von der Leith v. State, 60 N. J. L. 46; Roche v. Jersey City, 40 N. J. L. 257. An ordinance regulating the opening of streets for the purpose of laying gas pipes held to be repealed by a subsequent ordinance granting the right to use the streets therefor to a corporation which contained provisions intended to be *complete regulation* of the right of the corporation to open the streets. Public Service Corporation v. De Grote, 70 N. J. Eq. 454.

The amendment of an ordinance *omitting therefrom* a provision contained in it as originally enacted operates to repeal the omitted provision. State v. Enger, 81 Minn. 399. Where a city had adopted an ordinance prohibiting the discharge of fireworks within the city limits, it was held that a *resolution suspending the ordinance* during an election campaign so far as it applied to meetings and parades of political parties or associations was not a repeal, but was in purpose and effect a permit or license to such parties, and was to be so construed in determining the liability of the city to persons injured by an explosion of fireworks. Landau v. City of New York, 180 N. Y. 48, rev'g 93 N. Y. App. Div. 613; s. c. 90 N. Y. App. Div. 50.

A *change of a city charter* does not affect existing ordinances in harmony with the new charter. Ferrell v. Opelika, 144 Ala. 135. An ordinance to suppress houses of prostitution passed under the authority of a general incorporation law was held not to be

'The repeal cannot, where there is no reserved right to repeal, operate retrospectively to impair private rights vested under it.¹ Therefore, the legislature, having authorized a religious corporation to establish a cemetery within the limits of a city, on obtaining the consent of the city, and such consent having been given, the city authorities cannot, after their consent has been acted upon, repeal the resolutions giving it, and enjoin the religious corporation from the use of the cemetery, unless, indeed, it is shown to be an actual nuisance, detrimental to the health of the city, in which case its police and governmental powers might doubtless be exercised.²

repealed by the adoption of a new incorporation law by the legislature authorizing cities to "restrain, prohibit, and suppress" such houses, and expressly repealing the old incorporation law. *In re Hall*, 10 Neb. 537. An act changing an incorporated town into a city does not of itself repeal pre-existing ordinances. *Per Strong, J., Erie Academy Trustees v. Erie*, 31 Pa. St. 515. But a subsequent constitutional provision or legislative enactment in conflict with existing by-laws renders the latter void. *Mobile v. Dargan*, 45 Ala. 310. An ordinance is repealed by a subsequent charter containing provisions inconsistent therewith. *Wethington v. Owensboro*, 21 Ky. Law Rep. 960; 53 So. Rep. 644.

¹ *Rex v. Ashwell*, 12 East, 22; *King v. Bird*, 13 East, 367; *Terre Haute v. Lake*, 43 Ind. 480; *State v. Chillicothe City Clerk, &c.*, 7 Ohio St. 355; *Stoddard v. Gilman*, 22 Vt. 568; *Pond v. Negus*, 3 Mass. 230; *ante*, chap. xiii; *State v. Graves*, 19 Md. 351; *Bigelow v. Hillman*, 37 Me. 52; *Reiff v. Conner*, 10 Ark. 241; *Road, In re*, 17 Pa. St. 71, 75; *Nelson v. St. Martin's Parish*, 111 U. S. 716; *Louisiana v. Pillsbury*, 105 U. S. 278; *Cape May & S. L. R. R. Co. v. Cape May*, 35 N. J. Eq. 419; *People v. O'Brien*, 111 N. Y. 1; *Cunningham v. Almonte*, 21 Upper Can. C. P. 459; *Great Western R. Co., &c., In re*, 23 U. C. C. P. 28. A repeal of a repealing ordinance, reviving the original, does so only from the date of the reviving ordinance. It has no retroactive effect. *Rutherford v. Swink*, 96 Tenn. 564.

² *New Orleans v. St. Louis Church*, 11 La. An. 244, distinguished from *Brick Presb. Church v. Mayor of New York*, 5 Cow. (N. Y.) 538; *Musgrove v. Catholic Church*, 10 La. An. 431;

ante, § 245. The repeal of an ordinance puts an end to a pending prosecution under the repealed ordinance, unless there be a saving clause. The contrary rule as to State statutes held not to apply to by-laws or ordinances. *Naylor v. Galesburg*, 56 Ill. 285; *Kansas City v. Clark*, 68 Mo. 588; *Barton v. Gadsden*, 79 Ala. 495, which also holds that an ordinance prohibiting the sale of liquor under a penalty is repealed by an ordinance prohibiting such sale without a license, because of inconsistency and repugnancy. The fact that an ordinance directing a certain street improvement to be made was repealed, held, to be conclusive in favor of a perpetual injunction, restraining the contractor or the city from proceeding. *Kaime v. Harty*, 4 Mo. App. 357.

Where the right has not been reserved, an ordinance containing a franchise cannot after its acceptance be annulled or amended without the consent of both parties. *Cleveland City R. Co. v. Cleveland*, 94 Fed. Rep. 385. See also *Missouri K. & T. Trust Co. v. Smart*, 51 La. An. 416. An ordinance having for its obvious purpose the destruction of an irrevocable franchise theretofore granted (*e. g.* certain rights in a street to a railroad company) is void, where no question of a resort to the police power to abate an alleged nuisance is presented, as an attempted regulation of an admitted right. *Port of Mobile v. Louisville & Nashville R. R. Co.*, 84 Ala. 115. When no express power of repeal is preserved by the city's charter, the city cannot, by ordinance, repeal ordinances amounting to contracts. *Ashland v. Wheeler*, 88 Wis. 607; *Baltimore Trust & Guaranty Co. v. Baltimore*, 64 Fed. Rep. 153. See chapters on Contracts and Public Utilities.

§ 585 (315). **Mode of conferring the Power; Construction of Grants of Authority.** — Municipal charters, or incorporating acts, are sometimes *silent as to the power to pass by-laws* or ordinances; and where this is the case, the municipal body has the power, incidental to all corporations, to enact appropriate by-laws.¹ Occasionally, the charter or incorporating act, without any specific enumeration of the purposes for which by-laws may be made, contains a general and comprehensive grant of power to pass all such as may seem necessary to the well-being and good order of the place. More frequently, however, the charter or incorporating act authorizes the enactment of by-laws in certain specified cases, and for certain purposes; and after this specific enumeration a general provision is added, that the corporation may make any other by-laws or regulations necessary to its welfare, good order, &c., not inconsistent with the Constitution or laws of the State. This difference is essential to be observed, for the power which the corporation would possess under what may, for convenience be termed “the general welfare clause,” *if it stood alone*, may be limited, qualified, or, when such intent is manifest, impliedly taken away by provisions specifying the particular purposes for which by-laws may be made. It is clear that the general clause can confer no authority to abrogate the limitations contained in special provisions.²

§ 586 (316). **Special and general Grants of Authority.** — When there are *both special and general provisions*, the power to pass by-laws under the special or express grant can only be exercised in the cases and to the extent, as respects those matters, allowed by the charter or incorporating act; and the power to pass by-laws under the general clause does not enlarge or annul the power conferred by the special provisions in relation to their various subject matters, but gives authority to pass by-laws, reasonable in their character, upon all other matters within the scope of their municipal authority, and not repugnant to the Constitution and general laws of the State.³ And

¹ *Coal-Float v. Jeffersonville*, 112 Ind. 15, citing the text. *Supra*, § 573, note. *Chamberlain v. Evansville*, 77 Ind. 542. Text cited, *Baltimore & O. R. Co. v. Whiting*, 161 Ind. 228; *State v. Butler*, 178 Mo. 272, 302.

² *Yonkers v. Yonkers R. Co.*, 51 N. Y. App. Div. 271, citing text; *Mernaugh v. Orlando*, 41 Fla. 433, 439, quoting text.

³ *State v. Butler*, 178 Mo. 272, approving and applying text; *Ex parte* Mayor, &c. of Anniston, 90 Ala. 516, quoting text; *Mernaugh v. Orlando*, 41 Fla. 433, 439, quoting text; *Huesing v. Rock Island*, 128 Ill. 465, 476, quoting text; *State v. Ferguson*, 33 N. H. 424, where this subject is ably treated in a judgment delivered by Mr. Justice Foster, holding a by-law of the city of Concord, in relation to the sale of intoxicating liquor, invalid, as contravening the special provisions of the charter, and therefore not sustain-

it has been very properly held that a special grant of power to a municipal corporation to adopt ordinances on enumerated subjects connected with municipal concerns is in addition to the incidental power of the corporation.¹

§ 587 (317). **Ordinances cannot enlarge or change the Charter or Statute.** — Since all the powers of a corporation are derived from the law and its charter, it is evident that *no ordinance or by-law of a corporation can enlarge, diminish, or vary its powers.*² A similar

able under the general welfare clause of the charter.

"The power to make by-laws, when not expressly given, is implied as an incident to the very existence of a corporation; but in the case of an express grant of the power to enact by-laws limited to certain specified cases and for certain purposes, the corporate power of legislation is confined to the objects specified, all others being excluded by implication." *Per Sawyer, J., arguendo*, in *State v. Ferguson*, 33 N. H. 424, 430; citing 2 Kyd on Corp. 102; Angell & Ames on Corp. 177; and *Child v. Hudson's Bay Co.*, 2 P. Wms. 207. The true rule in such cases may, perhaps, be correctly expressed to be, that the enumeration of special cases does not, unless the intent be apparent, exclude the implied power any further than necessarily results from the nature of the special provisions. See *Heisembrittle v. Charleston*, 2 McMullan (S. Car.) 233; *Wadleigh v. Gilman*, 12 Me. 403; *State v. Clark*, 28 N. H. 176, and comments in 33 N. H. 432; *State v. Freeman*, 38 N. H. 426; *Commonwealth v. Turner*, 1 Cush. (Mass.) 493; *Collins v. Hatch*, 18 Ohio, 523; see *New Orleans v. Philippi* (taxation), 9 La. An. 44; *Indianapolis v. Indianapolis Gas Co.*, 66 Ind. 396, citing text; *Laundry License Case*, 22 Fed. R. 701; *Clark v. South Bend*, 85 Ind. 276; *Huesing v. Rock Island*, 128 Ill. 465, applying text. *Post*, § 749, and cases.

In *Georgia*, the Superior Courts adopt the following as the true rule for ascertaining the extent of the power of a city to pass ordinances. "The city council is restrained to such matters, whether specially enumerated or included under general grant, as are included in themselves, such matters as are free from constitutional objection and have not been the subject of general legislation; or, as it is expressed in the charter, are not repugnant to

the constitution or laws of the land." *Dubois v. Augusta* (health ordinance), *Dudley* (Ga.) Rep. 30; *Williams v. Augusta* (powder ordinance), 4 Ga. 509, 514. Power to pass necessary by-laws is incidental, but this power is limited not only by the terms, but the spirit and design, of the charter, and the general principles and policy of the common law. *Taylor v. Griswold*, 17 N. J. Eq. 222; *Mount Pleasant v. Breeze*, 11 Iowa, 399, *per Wright, J.*

A power to pass ordinances to "improve the morals and order" of the people does not authorize an ordinance to "punish" the offence of keeping houses of ill-fame. Whether the legislature can constitutionally confer power upon cities to punish acts made crimes by the laws of the State, *not decided*. *Chariton v. Barber*, 54 Iowa, 360, *Beck, J.* More fully, *post*, § 749, *et seq.*

¹ *State v. Morristown*, 33 N. J. L. 57. *Depue, J.*, in his opinion, distinguishes such a case from *Norris v. Staps, Hobart*, 210, where the corporation was created by the crown, and where it was held that a special clause in the letters-patent authorizing the corporate body (a fellowship of weavers) to make by-laws, did not add to implied powers, and that its by-laws were subject to the general law of the realm and subordinate to it. "But," he adds, "a special grant of power to a municipal corporation is an entirely different thing; it is a delegation of authority to legislate by ordinance on the enumerated subjects, and does add to the powers incident to the creation of the corporation. The numerous instances, in our own State, of the grant of such powers in relation to the opening and improvement of streets, the making of sewers, and the assessment of taxes, afford illustrations of this distinction." *Ib.* 62.

² *Thompson v. Carroll*, 22 How. 422; *Andrews v. Union M. F. Insurance Co.*,

rule obtains in England, where it is held that neither the king's charter nor any by-law can introduce an alteration in rules which have been prescribed to a corporation by an act of parliament.¹ By-laws are in their nature strictly local, and subordinate to the general laws.

§ 588 (318). **Ordinance need not recite Authority to pass it.** — *It is not essential to the validity* of an ordinance executing powers conferred by the legislature that it should state the power in execution of which the ordinance is passed. If it state no particular power as its basis, it will be judicially regarded as emanating from that power which would have warranted its passage. If two such powers exist, it may be imputed to either, in conformity to which its provisions and prerequisites show that it has been adopted. If,

37 Me. 256; *Thomas v. Richmond*, 12 Wall. 349; *Montgomery v. Foster*, 133 Ala. 587, citing text; *Chicago v. Burke*, 226 Ill. 191; *Heyker v. Herbst*, 106 Ky. 509, citing text; *State v. Butler*, 178 Mo. 272; *Asphalt & G. Const. Co. v. Haessler*, 201 Mo. 400; *Horan v. Lane*, 53 N. J. L. 275, 276, citing text; *Ex parte Powell*, 43 Tex. Crim. Rep. 391; *State v. Milwaukee Superior Court*, 105 Wis. 651, 673, approving text; *Garden City v. Abbott*, 34 Kan. 283 (license tax upon non-resident attorneys, imposed by ordinance under a law authorizing such a tax upon residents only held unlawful); *Commonwealth v. Roy*, 140 Mass. 432; *State v. St. Paul*, 36 Minn. 529; *State v. Nashville*, 15 Lea (Tenn.), 697 (power to change a salary confers no power to abolish it). "A power vested by legislation in a city corporation, to make by-laws for its own government and the regulation of its own police, cannot be construed as imparting to it the power to repeal the (general) laws in force, or to supersede their operation by any of its ordinances. Such a power, if not expressly conferred, cannot arise by mere implication, unless the exercise of the power given be inconsistent with the previous law, and does necessarily operate as its repeal *pro tanto*. Nor can the presumption be indulged, that the legislature intended that an ordinance passed by the city should be superior to, or take the place of, the general law of the State upon the same subject;" *Simpson, C. J., March v. Commonwealth*, 12 B. Mon. (Ky.) 25, 29; *Rothschild v. Darien*, 69 Ga. 503;

Breninger v. Belvidere, 44 N. J. L. 350. "Huckster" means a petty dealer or retailer of small articles of provisions, &c., and an ordinance cannot enlarge the ordinary meaning so as to embrace "any person not a farmer or butcher who should sell, or offer for sale, any commodity not of his own manufacture," and subject such person to a penalty; it not being, says *Ranney, J.*, "part of the franchise of municipal corporations to change the meaning of English words." *Mays v. Cincinnati*, 1 Ohio St. 268, 272, "Butcher" defined; *Henback v. State*, 53 Ala. 523. Where a charter forbids the passage of ordinances upon matters regulated by general statutes, ordinances dealing with subjects covered by the general statutes are invalid. *State v. Tyrrell*, 73 Conn. 407. An ordinance requiring labor agents to give bond for the faithful discharge of their duties is invalid where not authorized by statute, the city council having no power to impose unauthorized obligations. *State v. Von Sachs*, 45 La. An. 1416.

¹ *Rex v. Miller*, 6 Term R. 277; *Rex v. Barber Surgeons*, 1 Ld. Raym. 585. It has even been said that the general assembly cannot authorize a municipal corporation to repeal, by ordinance, a statute of the State. *Haywood v. Savannah*, 12 Ga. 404, *per Lumpkin, J.* But it may provide that on the passage of an ordinance of a certain character, the State law on the subject shall not be in force in the corporate limits. *State v. Binder*, 38 Mo. 450; *post*, chap. xxxii.

in these respects it is in accordance with both, no injustice can result in regarding it as the offspring of both or either of the powers.¹ But the necessity or reason for the ordinance must be expressed in it when the charter provision expressly requires that it shall be.²

§ 589 (319). **Must be Reasonable and Lawful.** — In England, the subjects upon which by-laws may be made were not usually specified in the king's charter, and it became an established doctrine of the courts that every corporation had the implied or incidental right to pass by-laws; but this power was accompanied with these limitations, namely, that *every by-law must be reasonable*, and not inconsistent with the charter of the corporation, nor with any statute of parliament, nor with the general principles of the common law of the land, particularly those having relation to the liberty of the subject or the rights of private property.³ In this country the courts have often affirmed the general incidental power of municipal corporations to make ordinances, but have always declared the sound and wise doctrine that ordinances passed in virtue of the implied

¹ *Per Dorsey, C. J.*, Methodist P. Church v. Baltimore, 6 Gill (Md.), 391. See also Townsend v. Hoyle, 20 Conn. 1, 8; Blakeslee v. Tyler, 55 Conn. 387, 395. Under power to pass an ordinance if found *necessary*, the *necessity* for its enactment, being implied from its mere passage, need not be recited in the ordinance, nor averred in proceedings to enforce it. Stuyvesant v. Mayor, &c. of New York, 7 Cow. (N. Y.) 588; s. p. Young v. St. Louis, 47 Mo. 492. This case reaffirmed in Kiley v. Forsee, 57 Mo. 390; Platter v. Elkhart County, 103 Ind. 300. See chap. on Municipal Bonds, *post*, that recital of wrong act does not invalidate bond. So, in England it is not necessary that the preamble to a by-law should state the reasons for making it. Rex v. Harrison, 3 Burr. 1328. See also Grierson v. Ontario, 9 Upper Can. Q. B. 623; Fisher v. Vaughan, 10 Upper Can. Q. B. 492. See also Crowley v. Ellsworth, 114 La. 308; Cronin v. People, 82 N. Y. 318, 323. If a municipal corporation attempt to act according to a statute not in force, this does not invalidate their proceedings, if the same are in accordance with existing statutes. State v. Jersey City, 27 N. J. L. 493; Compare Northern R. Co. v. Englewood, 62 N. J. L. 188, cited *infra*.

² Hoyt v. Saginaw, 19 Mich. 39. In Northern R. Co. v. Englewood, 62 N. J.

L. 188, the charter provided for two methods of opening streets. One was by proceedings on the petition of property owners and the other by the council on its own initiative. The latter power might be exercised by the council "whenever in their opinion the public good may require it." It was held that in view of the alternative methods, an ordinance intended to be an exercise of the second power should recite a determination that the public good required the opening. Collins, J., said, — "We think that where such a determination is authority only for alternative action, the determination must affirmatively appear. Any other rule would leave it impossible to know whether the action was based upon such a determination, or upon a mistake of fact as to the existence of the normal conditions authorizing it, and would in effect work a repeal of those conditions." *Quare?*

³ Sutton's Hospital Case, 10 Rep. 31 a; Feltmakers v. Davis, 1 Bos. & P. 98, 100; Norris v. Staps, Hob. 210, 211; Rex v. Spencer, 3 Burr. 1828; Com. Dig. Franch. F. 10; London v. Vanaker, 1 Ld. Raym. 496; 2 Kyd, chap. iv. § 10, p. 95, and cases cited; Bac. Abr. tit. *By-law*. Text cited Montgomery v. Foster, 133 Ala. 587, 596; McInerney v. Denver, 17 Colo. 302, 315; Cape May R. Co. v. Cape May, 59 N. J. L. 404, 407.

power must be reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the State.¹ These are the criteria or tests of the validity

¹ *Must be reasonable.* Kip v. Paterson, 26 N. J. L. 298; Dayton v. Quigley (citing text), 29 N. J. Eq. 77; Northern Liberties v. Northern Liberties Gas Co., 12 Pa. St. 318; Fisher v. Harrisburg, 2 Grant (Pa.) Cases, 291; Commonwealth v. Robertson, 5 Cush. (Mass.) 438; Waters v. Leech, 3 Ark. 110; Memphis v. Winfield, 8 Humph. (Tenn.) 707; Davis v. Anita, 73 Iowa, 325, text approved; Frank, *In re*, 52 Cal. 606; Commonwealth v. Steffee, 7 Bush (Ky.), 161; People v. Throop, 12 Wend. (N. Y.) 183, 186; Columbia v. Beasley, 1 Humph. (Tenn.) 232; State v. Freeman, 38 N. H. 426; White v. Nashville, 2 Swan (Tenn.), 364; Pedrick v. Bailey, 12 Gray (Mass.), 161; Dunham v. Rochester, 5 Cow. (N. Y.) 462; Clason v. Milwaukee, 30 Wis. 316; Tugman v. Chicago, 78 Ill. 405; *Ex parte* Chin Yan, 60 Cal. 78; Gilham v. Wells, 64 Ga. 192; Meyers v. Chicago, R. I. & P. R. Co., 57 Iowa, 555, approving text; Cape Girardeau v. Riley, 52 Mo. 424; Kneedler v. Norristown, 100 Pa. St. 368; O'Maley v. Freeport, 96 Pa. St. 24; Kirkham v. Russell, 76 Va. 956; Atkinson v. Goodrich Transportation Co., 60 Wis. 141 (ordinance requiring *spark arrester* on steamboats); Weigand v. District of Columbia, 22 App. D. C. 559, citing text; Heylman v. District of Columbia, 27 App. D. C. 563; Oxanna v. Allen, 90 Ala. 468; Toney v. Macon, 119 Ga. 83; Lake View v. Tate, 130 Ill. 247; Hawes v. Chicago, 158 Ill. 653; McFarlane v. Chicago, 185 Ill. 252; Wice v. Chicago & N. W. R. Co., 193 Ill. 351; Bush v. Peoria, 215 Ill. 515, 517; Peoria v. Gugenheim, 61 Ill. App. 374; Chicago v. Gunning System, 114 Ill. App. 377, *aff'd* 214 Ill. 628; Champer v. Greencastle, 138 Ind. 339; Pittsburgh, C. C. & St. L. R. Co. v. Crown Point, 145 Ind. 421; Gastenau v. Commonwealth, 108 Ky. 473; Winthrop v. New England Chocolate Co. 180 Mass. 464; State v. Barge, 82 Minn. 256, 257; Corrigan v. Gage, 68 Mo. 541, 545; Kelly v. Meeks, 87 Mo. 396, 401; State v. Birch, 186 Mo. 205, 219; Lamar v. Weidman, 57 Mo. App. 507; Springfield v. Starke, 93 Mo. App. 70; Trenton Horse R. Co. v. Trenton, 53 N. J. L. 132, 135; Cape May v. Cape

May, D. B. & S. P. R. Co., 60 N. J. L. 224; Carthage v. Frederick, 122 N. Y. 268; Buffalo v. Hill, 79 N. Y. App. Div. 402; State v. Hill, 126 N. Car. 1139, 1142, approving text; Wygant v. McLauchlan, 39 Ore. 429; *Ex parte* Battis, 40 Tex. Crim. Rep. 112; *Ex parte* Patterson, 42 Tex. Crim. Rep. 256; Stafford v. Chippewa Val. El. R. Co., 110 Wis. 331; Le Feber v. West Allis, 119 Wis. 608; Biggar's Mun. Manual (Canada, 1900), 329.

An ordinance requiring *druggists to furnish quarterly verified statements* of the kind and quantity of intoxicating liquors sold, to whom, &c., was held unreasonable and oppressive. Clinton v. Phillips, 58 Ill. 102. An ordinance *exacting a license from peddlers* of "not less than one nor more than twenty-five dollars for a fixed time, in the discretion of the mayor," held unreasonable. State Center v. Barenstein, 66 Iowa, 249. An ordinance requiring *cotton merchants to keep a record* of the name of the seller of loose cotton, and the quantity of each purchase, also held to be against the principles of personal liberty and common right. Long v. Shelby Taxing District, 7 Lea (Tenn.), 134. An ordinance *forbidding preaching, lecturing, &c., on a public common*, held reasonable. Commonwealth v. Davis, 140 Mass. 485; Mankato v. Fowler, 32 Minn. 364 (license fee of \$300 upon auctioneers unreasonable).

The trustees of public schools had statutory authority to direct what branches should be taught, and to adopt and enforce all necessary *rules and regulations for the management and government of schools*. A candidate for admission passed a satisfactory examination in everything but grammar, and was refused admission on that account. Held, a rule or regulation denying him admission on that account was unreasonable, and that *mandamus* would lie to compel his admission to study the other branches. Lake View School Trustees v. People, 87 Ill. 303; *s. p.* Rulison v. Post, 79 Ill. 567.

Ordinance may be shown to be unreasonable, as that one for building a sidewalk was unnecessary and oppressive, it being located in an uninhabited

of all ordinances not expressly authorized by valid legislative authority.

portion of the city and disconnected with any other street or sidewalk. *Corrigan v. Gage*, 68 Mo. 541. An ordinance providing that "no person shall attempt to get upon or off any train of cars while the same is in motion without first obtaining from the person or persons having charge thereof express permission to do so" and punishing in violation thereof by fine, is unreasonable and void. *Wice v. Chicago & N. W. R. Co.*, 193 Ill. 351. A writ of *habeas corpus* is a proper remedy, and relief will be granted, as against a city ordinance, where the ordinance in question is so unreasonable as to be void. *Ex parte Patterson*, 42 Tex. Crim. Rep. 256, citing *Ex parte Battis*, 40 Tex. Crim. Rep. 112.

Must not conflict with the charter or statute, or be repugnant to fundamental rights. *Dubois v. Augusta* (health ordinance), 4 Ga. 509; *Adams v. Albany* (liquor statute), 29 Ga. 56; *Taylor v. Griswold*, 17 N. J. Eq. 222; *New Orleans v. Philippi* (taxation), 9 La. An. 44; *Perdue v. Ellis* (liquor traffic), 18 Ga. 586; *Haywood v. Savannah*, 12 Ga. 404; *Paris v. Graham* (tax on dram-shops), 33 Mo. 94; *St. Louis v. Cafferata*, 24 Mo. 94; *St. Louis v. Bentz*, 11 Mo. 61; *Carr v. St. Louis* (fee of officers), 9 Mo. 190; *Marietta v. Fearing* (estrays animals), 4 Ohio, 427; *Collins v. Hatch* (animals at large), 18 Ohio, 523; *Mayor, &c. of New York v. Nichols* (inspection laws), 4 Hill (N. Y.), 209; *Commonwealth v. Turner* (liquor traffic), 1 Cush. (Mass.) 493; *Philips v. Wickham*, 1 Paige (N. Y.) Ch. 590; *Howard v. Savannah*, T. Charl. R. 173; *Smith v. Knoxville*, 3 Head (Tenn.), 245; *Cowen v. West Troy*, 43 Barb. (N. Y.) 48; *Pesterfield v. Vickers*, 3 Coldw. (Tenn.) 205; *Charleston v. Benjamin*, 2 Strob. (S. Car.) 508; *Charleston v. Ahrens*, 4 Strob. (S. Car.) 241; *Heisembrittle v. Charleston Council*, 2 McM. (S. Car.) 233; *Charleston v. Goldsmith*, 2 Speers (S. Car.) 428; *State v. Welch*, 36 Conn. 215; *Newton v. Belger*, 143 Mass. 598; *White v. Bayonne*, 49 N. J. L. 311; *Lozier v. Newark*, 48 N. J. L. 452; *Volk v. Newark*, 47 N. J. L. 117; *Ex parte Kearny*, 55 Cal. 212; *Cape Girardeau v. Riley*, 52 Mo. 424; *State*

v. Brittain, 89 N. Car. 574; *Dunn v. Court of County Revenues of Wilcox*, 85 Ala. 144; *Haywood v. Savannah*, 12 Ga. 404; *Hofmayer v. Blakely*, 116 Ga. 777 (taxation of travelling salesman); *Lockwood v. Muhlberg*, 124 Ga. 660; *In re Ridenbaugh*, 5 Idaho, 371; *State v. Quong*, 8 Idaho, 191; *Murdoch v. Strange*, 99 Md. 89, 106, citing text; *State v. Eloffson*, 86 Minn. 103; *Ex parte Powell*, 43 Tex. Crim. Rep. 391; *Ex parte Ogden*, 43 Tex. Crim. Rep. 531; *Ex parte Cross*, 44 Tex. Crim. Rep. 376; *Biggar's Mun. Manual* (Canada, 1900), 332, 335.

Ordinance requiring *city printing to bear union label is against public policy.* *Marshall v. Nashville*, 109 Tenn. 495. An ordinance authorizing the tax-collector and police to *put the purchaser* of land at a sale for taxes *in possession thereof*, held void for violating the constitutional provision declaring that no person shall be deprived of property without "due process of law." *Calhoun v. Fletcher*, 63 Ala. 574. An ordinance imposing a *license tax* upon the owners of towboats running between New Orleans and the Gulf of Mexico held to be a regulation of commerce between the States, and void under art. i., § 8, par. 3, of the U. S. Constitution. *Moran v. New Orleans*, 112 U. S. 69. An ordinance which gave to the municipal authorities arbitrary power to give or withhold consent for carrying on the *laundry business*, without regard to legal discretion or to the competency of persons applying therefor, and the administration of which caused unjust discriminations founded on differences of race, declared to be in violation of the Fourteenth Amendment to the U. S. Constitution. *Yick Wo v. Hopkins*, 118 U. S. 356, reversing *Matter of Yick Wo*, 68 Cal. 294. See also *In re Tie Loy*, 26 Fed. Rep. 611. But a municipal ordinance prohibiting washing and ironing in public laundries, in specified territorial limits, from ten at night till six in the morning, and operating upon all engaged in the same business under like conditions, sustained as a legitimate police regulation, within the competency of a municipality possessed of the ordinary powers, and not in conflict with the Fourteenth Amendment of the Constitution of the United States, since this Amendment does not

§ 590 (320). **Same Subject.** — The principle of law, that ordinances passed under the general authority to enact all such as will be necessary, *must be reasonable*, or they will be void, is well illustrated by a case in Pennsylvania.¹ A municipal corporation passed two ordinances *in relation to a gas company*, — a private corporation, with a special charter authorizing the construction and maintenance of suitable gas-works within the limits of the municipal corporation, and the use of the streets for the laying down of pipes. The first ordinance prohibited the gas company from opening paved streets from December to March in each year, for the purpose of laying gas mains. This ordinance the court considered to be reasonable, in view of the difficulty of repairing the paved streets during the winter months. The other ordinance prohibited the gas company from opening a paved street at any time, for the purpose of laying pipes from the main to the opposite side of the street. The court say: "The effect of this ordinance is to compel the company to construct two mains, one on each side of the street instead of one; thereby materially increasing the expense to the company, and consequently enhancing the price of gas to the inhabitants of the district." And this ordinance was declared to be void. So, where *the city owns*

impair the police power of the State. *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, *ib.* 703. Index title, "Police Power"; *infra*, §§ 595, 596, — and note. When a legislature has no power, under the Constitution, to authorize a municipal corporation to pass an ordinance (as here, to permit a railway to construct its road upon certain streets) it cannot, by a special act, legalize such an ordinance adopted by a city without authority. *Stange v. Dubuque*, 62 Iowa, 303. And see *Independent School Dist. of Burlington v. Burlington*, 60 Iowa, 500. A power to construct sewers when, in the judgment of the council, "the public good required," held not to confer power to grant the use of a public street to an individual for a private sewer. *Hutchinson v. Trenton Board of Health*, 39 N. J. Eq. 569.

An ordinance prohibiting any auctioneer to make any sale "except to the highest bidder" was held void for want of legislative or charter authority to enact it. *Martin, In re*, 27 Ark. 467. An ordinance prohibiting heavy awnings over sidewalks, without consent of municipal authorities, is reasonable and valid. *Pedrick v. Bailey*, 12 Gray (Mass.), 161. Under the general wel-

fare clause an ordinance forbidding sale of lemonade, cake, &c., at a temporary stand without paying a license tax is unauthorized and unreasonable. *Barling v. West*, 29 Wis. 307; *post*, § 706.

An ordinance conferring upon one person the right to remove and convert to his own use dead animals, to the exclusion of their owners' rights, held unconstitutional as being a taking of private property for public use without compensation, and as depriving a person of his property without due process of law. *River Rendering Co. v. Behr*, 77 Mo. 91. Where power was conferred upon a town "to prevent the introduction of infectious or contagious diseases, and to preserve the health of the inhabitants," an ordinance forbidding any person "to import, sell, or otherwise deal in second-hand or cast-off garments," &c., with a proviso excepting the sale of such articles when not imported or when they had not been used by persons having infectious diseases, was held not included in the power conferred, and unlawful as being in restraint of lawful trade. *Greensboro v. Ehrenreich*, 80 Ala. 579.

¹ *Northern Liberties v. Northern Liberties Gas Co.*, 12 Pa. St. 318.

water works, its by-laws in respect to the supply of water to the citizens must be reasonable; and a supply cannot be refused on the application of the *owner*, because the tenant was in arrears for water supplied to him while he occupied another house owned by another landlord.¹

§ 591. **When Ordinance will be deemed Unreasonable.** — It is of course within the power of the court to declare an ordinance to be *unreasonable and void on its face* by a mere inspection of the ordinance, if it is clearly of that character because of the inherent nature of its provisions.² But the power of the court to declare an ordinance void because it is unreasonable is one which must be carefully exercised.³ When the ordinance is within the grant of power conferred upon the municipality, *the presumption is* that it is reasonable, unless its unreasonable character appears upon its face.⁴ But the courts will declare an ordinance to be void because unreasonable *upon a state of facts being shown* which makes it unreasonable.⁵ If the ordinance is not inherently unfair, unreasonable or oppressive, the person attacking it must assume *the burden of affirmatively show-*

¹ *Dayton v. Quigley*, 29 N. J. Eq. 77; see cases cited in reporter's note at end of the opinion. The Chancellor in substance says: "The water-works belong to the municipality, and are for the benefit of the inhabitants of the city. The inhabitants are entitled to the use of the water on compliance with reasonable regulations. The use of the water for the complainant's tenants is necessary to the full enjoyment by him of his property. To refuse to furnish water to his tenant there unless the complainant pays a debt due from the tenant to the city for water furnished to him elsewhere, on premises not belonging to the complainant, would, obviously, be to compel him to pay the tenant's debt as a condition precedent to obtaining the water for his premises while occupied by the tenant. The regulations must be reasonable. 1 Dill. on Mun. Corp. 4th ed., §§ 319, 320 [§§ 589, 590, hereof]. The refusal to furnish water to complainant is, under the circumstances, unjustifiable, and is an injury for which he is entitled to relief in this court. High on Inj. § 787."

² *St. Louis v. St. Louis Theatre Co.*, 202 Mo. 690; *Hannibal v. Missouri & K. Tel. Co.*, 31 Mo. App. 23, 32.

³ *Commonwealth v. Robertson*, 5 Cush. (Mass.) 438, 442; *Pennsylvania R. Co. v. Jersey City*, 47 N. J. L. 286; *Scranton City v. Straff*, 28 Pa. Super. Ct. 258.

⁴ *Miller v. Birmingham*, 151 Ala. 469; 44 So. Rep. 388; *Van Hook v. Selma*, 70 Ala. 361; *Commonwealth v. Patch*, 97 Mass. 221; *Morse v. Westport*, 110 Mo. 502; *Trenton Horse R. Co. v. Trenton*, 53 N. J. L. 132; *Consolidated Traction Co. v. Elizabeth*, 58 N. J. L. 619; *Cape May R. Co. v. Cape May*, 59 N. J. L. 404, 407; *Mayor, &c. of New York v. Dry Dock, E. B. & B. R. Co.*, 133 N. Y. 104, 111; *Wygant v. McLauchlan*, 39 Oreg. 429. All reasonable doubts as to the reasonableness of an ordinance are to be resolved in favor of the municipality. *Stafford v. Chippewa Val. El. Co.*, 110 Wis. 331. The city council has a large discretion in the enactment of ordinances, and an ordinance enacted under the police power will not be declared void unless it is clearly oppressive and unreasonable. *Commonwealth v. Price*, 123 Ky. 163; 94 S. W. Rep. 32; *Wells v. Mt. Olivet*, 126 Ky. 131; 102 S. W. Rep. 1182; *Lamar v. Weidman*, 57 Mo. App. 507.

⁵ *St. Louis v. St. Louis Theatre Co.*, 202 Mo. 690; *Pennsylvania R. Co. v. Jersey City*, 47 N. J. L. 286; *Nicoulin v. Lowery*, 49 N. J. L. 391, 394.

ing that as applied to him it is unreasonable, unfair, and oppressive.¹ And an ordinance general in its scope may be adjudged reasonable as applied to one state of facts and unreasonable when applied to circumstances of a different character.²

§ 592 (321). **Must not be Oppressive.** — Courts will declare ordinances to be void that are oppressive in their character.³ Thus, the Supreme Court of Tennessee, in a judgment which reflects credit upon the tribunal that pronounced it, declared void an ordinance of the city of Memphis which ordered the arrest, imprisonment, and fine of all free negroes who might be found out after ten o'clock at night, within the limits of the corporation.⁴ So, an ordinance forbidding, under penalty, the "knowingly associating with persons having

¹ *Ex parte Haskell*, 112 Cal. 412; *In re Berry*, 147 Cal. 523; *Myers v. Chicago*, 196 Ill. 591; *Wells v. Mt. Olivet*, 126 Ky. 131, 102 S. W. Rep. 1182; *Consolidated Traction Co. v. Elizabeth*, 58 N. J. L. 619; *Cape May R. Co. v. Cape May*, 59 N. J. L. 404, 407; *Mayor, &c. of New York v. Dry Dock, E. B. & B. R. Co.*, 133 N. Y. 104, 111; *Scranton City v. Straff*, 28 Pa. Super. Ct. 258, 261; *Austin v. Austin City Cemetery Assoc.*, 87 Tex. 330. Where an ordinance appears to be reasonable on its face and no fact is pleaded and proved tending to show it to be unreasonable, an assignment of error on the ground that it is unreasonable is not well taken. *Gulf C. & S. F. R. Co. v. Holt*, 30 Tex. Civ. App. 330; *Austin v. Austin City Cemetery Assoc.*, 87 Tex. 330.

² *Chicago v. Gunning System*, 214 Ill. 628, 641; *St. Louis v. St. Louis Theatre Co.*, 202 Mo. 690; *Pennsylvania R. Co. v. Jersey City*, 47 N. J. L. 286; *Nicoulin v. Lowery*, 49 N. J. L. 391, 394; *Central R. Co. v. Elizabeth*, 70 N. J. L. 578, 581; *Ford v. Standard Oil Co.*, 32 N. Y. App. Div. 596, 601. When the ordinance is unreasonable as applied to a particular state of facts only, the remedy is to resist the enforcement of the ordinance in those localities where it is unreasonable. *Pennsylvania R. Co. v. Jersey City*, 47 N. J. L. 286. The burden is on the party attacking the ordinance to show that it is unreasonable as applied to the particular facts of the case. *St. Louis v. St. Louis Theatre Co.*, 202 Mo. 690; *Wells v. Mt. Olivet*, 126 Ky. 131; 102 S. W. Rep. 1182.

³ *Heylman v. District of Columbia*, 27 App. D. C. 563; *Oxanna v. Allen*, 90

Ala. 468, citing text; *McInerney v. Denver*, 17 Colo. 302, 315; *Lamar v. Weidman*, 57 Mo. App. 507; *State v. Hill*, 126 N. Car. 1139, 1146, approving text.

⁴ *Memphis v. Winfield*, 8 Humph. (Tenn.) 707. The oppressiveness and inequality, alleged to invalidate a by-law, must be made apparent to the court. *Columbia v. Beasley*, 1 Humph. (Tenn.) 232; *St. Louis v. Weber*, 44 Mo. 547. A by-law prohibiting *swine running at large* in a city is presumptively reasonable as a sanitary or police regulation. *Commonwealth v. Patch*, 97 Mass. 221; *Commonwealth v. Bean*, 14 Gray (Mass.), 52; *Cochrane v. Frostburgh*, 81 Md. 54.

Ordinances to regulate callings and trades must not be unreasonable, partial, in restraint of trade, or in contravention of public policy. *Frank, In re*, 52 Cal. 606. Thus a statute forbidding the reservation of seats at public exhibitions, upon the sale of tickets of admission, after the opening of the doors, is an unconstitutional interference with private property. *Dist. of Columbia v. Saville*, 1 McArthur, 581. Text quoted in *Oxanna v. Allen*, 90 Ala. 468, where it was held that an ordinance which "undertakes to make the superintendent of a street railway company responsible quasi-criminally for the failure of the corporation to expend money in putting the railway track in suitable repair" is unreasonable and oppressive and therefore void. Mere inconvenience or even hardship to an individual does not necessarily make an ordinance unreasonable and oppressive. *Wills v. Fort Smith*, 70 Ark. 221.

the reputation of being thieves and prostitutes," can only be sustained by construing it to require proof of complicity, actual or intended, with the persons named in the complaint as the reputed thieves and prostitutes; otherwise it would be void, as an invasion of the right of personal liberty.¹ So, where the common council of Baltimore, by ordinance, forbade any person to *erect or maintain any steam-engine or boiler* without authority from the mayor, and authorized the mayor, upon six months' notice, to revoke any permit to use or maintain a steam-engine or boiler, and that thereupon the same should be removed, under a heavy penalty for failure to remove it, in an action to restrain the prosecution of a suit for the penalty by one maintaining a steam-engine after notice to remove the same by the mayor, it was held that, by itself, a stationary steam-engine is not a nuisance; and that an ordinance which commits to the unrestrained will of a single public officer a power practically absolute over the use of steam within a city, so that he might prohibit its use altogether, the exercise of which may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences, and motives easy of concealment and difficult to be detected and exposed, does not fall within the domain of law, and is void and inoperative.²

§ 593 (322). **Must be Impartial, Fair, and General.** — As it would be unreasonable and unjust to make, under the same circumstances, an act done by one person penal, and if done by another not so, ordinances which have this effect cannot be sustained. *Special and unwarranted discrimination*, or unjust or oppressive interference in particular cases, is not to be allowed. The powers vested in municipal corporations should, as far as practicable, be exercised by ordinances general in their nature and impartial in their operation.³

¹ St. Louis v. Fitz, 53 Mo. 582.

² Baltimore v. Radecke, 49 Md. 217.

³ Russ v. Mayor, &c. of New York, 12 N. Y. Leg. Obs. 38; White v. Nashville, 2 Swan (Tenn.), 364; De Ben v. Gerard, 4 La. An. 30; Chicago v. Rumpff, 45 Ill. 90; Hudson v. Thorne, 7 Paige (N. Y.), 261; Baton Rouge Council v. Crémonini, 36 La. An. 247; *Ex parte Chin Yan*, 60 Cal. 78; Zanone v. Mound City, 103 Ill. 552; Citizens' Gas & M. Co. v. Elwood, 114 Ind. 332; Denver v. Bach, 26 Colo. 530; St. Anthony v. Brandon, 10 Idaho, 205; Tugman v. Chicago, 78 Ill. 405, approving text; Lake View v. Tate, 130 Ill. 247; Cairo v. Feuchter, 159 Ill. 155;

Monmouth v. Popel, 183 Ill. 634; Peoria v. Guggenheim, 61 Ill. App. 374, 379, quoting text; Marshalltown v. Blum, 58 Iowa, 184; Pacific Junction v. Dyer, 64 Iowa, 38; State v. Omaha & C. B. Bridge Co., 113 Iowa, 30; State v. Elofson, 86 Minn. 103; State v. Hill, 126 N. Car. 1139; Wygant v. McLaughlan, 39 Oreg. 429, citing text; Biggar's Mun. Manual (Canada, 1900), 330. See also Kiel v. Chicago, 176 Ill. 137.

An ordinance prohibiting a particular railroad corporation by name from running locomotives by steam on a specified street is valid, and does not contravene the principle stated in the text. Richmond, &c. R. Co. v. Richmond, 96

§ 594 (323). **May regulate, but not restrain Trade.** — In England, certain customs prevail in prescriptive corporations restrictive of

U. S. 521. So an ordinance compelling a railroad company to station flagmen wherever the railroad may cross streets, &c., is a valid exercise of legislative power, as a police regulation for the safety of the public and passengers on the trains. Such ordinance when passed is a judicial act, imposing pecuniary burden and loss on the railroad company, and is subject to review by courts, which will determine whether the power conferred was exercised in a legal and reasonable manner. *State v. East Orange*, 41 N. J. L. 127. So, also, a resolution of a water board, under authority of a city charter, requiring certain consumers to put in expensive meters, without their consent, under the penalty of cutting off the water for non-payment of the price of the meters, was declared void as being an unwarranted discrimination. *Red Star Steamship Co. v. Jersey City*, 45 N. J. L. 246, citing the text.

Discriminating ordinances. Ordinances should be general, or, at all events not discriminating in their operation. They may, as it said, impose fines on persons violating their provisions within the corporation or within a designated district therein, or in a certain street; but an ordinance naming one individual and directing him to do certain acts with respect to a building alleged to be a nuisance, and in default of compliance, imposing a fine of a specific amount upon him, was held to be unreasonable, contrary to common right, and void. *Municipality v. Blineau*, 3 La. An. 688. Compare *Bozant v. Campbell*, 9 Rob. (La.) 411, where, without repealing an ordinance prohibiting private hospitals, the grant of permission to one or more individuals to erect such hospitals was sustained. And see, also, *Commonwealth v. Goodrich*, 13 Allen (Mass.), 546, where a municipal regulation, limited in its character, was considered valid. Such cases depend upon their special circumstances. The test is that the regulation must be reasonable as applied to the subject matter.

If an ordinance is general in its application, the mere fact that it peculiarly affects a particular person raises no presumption that it was enacted for the purpose of annoying him or depriving him of his rights. *Shinkle v. Covington*, 1 Bush (Ky.), 617. Ordinances

may be adapted to the varying municipal necessities and exigencies. *Covington v. East St. Louis*, 78 Ill. 548, *post*, § 713. In exercising its power to require adjacent lot-owners to make local improvements, the corporation, it has been held in *Tennessee*, must not act in a partial and oppressive manner; therefore it cannot select particular individuals by name, and require them to construct pavements or local improvements in front of their lots, and omit others in the same improvement district, if this be done without good cause or reason for the distinction. *White v. Nashville*, 2 Swan (Tenn.), 364; *post*, § 1448.

Where there is no discrimination between persons engaged in the same business an ordinance regulating the business is not discriminatory. *St. Anthony v. Brandon*, 10 Idaho, 205; quoting and approving the text with special reference to the words "under the same circumstances." Cities cannot discriminate, in licensing, between citizens engaged in the same business; if they license, they must license all alike. *Mt. Clemens v. Sherbert*, 122 Mich. 674.

A frequent discrimination held by the courts to invalidate ordinances is that in favor of residents as against non-residents. *Indianapolis v. Bieler*, 138 Ind. 30; *Carrollton v. Bazzette*, 159 Ill. 284; *Saginaw v. McKnight*, 106 Mich. 32; *Marshalltown v. Blum*, 58 Iowa, 184; *Pacific Junction v. Dyer*, 64 Iowa, 38; *Watertown v. Rodenbaugh*, 112 N. Y. App. Div. 723; *Buffalo v. Reavey*, 37 N. Y. App. Div. 228; *Clements v. Casper*, 4 Wyo. 494. But in *Ottumwa v. Zekind*, 95 Iowa, 622, it was held that an ordinance which merely imposes a license tax upon transient merchants does not discriminate in favor of residents, merely because of the fact that it contains no provision taxing residents, and is not therefore on that account invalid. The court held that the tax applied to business of transient nature rather than to the residence of the person conducting it, and that residents transacting business of a transient nature were subjected to the tax as well as non-residents. See also *Ex parte Haskell*, 112 Cal. 412; *Index, Commercial Travellers*, and chapter on Taxation, *post*, as to Federal limitations on the State's power to tax

freedom of trade and against common right. Such customs, from long usage and unknown origin, are regarded in the light of regulations prescribed by a charter which is supposed to have existed, but it lost. Such customs, while not favored by the English courts, are yet held legal, but must be incontrovertibly established. But by the Municipal Corporations Act of 1835 (5 & 6 Wm. IV. chap. lxxvi. § 14),¹ exclusive rights of trading have been abolished, and it is enacted "that, notwithstanding such custom or by-law [to the contrary], every person in any borough may keep any shop for the sale of all lawful wares and merchandise, by wholesale or retail, and use every lawful trade, occupation, mystery, and handicraft, for hire, gain, sale, or otherwise, within any borough."

§ 595 (324). **Customs in Restraint of Trade.** — In *this country* corporations derive all their powers from legislative acts of comparatively modern date, and *prescriptive customs in restraint of trade or against common right are unknown*. No inconsiderable portion of the cases in the old books in England relate to these customs, their validity and mode of proof, but they are in the main inapplicable to the present period and to the institutions in this country, where freedom in the choice and pursuit of all occupations never has been denied. The inapplicability of the English decisions is noticed by Mr. Justice Dewey, in delivering the opinion of the Supreme Court of Massachusetts in an important case involving the validity of an

and license. While a city has *unrestricted power to abate a nuisance* the court will not declare void an ordinance merely because the city may discriminate against one citizen and favor another. *St. Louis v. Fischer*, 167 Mo. 654, aff'd 194 U. S. 631. An ordinance applicable to *all the members of a trade or occupation*, and subjecting all to the same restrictions and restraints is not invalid as class legislation. *State v. Calloway*, 11 Idaho, 719; *McClelland v. Denver*, 36 Colo. 486.

¹ *Ante*, chap. iii, § 53, and note. *Post*, § 668, note and cases as to monopolies and ordinances in restraint of trade. *Criminal conspiracies* in restraint of trade and the various English statutes in respect thereof are instructively presented by Mr. Justice Stephen, 3 Hist. Criminal Law, chap. xxx., and by Prof. Dacey in Law and Opinion in England, 1905, chaps. v., vi., viii. The fact that certain persons were engaged in a particular kind of business in a given locality, at the time of the adop-

tion of an ordinance, would not authorize the municipal corporation, by such ordinance, to permit such persons to continue their business, whilst it prohibited others from engaging in the same business in the same locality. *Tugman v. Chicago*, 78 Ill. 405.

A statute authorizing municipal authorities to license and regulate such callings, trades, and employments as the public good may require, will empower them to exact a license for revenue purposes, if that construction is not inconsistent with the whole charter and the general legislation of the State. An ordinance fixing one rate of license for selling goods which are within or in transit to the city, and another rate for goods not within or in transit to the city, is invalid. *Frank, In re*, 52 Cal. 606; *s. p. Nashville v. Althrop*, 5 Coldw. (Tenn.) 554; *Cronin v. People*, 82 N. Y. 318 (an ordinance regulating the slaughter of animals held valid). *Supra*, § 589, note.

ordinance of the city of Boston regulating the use of hackney coaches and other vehicles within the city. He observes that "in the arguments addressed to the court, the question was somewhat discussed as to the power incident to municipal corporations to create by-laws of the character here adopted; and a reference was made to various cases in the English courts, where questions of this nature had arisen. Upon examination of those cases they will be found less important and less satisfactory as guides here, inasmuch as it is quite obvious that in many of them, and particularly those where the ordinance seemed most questionable as not being within the ordinary exercise of municipal authority, the by-laws were sustained upon the ground of ancient and long-continued usage, ripening into a prescriptive right on the part of the municipal corporation." But "no such ground," he adds, "can be urged here; and the present ordinance, if sustained at all, must be shown to be authorized by the express provision of the charter, or be derived as an incidental power resulting from its incorporation as a city, or be found in some general or special statute."¹

§ 596 (325). **Must not contravene Common Right.** — An ordinance cannot legally be made *which contravenes a common right*, unless the power to do so be plainly conferred by a valid and competent legislative grant; and in cases relating to such a right, authority to regulate, conferred upon towns of limited powers, has been held not necessarily to include the power to prohibit.² Thus, in

¹ *Commonwealth v. Stodder*, 2 Cush. (Mass.) 562, 568. See as to English decisions, remarks of Rhodes, J., in *Herzo v. San Francisco*, 33 Cal. 134, 145. *Post*, § 668, note. In the case first cited the court decided that the business of *carrying persons for hire* from town to town in stage-coaches and omnibuses is not so far a territorial or local occupation as will authorize one city, unless it has express and direct authority so to do from the legislature, to pass an ordinance requiring the inhabitants of other towns to obtain from it a license before exercising that employment in carrying persons to or from it. Such an ordinance was considered to be an unnecessary restraint upon business, and is not binding upon citizens of other places. The court does not question the right of the city, by reasonable by-laws, to require *inhabitants*, whose business is local and carried on within the city, to obtain a license before exercising cer-

tain employments. *Per Dewey, J.*, *Commonwealth v. Stodder*, 2 Cush. (Mass.) 562, 575; see also *Napman v. People*, 19 Mich. 352; *Barling v. West*, 29 Wis. 307; *Hayes v. Appleton*, 24 Wis. 544; *Taylor v. Pine Bluff*, 34 Ark. 603 (excessive charge for weighing cotton); *post*, § 677; *St. Louis v. Weitzel*, 130 Mo. 600. The principle was applied to express companies carrying parcels in *Cairo v. Adams Exp. Co.*, 54 Ill. App. 87, where it was held that the city could only license carrying on business entirely within the city.

Whenever a by-law seeks to alter a well-settled and fundamental principle of the common law, or to establish a rule interfering with the rights of individuals or the public, the power to do so must come from plain and direct legislative enactment. *Taylor v. Griswold*, 17 N. J. L. Eq. 222; *ante*, § 237, and note.

² *Taylor v. Griswold*, 17 N. J. Eq. 222; *State v. Mott*, 61 Md. 297; *Fulton*

Connecticut, it is held that every one has, presumptively, a *common-law right to fish* in navigable rivers, and that, though every town may, by statute, have the power to make by-laws to *regulate* fisheries of clams and oysters within its limits, yet this power does not authorize a by-law *prohibiting all persons* except its own inhabitants from taking shell-fish in a navigable river, within the limits of such town; such a by-law, being in contravention of a common right, is void.¹

§ 597 (326). **Same Subject.** — But there is, however, *no common right* to do that which, by a valid law or ordinance, is prohibited; and hence courts will not declare an authorized ordinance void because it prohibits what otherwise might lawfully be done. In discussing the subject, Mr. Justice Evans illustrates it in this wise: "If there was no law interfering, the butcher might kill his beeves and hogs in the street. If the butcher could do it, any man might, and it might, therefore, be said to be a common right; but when the law prohibited it, it was no longer a common right. A legal restraint may be imposed on a few for the benefit of the many."² Therefore, while ordinances which unnecessarily restrain trade or operate oppressively upon individuals will not be sustained, yet such as are reasonably calculated to preserve the public health are valid although they may abridge individual liberty and individual rights in respect of property.³ Accordingly, in a populous city an ordinance is valid as a sanitary regulation which *prohibits the purchasing of carcasses of animals* for boiling, steaming, or rendering the same, and the rendering and steaming of the same, within the city, except in certain enumerated cases and under specified conditions of a reasonable character.⁴

§ 598. **Ordinances conferring Discretionary Powers on City Officers.**

— Ordinances prohibiting certain acts *without the consent or permit*

v. Norteman, 60 W. Va. 562; 55 S. E. engaging in a lawful business — sale of Rep. 658; *Thousand Island Park Assoc. v. Tucker*, 173 N. Y. 203, 210, lemonade, cake, &c. — at temporary stands on sidewalk. *Barling v. West*, quoting text; *Milliken v. Weatherford*, 29 Wis. 307; see *post*, § 706, *ante*, § 51 Tex. 388, where an ordinance *prohibiting the renting of private property to lewd women* was declared void. See also *State v. Hill*, 126 N. Car. 1139, approving text.

¹ *Hayden v. Noyes*, 5 Conn. 391; *Peck v. Lockwood*, 5 Day (Conn.), 22; *Willard v. Killingworth*, 8 Conn. 247; *Clason v. Milwaukee*, 30 Wis. 316. The general welfare clause does not authorize the imposition of a license tax for

² *Per Evans, J.*, in *Charleston v. Ahrens*, 4 Strob. (S. Car.) 241, 257; *Charleston v. Wentworth Baptist Church*, *Id.* 306, 310; *Peoria v. Calhoun*, 29 Ill. 317; *St. Paul v. Colter*, 12 Minn. 41.

³ Text approved, *State v. Holcomb*, 68 Iowa, 107; *Commonwealth v. Patch*, 97 Mass. 221.

⁴ *State v. Fisher*, 52 Mo. 174.

of the common council or the mayor or other executive officer, have in some cases been held to be unreasonable and void, because they submit the rights of individuals to the unrestrained discretion of the council or official. It has been said of ordinances of this nature that they remove the rights of the individual from the domain of law and subject them to the exercise of arbitrary discretion on the part of the council or the officer upon whom the dispensing power is conferred; that it is unreasonable to reserve the right to grant or withhold the privilege as it may suit the pleasure of the council or officer, and that to be valid an ordinance of this nature must lay down a uniform rule of action governing the exercise of the dispensing power.¹

¹ *Barthet v. New Orleans*, 24 Fed. Rep. 563 (requiring permit before engaging in business of slaughtering cattle within the limits fixed for that business); *Montgomery v. West*, 149 Ala. 311; 42 So. Rep. 1000 (ordinance prohibiting the operation of steam engines, planing mills, &c., without the consent of council); *Los Angeles v. Hollywood Cem. Assoc.*, 124 Cal. 344 (prohibiting the establishing of any cemetery within the limits of the county without permission of the county board of supervisors); *May v. People*, 1 Colo. App. 157 (storing hides and pelts within city limits without permit from common council); *Chicago v. Trotter*, 136 Ill. 430 (ordinance prohibiting parades, &c., in the public streets without a permit from the police department); *Rich v. Naperville*, 42 Ill. App. 222 (prohibiting public parades and demonstrations without permission of city council); *Cicero Lumber Co. v. Cicero*, 176 Ill. 9 (prohibiting business traffic on certain streets except "upon special permission" of board of trustees); *Bessones v. Indianapolis*, 71 Ind. 189 (ordinance requiring permit for establishing and maintaining hospitals within the city); *Richmond v. Dudley*, 129 Ind. 112 (ordinance prohibiting keeping and storing inflammable oil without permit from council); *Plymouth v. Schultheis*, 135 Ind. 339 (prohibiting tanneries without a permit from the common council); *Elkhart v. Murray*, 165 Ind. 304 (prohibiting running of street cars without a specified kind of fender, or one equally as good "to be approved by the common council or its committee"); *Anderson v. Wellington*, 40 Kan. 173 (ordinance prohibiting parades in the public streets without the consent of the mayor); *Boyd v. Frankfort*, 117 Ky. 199 (prohibiting erection of any building without consent of common council); *State v. Mahner*, 43 La. An. 496 (prohibiting dairies within specified limits without permit from the council); *Matter of Frazee*, 63 Mich. 396 (ordinance prohibiting parades, &c., without consent of mayor or council); *Trenton v. Clayton*, 50 Mo. App. 535 (ordinance conferring discretionary power on the mayor to grant or withhold peddlers' licenses); *State v. Tenant*, 110 N. Car. 609 (prohibiting erection of buildings within fire limits with permit from board of aldermen); *Sioux Falls v. Kirby*, 6 S. Dak. 62 (ordinance prohibiting erection of any building without a permit from the building inspector); *State v. Dering*, 84 Wis. 585 (ordinance prohibiting parades without the consent of mayor). See also *Ex parte Sing Lee*, 96 Cal. 354; *Noel v. People*, 187 Ill. 587; *Robison v. Miner*, 68 Mich. 549, 556; *St. Louis v. Russell*, 116 Mo. 248; *State v. Withnell*, 78 Neb. 33; 110 N. W. Rep. 680.

In *Anderson v. Wellington*, 40 Kan. 173, 180, where an ordinance prohibiting parades, &c., without the consent of the mayor was held to be invalid, *Simpson, C.*, said: "It is not a reasonable regulation to vest the power arbitrarily in the mayor to grant or refuse permission to any association of persons combined for legal and meritorious purposes to parade the streets with music. . . . All by-laws made to regulate parades must fix the conditions upon which all persons or associations can move upon the public streets, ex-

In these cases the remarks of the court appear to have been directed to the denial of any right or authority on the part of the

pressly and intelligently; such conditions operating upon all of the same class alike, and being reasonable in their requirements, and not oppressive in their operation, and must not give the power of permitting or restraining processions to an unregulated official discretion, and thus allow an officer to prevent those with whom he does not agree on controverted questions from calling public attention to the principles of their party or the objects of their organization in one of the most effectual methods known to associated effort."

In *Baltimore v. Radecke*, 49 Md. 217, the defendant in 1866 had obtained permission from the mayor and council to erect and use a steam engine in his business of carpentering and box-making. The resolution granting this permit, contained a provision in conformity to a city ordinance that the engine should be removed after six months' notice to that effect from the mayor. The engine was erected and continued in use until 1873, when defendant received notice to remove it. It was held that a stationary engine is not in itself a nuisance even if erected and used in the midst of a populous city; that an ordinance requiring the removal of steam engines, after notice from the mayor, simply committed to the unrestrained will of a single public officer a power over the use of steam in the city limits practically absolute, so that he might prohibit its use; and that the ordinance was unreasonable and void. This case is distinguished in *Com'rs of Easton v. Covey*, 74 Md. 262, where an ordinance prohibiting the erection of any kind of building without a permit from the commissioners of the town, through the clerk, was sustained as a valid exercise of the authority conferred upon the commissioners. The ground of distinction advanced was that the ordinance in the earlier case gave the mayor unrestrained and absolute power, at his mere will and pleasure, to revoke any and every permit already granted for the use of steam engines and boilers in the city, but in so holding, the court expressly said that they were not to be understood as expressing disapproval of an ordinance which required a permit for the

erection of every such engine within the city limits.

In *In re Frazee*, 63 Mich. 396, an ordinance absolutely prohibiting (not regulating) *street processions with musical instruments, banners, torches, &c.*, or while singing or shouting without the consent first obtained of the mayor, under penalty of a fine, and, in default of payment, of imprisonment, was held in the absence of any express legislative authority therefor to be unreasonable and void. The ground of the decision in this case was that the use of the city streets for orderly parades was not unlawful, and while it might be regulated, it could not be prohibited, and that a prohibition qualified by a dispensing power was not a reasonable exercise of the power to regulate. This decision was distinguished by the same court in the later case of *Love v. Judge of Recorders Court*, 128 Mich. 545, where it was held that an ordinance forbidding the making of *any public address in any public place within one-half mile of the city hall*, or without first obtaining a permit from the mayor, was a valid exercise of the power to control and regulate the manner in which streets and public places should be used. It was pointed out that the earlier case involved the right to use the streets for a method of travel, while this case only involved the right to occupy public places and to use them in a specified manner. The court adopted the view that it was within the power of the city to prohibit the making of addresses in the public squares, and, if it had the power to exclude, it necessarily had the power to qualify the exclusion by an exercise of the dispensing power. See also *In re Cox*, 129 Mich. 635.

The case of *Newton v. Belger*, 143 Mass. 598, is sometimes cited as authority for the proposition that a prohibitory ordinance conferring a discretionary dispensing power upon the council or some city officer is invalid, because the exercise of the dispensing power is discretionary. In that case authority was conferred by statute upon a city to regulate by ordinance "the inspection of materials, construction, alteration, and use of buildings" for the purpose of preventing fires, &c.

city to subject the individual to an arbitrary discretion on the part of the council or of the officer upon whom the dispensing power is conferred. It is, however, to be observed that in the great majority, if not in all, of the cases cited, the ordinance was prohibitory in its nature, and in the view of the courts the acts sought to be prohibited were not of themselves harmful or of such a nature as to justify prohibition. This is particularly true of the cases cited above prohibiting parades and processions in the city streets. In these cases the courts appear to have adopted the view that a parade or a procession conducted in an orderly manner is a reasonable and proper use of the city streets, and whatever view the courts might take as to the right to regulate parades, yet there was nothing in their nature to justify prohibition or to subject them to the arbitrary discretion of the council or of an individual officer. But whilst the principles so laid down are supported by a respectable body of authority, it is believed that they are contrary to the weight of the decisions. Many cases are to be found sustaining ordinances prohibiting acts or even the following of trades or occupations without procuring permits which may be issued at the discretion of the council, mayor, or some other city officer or department, and the fact that the dispensing power was apparently conferred without restraint or qualification has been regarded as arising merely from the difficulty of defining in advance upon what conditions the permit shall be given or the dispensing power exercised. It has also been said that it is not to be assumed that the council or officer in exercising the dispensing power will act arbitrarily or otherwise than in the exercise of a sound discretion.¹

The city assumed to pass ordinances under this authority *prohibiting the erection or alteration of any building without first obtaining a permit* from the board of aldermen. It was held that the ordinance was broader than the authority conferred by statute, and was void. The opinion of the court was entirely directed to the question whether under a power to regulate the construction of buildings the city had authority to adopt a prohibitory ordinance qualified by a dispensing power. Any remarks of the court denying the right to subject the use of property to an arbitrary discretion are to be considered as intended to be directed against the existence of any power of prohibition. See also to the same effect, *Winthrop v. New England Chocolate Co.*, 180 Mass. 464. In

Austin v. Murray, 16 Pick. (Mass.) 126, it was held that statutory power to regulate burials did not authorize the adoption of an ordinance prohibiting burials without a permit from the selectmen of the town.

¹ *Wilson v. Eureka City*, 173 U. S. 32; *s. c.* 15 Utah, 53; *Davis v. Massachusetts*, 167 U. S. 43, *aff'g* 162 Mass. 510; *Gundling v. Chicago*, 177 U. S. 183; *Fischer v. St. Louis*, 194 U. S. 361; *Lieberman v. Van de Carr*, 199 U. S. 552, *aff'g* 175 N. Y. 440; *In re Flaherty*, 105 Cal. 558; *Commonwealth v. Parks*, 155 Mass. 531; *Love v. Judge of Records Court*, 128 Mich. 545; *Buffalo v. Hill*, 79 N. Y. App. Div. 402. In *Buffalo v. Hill*, 79 N. Y. App. Div. 402, 406, *Spring, J.*, after citing the authorities, and referring to the fact that in some the test upon which the dis-

It is, however, to be observed that in sustaining these ordinances in some instances the courts declared that it was within the power

cretion of the mayor was to be exercised as defined in the ordinance creating the authority while in others there was no limitation placed upon it, said: "It does not follow that the omission to prescribe the bounds of the authority carries the conclusion that it is vested arbitrarily in the official or body to whom it is committed. The difficulty of defining in a given case what standard shall be applied in the disposition of the petition, and the fact that the conservation of the public health is the basis for the existence of the authority, indicate the reason for the absence of the definition, but is no warrant for the inference that the power is an arbitrary one to be exercised in ruthless disregard of the rights of any class or individual. The discretionary authority must rest somewhere, and experience has shown that its lodgment in some body or official of the municipality is more efficacious than to leave it with the legislature, to whom the local situation may be unknown."

In *In re Flaherty*, 105 Cal. 558, where the court sustained an ordinance prohibiting the beating of drums in the streets of a city without the permission of the president of the board of trustees, *McFarland, J.*, said: "In dealing with this and similar questions, — such as repairs to wooden buildings within fire limits, carrying concealed weapons, using public buildings and grounds, ringing bells on buildings where many operatives are employed, haranguing on the streets by lecturers, preachers, &c., singing or playing on musical instruments on the streets, and the like, — our Federal, State, and municipal governments have always recognized the practical impossibility of providing in advance for proper exceptional cases, and the necessity of giving to a public officer some discretion in the premises; and laws and ordinances based on that principle have nearly always been upheld when subjected to judicial test. Laws are not made upon the theory of the total depravity of those who are elected to administer them; and the presumption is the municipal officers will not use these small powers villanously and for purposes of oppression and mischief."

A statutory requirement that a

person must secure leave from another to exercise a right — *e. g.*, that an auctioneer shall obtain a license from the mayor before engaging in business carries with it, by necessary implication, a discretion upon the part of the other to give or refuse it, if in his judgment it is unwise or improper to give the required consent. Hence, under such a statutory requirement the mayor may refuse a license to any person whose character and qualifications are not satisfactory to him, or where in his judgment public interest requires it, and the exercise of this discretion on the part of the mayor is not subject to judicial supervision or control. *People v. Grant*, 126 N. Y. 473. See also *People v. Grant*, 58 Hun (N. Y.), 455; *Matter of Armstrong v. Murphy*, 65 N. Y. App. Div. 123; *People v. Saratoga Springs Sewer Commission*, 90 N. Y. App. Div. 555.

Ordinances prohibitory of the following matters have been sustained, viz.: prohibiting the beating of drums on the streets of a town without special permit in writing from the president of the board of trustees, *In re Flaherty*, 105 Cal. 558; prohibiting awnings without the consent of the mayor and aldermen, *Pedrick v. Bailey*, 12 Gray (Mass.), 161; forbidding orations, &c., in a park without the prior consent of the park commissioners, *Commonwealth v. Abrahams*, 156 Mass. 57; or upon the common or other public grounds without obtaining a permit from the city government or committee, *Commonwealth v. Davis*, 140 Mass. 485; or from the mayor, *Davis v. Massachusetts*, 167 U. S. 43, *aff'g* 162 Mass. 510; beating drums or tambourines or making any noise with any instrument for any purpose whatsoever, without the written permission of the president of the village, *Vance v. Hadfield*, 4 N. Y. Supp. 112; giving the right to manufacturers to ring bells and blow whistles in such manner and at such hours as the board of aldermen or selectmen may in writing designate, *Sawyer v. Davis*, 136 Mass. 239; prohibiting the erecting or repairing of a wooden building without the permission of the board of aldermen, *Hine v. New Haven*, 40 Conn. 478; see also *Ex parte Fiske*, 72 Cal. 125; prohibit-

of the legislature, or of the city council by virtue of delegated authority, to prohibit the act absolutely, and that the right to absolutely prohibit necessarily includes the authority to determine under what circumstances the act may be permitted, as the greater power contains the less.¹ But in other cases this distinction does not seem

ing the erection of bill-boards exceeding six feet in height without the permission of the common council, *Rochester v. West*, 164 N. Y. 510, aff'g 29 N. Y. App. Div. 125; forbidding the removal of any building into or upon any of the public streets without the written permission of the mayor, *Wilson v. Eureka City*, 173 U. S. 32; s. c. 15 Utah, 53; authorizing harbor masters to station vessels and to assign to each its place, *Vanderbilt v. Adams*, 7 Cowen (N. Y.), 349; forbidding blasting of rock with gunpowder within the city limits without the written consent of the board of aldermen, *Commonwealth v. Parks*, 155 Mass. 531; forbidding the occupancy of any place on the street for a stand without the permission of the clerk of Faneuil Hall Market, *Nightinale, Petitioner*, 11 Pick. (Mass.) 168; forbidding the keeping of swine without permit in writing from the board of health, *Quincy v. Kennard*, 151 Mass. 563; forbidding the erection of any kind of a building without a permit from the commissioners of the town through their clerk, *Com'rs of Easton v. Covey*, 74 Md. 262; forbidding any person from remaining within the limits of a market for more than twenty minutes, unless authorized so to do by the superintendent or his deputy, *Commonwealth v. Brooks*, 109 Mass. 355; prohibiting selling of any goods in the street without a permit from the superintendent of streets, *Commonwealth v. Ellis*, 158 Mass. 555; forbidding the sale of meat outside public markets without a license issued by the mayor on the direction of the council, *Buffalo v. Hill*, 79 N. Y. App. Div. 402; forbidding peddling without a license issued by the mayor, *Bradley v. Rochester*, 54 Hun (N. Y.), 140; forbidding the vending of milk without a permit from the board of health, *Lieberman v. Van de Carr*, 199 U. S. 552, aff'g 175 N. Y. 440; forbidding the erection of cow stables without permission from common council, *Fischer v. St. Louis*, 194 U. S. 361; forbidding the making of public addresses in any

public place within one-half mile of the city hall without a permit from the mayor, *Love v. Judge of Recorders Court*, 128 Mich. 545; *In re Cox*, 129 Mich. 635.

¹ *Davis v. Massachusetts*, 167 U. S. 43, aff'g 162 Mass. 510. In *Commonwealth v. Parks*, 155 Mass. 531, where the court sustained an ordinance forbidding the *blasting of rock* with gunpowder within the city limits without the written consent of the board of aldermen, *Holmes, J.*, said: "It (the legislature) may prohibit a use of land which the common law would regard as a nuisance if it endangered adjoining houses or the highway, and the legislature may authorize cities and towns by ordinance and by-laws to make similar prohibitions. Furthermore, what the municipal body may forbid altogether, it may forbid conditionally, unless its written permission be obtained beforehand." Similarly in *Commonwealth v. Ellis*, 158 Mass. 555, where the ordinance before the court prohibited the *selling of any goods in the streets* without a permit from the superintendent of streets, the court pointed out that it was within the power of the legislature to forbid, or to authorize the municipality to forbid, street sales entirely, and it held that, having the power to forbid, it might provide for exception by an exercise of the dispensing power. In *Quincy v. Kennard*, 151 Mass. 563, where the ordinance forbade the *keeping of swine* without a permit in writing from the board of health, it was pointed out that the board of health had authority to forbid the keeping of swine in the city, and the court held that the fact that the prohibition contained in the ordinance was qualified by a provision for a permit did not affect its validity. If it might prohibit entirely, it might permit under qualifications.

In *Love v. Judge of Recorders Court*, 128 Mich. 545, where the ordinance forbade the *making of any public address in any public place* within one-half mile of the city hall without a permit from the mayor, the court pointed

to have been adverted to, and it appears to have been held that the constitutional rights of the individual are not affected in any way merely because the discretion to grant a permit to do an act or to exercise a trade or calling has been vested in a municipal board or officer. In these cases it appears to be assumed that if the trade or calling is properly of a nature which may be regulated or controlled by virtue of the police power, such regulation or control may be exercised by a prohibition unless a permit be obtained.¹ There

out that the city had the right to forbid the use of public places for this purpose entirely, and having the power so to do, it of necessity had the power to permit it in its discretion and on what it deemed proper occasions.

¹ *Effect of the Fourteenth Amendment*: In *Wilson v. Eureka City*, 173 U. S. 32, s. c. 15 Utah, 53, the ordinance prohibited the moving of any building into or upon the city streets without a written permission of the mayor. The contention on behalf of the plaintiff in error was that the ordinance committed the rights of the plaintiff in error to the unrestrained discretion of a single individual, and thereby removed them from the domain of law. But the court appears to have been of the opinion that there was no merit in this contention and disposed of the case without referring to the fact that the city might, under statutory authority, entirely prohibit the use of the city streets for the purpose. In *Gundling v. Chicago*, 177 U. S. 183, an ordinance of the city authorized the mayor to grant licenses for the sale of cigarettes. The plaintiff in error contended that the ordinance vested arbitrary power in the mayor to grant or refuse a license, and that such arbitrary power was in violation of the fourteenth Amendment of the Federal Constitution. The ordinance required the license to be granted if the mayor was satisfied that the person applying was of good character and reputation and a suitable person to be entrusted with the sale of cigarettes upon filing a bond. The court held that the ordinance, so far as the objection made was concerned, was clearly within the power of the State to authorize and was valid.

In *Fischer v. St. Louis*, 194 U. S. 361, aff'g 167 Mo. 654, the ordinance prohibited the erection or establishing of any dairy or cow stable within the city limits without permission from the municipal assembly. The court pointed out that the legislature had power to

authorize its municipalities to regulate and suppress all such places or occupations as in its judgment are likely to be injurious to the health of its inhabitants, or to disturb people by loud noises or offensive odors. The court held that the fact that permission might be granted by the municipal assembly to keep cattle, did not in any degree impair the validity of the ordinance or deny to dairy keepers to whom the permission was refused the equal protection of the law. Mr. Justice Brown, said: "As the dispensing power must be vested in some one, it is not easy to see why it may not properly be delegated to the municipal assembly which enacted the ordinance. . . . We have no criticism to make of the principle of granting a license to one and denying it to another, and are bound to assume that the discrimination is made in the interest of the public and upon conditions applying to the health and comfort of the neighborhood. The only alternative to the allowance of such exceptions would be to make the application of the ordinance universal. This would operate with great hardship upon persons who desired to establish dairies and cow stables in the outskirts of the city as well as inconvenience to the inhabitants who, to that extent, would be limited in their supply of milk. It would be difficult to make exceptions in the ordinance itself without doing injustice in individual cases, and we see no difficulty in vesting in some body of men, presumed to be acquainted with the business and its conditions, the power to grant permits in special cases. It has been held in some of the State courts to be contrary to the spirit of American institutions to vest this dispensing power in the hands of a single individual, *Chicago v. Trotter*, 136 Ill. 430; *Matter of Frazee*, 63 Mich. 396; *State v. Fiske*, 9 R. I. 94; *Baltimore v. Radecke*, 49 Md. 217; *Sioux Falls v. Kirby*, 6 S. Dak. 62;

are, however, limits to the principle. Thus, for example, if it is shown that the power thus conferred upon the council or officer *is in fact arbitrarily exercised* against the individual under the sanction of State authority to deprive him of rights which he ought to be permitted to enjoy by discriminating against him in the enjoyment of these rights, the Supreme Court of the United States has given redress when the case has come before it in such manner as to authorize the interference of a Federal court.¹

§ 599 (327). **Validity is for the Court, and not the Jury, to determine.** — Whether an ordinance be reasonable and consistent with the law or not *is in general a question for the court*, and not the jury, and evidence to the latter on this subject is usually but not always inadmissible.² But in determining this question the court

and in others that such authority cannot be delegated to the adjoining lot owners. *St. Louis v. Russell*, 116 Mo. 248; *Ex parte Sing Lee*, 96 Cal. 354, 359. But the authority to delegate that discretion to a board appointed for that purpose is sustained by the great weight of authority, *Quincy v. Kennard*, 151 Mass. 563; *Commonwealth v. Davis*, 162 Mass. 510; and by this court the delegation of such power even to a single individual was sustained in *Wilson v. Eureka City*, 173 U. S. 32, and *Gundling v. Chicago*, 177 U. S. 183."

Similarly in *Lieberman v. Van de Carr*, 199 U. S. 552, where it was held that a provision of a sanitary code *prohibiting the vending of milk without a permit in writing from the board of health* was a proper exercise of the police power, Mr. Justice Day said: "That this court will not interfere because the States have seen fit to give administrative discretion to local boards to grant or withhold licenses or permits to carry on trades or occupations, or perform acts which are properly the subject of regulation in the exercise of the reserved power of the States to protect the health and safety of its people there can be no doubt." After referring to many of the cases cited above he added: "These cases leave in no doubt the proposition that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the State is not violative of rights

secured by the Fourteenth Amendment. There is no presumption that the power will be arbitrarily exercised."

¹ *Yick Wo v. Hopkins*, 118 U. S. 356. See also *Lieberman v. Van de Carr*, 199 U. S. 552, 562.

² *Ex parte Frank*, 52 Cal. 606, 610, citing text; *Lake View v. Tate*, 130 Ill. 247, 249, 252, citing text; *Hawes v. Chicago*, 158 Ill. 653; *Wice v. Chicago & N. W. R. Co.*, 193 Ill. 351, 356, citing text; *Meyers v. Chicago, R. I. & P. R. Co.*, 57 Iowa, 555, 558; *Burlington v. Unterkircher*, 99 Iowa, 401, citing text; *Commonwealth v. Worcester*, 3 Pick. (Mass.) 462; *Boston v. Shaw*, 1 Met. (Mass.) 130, 135; *Evison v. Chicago, St. P. M. & O. R. Co.*, 45 Minn. 370, 375, citing text; *Wygant v. McLauchlan*, 39 Oreg. 429; *Northern Liberties v. Northern Liberties Gas Co.*, 12 Pa. St. 318, 321. "Whether or not a municipal ordinance is discriminating must be determined by the court as a question of law from the provisions of the ordinance itself, and not from the manner of its enforcement." *Denver v. Girard*, 21 Colo. 447, citing text, and holding that an ordinance *prohibiting the use of the sidewalk for the display of goods* is not void merely because the municipal authorities have been lax in its enforcement, and it has not been uniformly enforced against all affected by its provisions.

In *Atlantic & P. Tel. Co. v. Philadelphia*, 190 U. S. 160, 166, a case involving the reasonableness in amount of a license fee imposed by the city upon telegraph poles in the public streets, it was held that under some circum-

will have to regard all the circumstances of the particular city or corporation, the objects sought to be attained, and the necessity which exists for the ordinance. Regulations proper for a large and prosperous city might be absurd or oppressive in a small and sparsely populated town, or in the country.¹

stances the question of reasonableness of an ordinance may be one for the determination of the jury. Mr. Justice Brewer, who delivered the opinion of the court, quoted the text, *supra*, and said: "While that may be correct as a general statement of the law, and especially in cases in which the question of reasonableness turns on the character of the regulations prescribed, yet when it turns on the amount of a license charge, it may rightly be left for the determination of a jury. There are many matters which enter into the consideration of such a question, not infrequently matters which are disputed and in respect to which there is contradictory testimony." These views are reiterated in *Postal Telegraph & Cable Co. v. New Hope*, 192 U. S. 55, 63. See also *Philadelphia v. Western Union Tel. Co.*, 89 Fed. Rep. 454, 461. When the jury finds that the amount of the license fee is unreasonable, neither the jury nor the court can fix a smaller fee which may be regarded as reasonable, and the ordinance imposing the license fee is void. *Postal Telegraph Cable Co. v. New Hope*, 192 U. S. 55.

¹ *Atlantic & P. Tel. Co. v. Philadelphia*, 190 U. S. 160, 167, quoting text; *Los Angeles v. Hollywood Cem. Assoc.*, 124 Cal. 344, 348; *Lake View v. Tate*, 130 Ill. 247, 249, 252, citing text; *Hawes v. Chicago*, 158 Ill. 653; *Wice v. Chicago & N. W. R. Co.*, 193 Ill. 351, 356; *Vandine, Petitioner*, 6 Pick. (Mass.) 187; *Austin v. Murray*, 16 Pick. (Mass.) 126; *People v. Blom*, 120 Mich. 45, citing text; *Grand Rapids v. Braudy*, 105 Mich. 670, 675, quoting text; *Hudson v. Thorne*, 7 Paige Ch. (N. Y.) 261; *Wygant v. McLauchlan*, 39 Oreg. 429; *Sandys v. Williams*, 46 Oreg. 327, 339, citing text; *Kneedler v. Norristown*, 100 Pa. St. 368, quoting text; *Austin v. Austin City Cem. Assoc.*, 87 Tex. 330; *Ex parte Patterson*, 42 Tex. Crim. R. 256, citing text.

The doctrine of the text that the validity of a by-law is in all cases a question for the court, and that evidence

to the jury is inadmissible, *has been denied* by the Supreme Court of *Wisconsin*, which, in *Clason v. Milwaukee*, 30 Wis. 316 (involving the validity of an ordinance to protect the harbor, and also the city, from inundation by preserving the shore or beach), considered it to be no violation of principle, in a case where the reasonableness of the ordinance depended upon extrinsic facts, to submit testimony to the jury bearing upon the reasonableness of the requirements of the ordinance. But the argument of the counsel for the city, that this view makes the same by-law "valid in one case and invalid in another, according to the varying weight of testimony and the varying views of juries," seems unanswerable, and the text states probably the true doctrine. See *Glover on Corp.*, 297, and cases in this note. In *Wisconsin*, it is now held that the reasonableness of an ordinance is a question of law for the court when all the material facts are undisputed. *Bartlett v. Eau Claire County*, 112 Wis. 237, 248.

"Where the municipal legislature has authority to act, it must be governed, not by our discretion, but by its own; and we shall not be hasty in convicting them of being unreasonable in the exercise of it." *Per Lourie, J.*, *Fisher v. Harrisburg*, 2 Grant (Pa.) Cases, 291; s. p. *St. Louis v. Weber*, 44 Mo. 547. "The courts," says *Dacey, J.*, "doubtless have the power to deny effect to a by-law obnoxious to the objection that it is unreasonable. It is, however, a power to be cautiously exercised," especially where the question is a practical one, — for example, the length of time which ought to be allowed to vehicles to remain in the street, and as to which the city authorities, it is to be presumed, can judge better than the court. *Commonwealth v. Robertson*, 5 Cush. (Mass.) 438, 442. See also *Vintners v. Passey*, 1 Burr. 237, 239; *Workingham v. Johnson*, Cas. temp. Hardw. 285; *Poulter's Co. v. Phillips*, 6 Bing. (N. C.) 315; *Commonwealth v. Patch*, 97 Mass. 221.

§ 600 (328). **Legislative Authority to adopt what would otherwise be Unreasonable Ordinances.**—Where the *legislature, in terms, confers upon a municipal corporation the power to pass ordinances of a specified and defined character*, if the power thus delegated be not in conflict with the Constitution, an ordinance passed pursuant thereto cannot be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental power of the corporation, or under a grant of power general in its nature. In other words, what the legislature distinctly says may be done cannot be set aside by the courts because they may deem it to be unreasonable or against sound policy.¹ But where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid.²

¹ *Carpenter v. Yeadon*, 151 Fed. Rep. 879, 882, quoting text; *Hot Springs v. Curry*, 64 Ark. 152; *Patterson v. Taylor*, 51 Fla. 275; *Greencastle v. Thompson*, 168 Ind. 493; 81 N. E. Rep. 497; *Pittsburgh, C. C. & St. L. R. Co. v. Crown Point*, 146 Ind. 421; *Coal Float v. Jeffersonville*, 112 Ind. 15; *Cleveland C. C. & I. R. Co. v. Harrington*, 131 Ind. 426; *Skaggs v. Martinsville*, 140 Ind. 476; *Rund v. Fowler*, 142 Ind. 214; *Beiling v. Evansville*, 144 Ind. 644, 648; *Shea v. Muncie*, 148 Ind. 14, 23; *Chesapeake & O. R. Co. v. Maysville*, 24 Ky. Law. Rep. 615; 69 S. W. Rep. 728; *Hall v. Commonwealth*, 101 Ky. 382; *Grand Rapids v. Braudy*, 105 Mich. 670, citing text; *Tarkio v. Cook*, 120 Mo. 1; *Haynes v. Cape May*, 50 N. J. L. 55; *Kennelly v. Jersey City*, 57 N. J. L. 293, 296; *Rafetto v. Mott*, 60 N. J. L. 413; *Fire Department v. Gilmour*, 149 N. Y. 453, 458, citing text; *Griffin v. Gloversville*, 67 N. Y. App. Div. 403; *Darlington v. Ward*, 48 S. Car. 570; *Ligonier Val. R. Co. v. Latrobe Borough*, 216 Pa. 221, citing text; *Biggar's Mun. Manual* (Canada, 1900), 330, 331.

Speaking of a provision of the charter of the city of St. Louis, authorizing the city authorities "to regulate," and, by construction, to permit *baudy houses*, and the objection made by counsel to an ordinance licensing such houses, *Napton, J.*, says: "It is naked assumption to say that any matter allowed by the legislature is against public policy. The best indications of public policy are to be found in the enact-

ments of the legislature. To say that such a law is of unusual tendency is disrespectful to the legislature, who, no doubt, designed to promote the morals and health of the citizens. Whether the ordinance in question is calculated to promote the object is a question with which the courts have no concern," when the legislative will has been plainly expressed. *State v. Clarke*, 54 Mo. 17, 36. When an ordinance is within the express power granted, the court can only construe the extent of the grant, and has nothing to do with the reasonableness of an ordinance carrying it into effect. *District of Columbia v. Wagaman*, 4 Mackey (D. C.) 328.

² *Peoria v. Calhoun*, 29 Ill. 317; *St. Paul v. Colter*, 12 Minn. 41; *Brooklyn v. Breslin*, 57 N. Y. 591, 596; *Breninger v. Belvidere*, 44 N. J. L. 350; *post*, § 646; *Lake View v. Tate*, 130 Ill. 248, 252, quoting text; *Chicago & A. R. Co. v. Carlinville*, 200 Ill. 314; *Champer v. Greencastle*, 138 Ind. 339, 343, quoting and approving text; *Trenton Horse R. Co. v. Trenton*, 53 N. J. L. 132, 135, citing text; *Carthage v. Frederick*, 122 N. Y. 268, 271, citing text; *Sandys v. Williams*, 46 Ore. 327, 338, quoting text. See also *Ex parte Vance*, 42 Tex. Crim. Rep. 618; approving the latter part of the text and holding that the court may pass upon the reasonableness of an ordinance passed in pursuance of an express grant of power from the legislature where the mode of the exercise of the power is not prescribed, or the legislature has not acted directly on the subject.

§ 601 (329). **Must be consistent with Public Legislative Policy.** — The rule that a municipal corporation can pass no ordinance which conflicts with its charter, or any general statute in force and applicable to the corporation, has been before stated.¹ Not only so, but it cannot, *in virtue of its incidental power* to pass by-laws, or under any general grant of that authority, adopt by-laws which infringe the spirit or are repugnant to the policy of the State as declared in its general legislation. This principle is well exemplified by a case in Ohio,² in which incorporated towns were, by statute, prohibited from *subjecting stray animals* owned by persons *not residents* of such towns to their corporation ordinances. It was held that an ordinance operating, not on the animals but on the non-resident *owner*, in the shape of a penalty, violated the spirit of the statute, and was void. So, in a later case in the same State, it was shown that the general policy of the State was to allow animals to run at large; and it was ruled that a municipal corporation with power to pass "all by-laws deemed necessary for the well-regulation, health, cleanliness, &c.," of the borough, and with power to "abate nuisances," had no authority to pass a by-law restraining cattle from running at large, such a by-law being in contravention of the general law of the State.³

§ 602 (330). **Same Subject.** — The general statutes of the State abolished the system of inspecting hay, and, in the place of it, the

¹ See *ante*, § 237, 587, 589. *Dunn v. Court of County Revenues*, 85 Ala. 144, 147, citing text; *Montgomery v. Foster*, 133 Ala. 587, 596, citing text.

² *Marietta v. Fearing*, 4 Ohio, 427. See also *Grand Rapids Electric, &c. Co. v. Grand Rapids Edison, &c. Co.*, 33 Fed. Rep. 659; *Ex parte Chin Yan*, 60 Cal. 78; *Baltimore v. Scharf*, 54 Md. 499.

³ *Collins v. Hatch*, 18 Ohio, 523. But in *Illinois* it has been decided that a town, authorized by its charter to declare what should be nuisances, and to provide for the abatement thereof by ordinance, may pass an ordinance declaring *swine running at large* within the corporation to be nuisances, and providing for the taking up of the same, &c., and this though under the laws of the State the owners of stock may lawfully allow it to run at large upon the common, the court regarding the power named in the charter as abridging or limiting any right of common which might otherwise exist. *Roberts v. Ogle*, 30 Ill. 459. As thus construed the ordi-

nance was not in conflict with the general laws of the State. By-laws which contravene the policy of the general statutes of the State, by undertaking to punish acts which those statutes authorize, are void. *Canton v. Nist*, 9 Ohio St. 439, holding void a by-law, which, disregarding the statutory exceptions of cases of necessity, charity, &c., prohibited the opening of shops for business on Sunday. Followed, *Thompson v. Mount Vernon*, 11 Ohio St. 688, adjudging an ordinance to be invalid because inconsistent with the liquor law of the State. And see *Adams v. Albany*, 29 Ga. 56; *Sill v. Corning*, 15 N. Y. 297; *Cincinnati v. Gwynne*, 10 Ohio, 192; *Wood v. Brooklyn*, 14 Barb. (N. Y.) 425; *Markle v. Akron*, 14 Ohio, 586; *Thomas v. Richmond*, 12 Wall. (U. S.) 349. But a corporation may, in some cases, consistently with general law, *further regulate* by ordinance subjects already regulated by statute. *Huddleson v. Ruffin*, 6 Ohio St. 604; *Rogers v. Jones*, 1 Wend. (N. Y.) 237; *State v. Welch*, 36 Conn. 215.

seller was required to prepare the article for market in a particular manner, at the peril of being subjected to certain designated penalties. In other words, he was at liberty to dispose of his hay without inspection if he chose to do so. Under these circumstances, it was decided that a city ordinance prohibiting the sale of pressed hay *without inspection* was void, because it *conflicted with the laws of the State* upon the same subject.¹

§ 603 (331). **When Publication is required.**— In the absence of a statutory or charter provision directing that ordinances be published before they take effect, *no publication is necessary* and ordinances take effect immediately without it.² When ordinances are *required to be published* before they shall go into effect, this requirement is essential, and the publication must be in the designated mode. Until such publication be made, or until they have gone into operation, no penalty can be enforced under them.³ But under

¹ *Mayor, &c. of New York v. Nichols*, 4 Hill (N. Y.), 209. Compare *Mayor v. Hyatt*, 3 E. D. Smith (N. Y.), 156; *Rogers v. Jones*, 1 Wend. (N. Y.) 237. Construction of power to appoint weighmasters. *Hoffman v. Jersey City*, 34 N. J. L. 172.

² *In re Guerrero*, 69 Cal. 88; *Greer v. Jackson*, 127 Ga. 47; *Paducah v. Ragsdale*, 122 Ky. 425; 92 S. W. Rep. 13.

Where the charter provided that a *failure to publish* should not make ordinances void unless the delay caused them to operate retrospectively, it was held that an ordinance became a law without publication. *Schweitzer v. Liberty*, 82 Mo. 309. When *no provision* for the publication of ordinances is contained in a special charter, the promulgation should be reasonably sufficient to notify all parties interested, and the presumption is in favor of the reasonableness of the time adopted by the corporation, which must prevail unless countervailing facts are proved. *Pitts v. Opelika*, 79 Ala. 527, which further decides that a provision for publication contained in a general law applies only to municipalities organized under that law.

³ *Barnett v. Newark*, 28 Ill. 62; *Conboy v. Iowa City*, 2 Iowa, 90; *Higley v. Bunce*, 10 Conn. 567; *Meyer v. Fromm*, 108 Ind. 208; *Napa v. East-erby*, 61 Cal. 509; *Wain v. Philadelphia*, 99 Pa. St. 330; *Schwartz v. Oshkosh*, 55 Wis. 490; *Nat. Bank of Commerce*

v. Grenada, 44 Fed. Rep. 262; s. c. 48 Fed. Rep. 278; 54 Fed. Rep. 100; *State v. Omaha & C. B. Bridge Co.*, 113 Iowa, 30; *Mandeville v. Band*, 111 La. 806; *Union Pacific R. Co. v. Montgomery*, 49 Neb. 429; *Lewis v. New-ark*, 74 N. J. L. 308; 65 Atl. Rep. 1039; *Hoboken v. Gear*, 27 N. J. L. 265, 274; *Shaw v. New York Central & H. R. R. Co.*, 85 N. Y. App. Div. 137; *Marshall v. Allegheny City*, 59 Pa. St. 455; *Carpenter v. Yeadon Borough*, 208 Pa. 396, 400, citing text. When the *mayor's approval is essential* to the validity of an ordinance, it cannot be published pursuant to the charter or statute until it has either been approved by him or passed over his veto. *New Iberia v. Moss Hotel Co.*, 112 La. 526. In *Massachusetts* a provision *by ordinance for the publica-tion of ordinances* was held to be direc-tory, and not a condition precedent to their validity. *Commonwealth v. Davis*, 140 Mass. 485. Statutory re-quirement of publication held on the construction of the particular charter, not to prevent ordinance immediately taking effect without publication when so directed by council. *Johnson v. Finley*, 54 Neb. 733.

Publication held to be a *ministerial act* only, and ordinance held to take effect from date of its passage although the charter directed that all ordinances should be published. *Sacramento v. Dillman*, 102 Cal. 107, 111. Under a charter forbidding the increase of

this provision, unless it is required that publication shall be made within a specified time, the only effect of an omission to publish is that the ordinance remains inoperative. It may be made operative at any time by publication in the manner required by the statute, and a failure to publish the ordinance is not sufficient ground to set it aside on *certiorari* as invalid, although such failure may be a defence to any attempted enforcement of the ordinance.¹

§ 604 (332). **Alternate Modes of Publication.** — Where *alternate modes of publication* of a by-law are allowed by statute, and the statute requires the *corporation* to direct which mode shall be adopted, a publication made by order of the clerk, without direction from or selection of the mode having been made by the corporation, is not valid.²

salaries during terms of office, and providing that ordinances should not take effect until after publication for twenty days, an ordinance respecting salaries, adopted before a term began, but the last publication of which was after that time, was held to fix the salaries for that term. *Stuhr v. Hoboken*, 47 N. J. L. 147. In an action for personal injuries the publication of an ordinance must be shown by the party who relies upon its effect where publication is required by law and where want of publication is made an objection. *Larkin v. Burlington C. R. & N. R. Co.*, 85 Iowa, 492. Failure to publish ordinance held not to affect validity of bonds issued under a subsequent act authorizing the corporation to incur a debt. *Arney v. Allegheny City*, 24 How. (U. S.) 364; *Clark v. Janesville*, 10 Wis. 136; *State v. Newark*, 30 N. J. L. 303; *People v. San Francisco*, 27 Cal. 655.

¹ *Croker v. Camden Excise Com'rs*, 73 N. J. L. 460; *Bowyer v. Camden*, 50 N. J. L. 87, 91; *Anderson v. Camden*, 58 N. J. L. 515, 520. "Publication is a duty imposed upon the corporate officers, and until it is performed no rights are granted and the observance of no duties is enjoined by the ordinance which can be enforced by or against the municipality. Before the statute has been complied with in this respect, the ordinance remains in the hands of the officers of the corporation awaiting the performance of an act by them essential to give it validity as a law of the borough." *Per Mestrezat, J.*, in *Carpenter v. Yeadon Borough*, 208 Pa.

396, 400. An ordinance was passed by the council over the mayor's veto granting to plaintiff the right to use land within the borough as a cemetery on certain conditions. Plaintiff applied for *mandamus* to compel the publication of the ordinance so as to render it operative. The court held that, conceding it was the purpose of the council to contract with the plaintiff on the terms set forth in the ordinance, yet the action conceded that publication was necessary to make it operative, and hence the contract was not consummated and was not obligatory on the borough; and as the power to make the contract involved discretion on the part of the council, the court would not compel the council by *mandamus* to complete the discretionary act. *Carpenter v. Yeadon Borough*, 208 Pa. 396. *Re-enactment and re-publication* will cure a defect founded upon failure to publish the ordinance originally passed. *Muir's Adm'rs v. Bardstown*, 120 Ky. 739.

² *Higley v. Bunce* (restraining cattle), 10 Conn. 567. The language of the statute was this: "Such by-laws shall not be in force until published four weeks in a newspaper printed in such town, or in the town nearest to such town in which a newspaper is printed, or in some other newspaper generally circulated in the town where such by-law is made, as the town shall direct." Rev. 1821, p. 458. Held, that the town must point out one of the three descriptions of newspapers in which the by-law should be printed. *Ib.* Mode of publication under the

§ 605 (333). **Time and Method of Publication.** — When the *method of publishing* the ordinances is specified in the statute or charter, a substantial compliance with that method is essential.¹ A municipal charter required every ordinance *to be published* for the space of *twenty days* in at least one newspaper before it should go into effect; and it was held that an ordinance would go into force in twenty days after its publication in the first number of the paper; that twenty days need not intervene between the first and last insertions; that it is clearly sufficient if it be published in each number of the paper issued within the twenty days, and probably sufficient if there is but one insertion, twenty days after which the ordinance will go into effect.² Where an ordinance has been once duly

general incorporation law of *Illinois* of 1872. *Byars v. Mt. Vernon*, 77 Ill. 467. Special provisions construed. *Phillips, In re*, 60 N. Y. 16; *Bassford, In re*, 50 N. Y. 509. Certificate of city clerk of due publication not competent evidence unless made so by statute. *Chicago & A. R. Co. v. Engle*, 76 Ill. 317. Mode of publication in *Kansas*. *Kansas City v. Overton*, 68 Kan. 560.

¹ *State v. Hoboken*, 38 N. J. L. 110, 113; *Hoboken v. Gear*, 27 N. J. L. 265. When it is shown that the ordinance was published in a newspaper, it *will be presumed*, in the absence of evidence to the contrary, that the newspaper was one of general circulation in the municipality as required by the statute. *Bayard v. Baker*, 76 Iowa, 220. The *signature of the presiding officer* to the record of the ordinance held not to be an essential part of the publication. *Bumb v. Evansville*, 168 Ind. 272; 80 N. E. Rep. 625. The *omission* of the number of a section will not affect the sufficiency of the publication. *Los Angeles v. Eikenberry*, 131 Cal. 461. Publication in an *extra edition* of a daily newspaper and the distribution of the copies among persons interested in the ordinance is not sufficient publication. *State v. Omaha & C. B. Bridge Co.*, 113 Iowa, 30. When the statute required ordinances to be published "in two newspapers of opposite politics" an *independent newspaper* was held not to come within the description. *Ohio State Journal Co. v. Brown*, 10 Ohio Cir. Dec. 470; *Columbus v. Barr*, 27 Ohio Cir. Ct., 264. See also *People v. Sullivan County*, 56 N. Y. 249; *Shields v. McGregor*, 91 Mo. 534.

Publication on Sunday. An ordinance is not process and its validity is

not affected by the fact that the publication was made on Sunday. *Hallett v. United States Security & Bond Co.*, 40 Colo. 281; 90 Pac. Rep. 683; *Denver v. Dumars*, 33 Colo. 94; *Denver v. Londoner*, 33 Colo. 104; *Dumars v. Denver*, 16 Colo. App. 375. But see to the contrary, *Scammon v. Chicago*, 40 Ill. 146; *Ormsby v. Louisville*, 79 Ky. 197. Publication in a newspaper published only on Sunday held valid under the Ohio Statute. *Hastings v. Columbus*, 42 Ohio St. 585. An ordinance held not invalid because published in the Sunday edition of a daily newspaper, that being the best advertising medium available. *Knoxville v. Knoxville Water Co.*, 107 Tenn. 647. Where publication for five successive days is required, a publication for five successive week days is sufficient, though a Sunday intervenes when no paper is issued. *Ex parte Fiske*, 72 Cal. 125.

A city charter required all ordinances passed by the *city council* to be published for two weeks before taking effect. A statute provided that ordinances of the board of excise commissioners should, before final passage, be published for two insertions in two newspapers. Held that, as the board of excise commissioners were in no sense a department or committee of the city council, the provision of the charter did not apply to its ordinances, and that advertisement as prescribed by the statute before final passage was sufficient. *Croker v. Camden Excise Com'rs*, 73 N. J. L. 460.

² *Hoboken v. Gear*, 27 N. J. L. 265. Where a city is required to *promulgate* its ordinances, it is sufficient to publish them in the newspaper in which the ordinances are *usually* published,

published, and it is afterwards included in a revision or digest of ordinances, no additional publication is necessary.¹

§ 606 (334). **Proof of Publication.** — A charter provided that no ordinance should be *in force until published in some newspaper of the place*, and also declared that ordinances should be sufficiently proved in any court (among other modes) by a printed copy taken from the newspaper or printed pamphlet in which the same had been published, provided the same purports to have been done by authority of the corporation. Under this provision, the production of a newspaper published in the town, containing what appears as an ordinance, with a caption, "Published by Authority," duly signed, *is evidence* of the existence and adoption of the ordinance.² So where

though there may be other newspapers within the city. *Truchelut v. Charleston*, 1 Nott & McC. (S. Car.) 227; and see cases noted in § 603, note, *supra*. When the statute required that ordinances should be published "for at least one week" in some newspaper published in the city, it was held that publication for one day in a daily newspaper is not sufficient. It should be published in each issue thereof for one week. *Union Pacific R. Co. v. Montgomery*, 49 Neb. 429; *Union Pacific R. Co. v. McNally*, 54 Neb. 112. But if the newspaper selected is only published weekly, then it has been held that one insertion is sufficient under this statute. *State v. Hardy*, 7 Neb. 377; *Union Pac. R. Co. v. Montgomery*, 49 Neb. 429. Further as to *computation of time*, see Index, *Elections; Meetings; Notice*.

¹ *St. Louis v. Foster*, 52 Mo. 513. "It would be of the most mischievous consequence to hold that the revision of a law had the effect of making the revised law entirely original, to be considered as though none of its provisions had effect but from the date of the revised law. When a former provision is included in a revised law, it is only thereby intended to continue its existence, not to make it operate as an original act, to take effect from the date of the revised law. The revision has not the effect to break the continuity of those provisions which were in force before it was made." *St. Louis v. Alexander*, 23 Mo. 483. See also as supporting the text, *Chrisman v. Jackson*, 84 Miss. 787. Exception to rule, see *Emporia v. Norton*, 16 Kan. 236.

² *Block v. Jacksonville*, 36 Ill. 301.

Authorized book of ordinances is *prima facie* evidence of due passage and publication of the ordinances therein contained. *Prell v. McDonald*, 7 Kan. 426. See *Pendergast v. Peru*, 20 Ill. 51; *Boyer v. Yates City*, 47 Ill. App. 115; *McGregor v. Lovington*, 48 Ill. App. 202, 208. Proof of publication under special charter provision. *St. Charles v. O'Mailey*, 18 Ill. 407; *Moss v. Oakland*, 88 Ill. 109. In an action against a city, plaintiff need not prove the publication of an ordinance offered in evidence, where he shows that the city had for several years acted upon the ordinance as in force. *Atchison v. King*, 9 Kan. 550; *State v. Altantic City* (burden of proof), 34 N. J. L. 99, 106. A note upon the record of an ordinance stating that it had been duly published, held *prima facie* proof of the fact of publication. *Downing v. Miltonvale*, 36 Kan. 740. See also *Blanchard v. Benton*, 109 Ill. App. 569.

Parol proof of publication has been held to be admissible as primary evidence. See *Des Moines v. Casady*, 21 Iowa, 570. Parol proof of publication is admissible where no proof of publication is on file or otherwise available. *Larkin v. Burlington C. R. & N. R. Co.*, 91 Iowa, 654. As to proof of publication under statute making certificate of city clerk *prima facie* evidence, see *Lindsay v. Chicago*, 115 Ill. 120; *Terre Haute & I. R. Co. v. Voelker*, 129 Ill. 540; *Gage v. Chicago*, 162 Ill. 313, 318; *Hutchison v. Mt. Vernon*, 40 Ill. App. 19; *Chamberlain v. Litchfield*, 56 Ill. App. 652, 655; *Cleveland, C. C. & St. L. R. Co. v. Tartt*, 64 Fed. Rep. 823. When by statute it is provided that the

the charter provides that *ordinances published by authority of the corporation* shall be received in evidence without further proof, a *book of ordinances*, purporting to be thus published, is competent evidence, without further authentication; but it is not, of course, conclusive.¹

§ 607 (335). **Signing and recording Ordinances.**—Statutory and charter provisions that ordinances shall be *recorded*, *signed* by the presiding officer, and *attested* by the clerk are directory only in their nature, and a failure to observe them will not invalidate an ordinance or prevent its taking immediate effect.² Accordingly, it has been held that a provision in a statute changing an incorporated town into a city, that the existing town ordinances shall remain in force provided they *shall be recorded* within four months thereafter, is merely directory, and such ordinances are valid, though not recorded within the designated period.³ Nor is it a valid objection to a municipal ordinance that it is recorded in print (being printed and pasted in the proper book) and not in manuscript.⁴ Within this principle, also, it has been held that a statutory requirement that the mayor or other presiding officer shall *sign the ordinance or the record thereof* is directory only, and that his omission to sign does not affect the validity of the ordinance.⁵ Within this principle also it

recording of town ordinances in a book styled "Book of Ordinances" shall be considered *prima facie* evidence of publication, and an ordinance is duly recorded in the book, it devolves upon the town to overcome the presumption of publication by affirmative evidence. *Fletcher v. Hickman*, 136 Fed. Rep. 568.

¹ *St. Louis v. Foster*, 52 Mo. 513; *Lindsay v. Chicago*, 115 Ill. 120; *ante*, § 579, note. The legislature may enact that the simple production of the ordinance, or a copy thereof, shall be *prima facie* evidence that every step has been taken with reference to it, essential to make it a valid ordinance. *Schott v. People*, 89 Ill. 195.

² *People v. Cole*, 70 Cal. 59; *Central Irrig. Dist. v. DeLappe*, 79 Cal. 351, 358; *Landes v. State*, 160 Ind. 479; *Allen v. Davenport*, 107 Iowa, 90; *Upington v. Oviatt*, 24 Ohio St. 232, 241. See also *Whalin v. Macomb*, 76 Ill. 49; *Ede v. Knight*, 93 Cal. 159. See *supra*, § 578, as to *approval* of ordinances by mayor.

³ *Erie Academy Trs. v. Erie*, 31 Pa. St. 515; *Amey v. Allegheny City*, 24 How. (U. S.) 364; *Tipton v. Norman*,

72 Mo. 380. See chapter on Corporate Records, and Documents, *ante*.

⁴ *Ewbanks v. Ashley*, 36 Ill. 177. *Parol evidence of resolutions* is competent where the charter does not require them to be recorded, and no record thereof has been made. *Darlington v. Commonwealth*, 41 Pa. St. 68. See *ante*, § 579.

⁵ *Nat. Bank of Commerce v. Grenada*, 41 Fed. Rep. 87; *Martindale v. Palmer*, 52 Ind. 411; *Shea v. Muncie*, 148 Ind. 14; *Conboy v. Iowa City*, 2 Iowa, 90; *Commonwealth v. Williams*, 120 Ky. 315; *Opelousas v. Andrus*, 37 La. An. 699; *MacKenzie v. Wooley*, 39 La. An. 944, 949; *Stevenson v. Bay City*, 26 Mich. 44; *Blanchard v. Bissell*, 11 Ohio St. 96, 101, 103. In *Mandeville v. Band*, 111 La. 806, however, it was held that an ordinance which was not signed by the mayor as required by the statute until the day of the trial and after the alleged offence, had no validity to support a conviction for a violation thereof. But that the duty of signing the record is merely a ministerial one is well illustrated by the fact that it has been held that *mandamus* lies to compel the presiding officer to sign an

has been held that the validity of an ordinance is not affected by the omission of the clerk to copy it into the record,¹ or by the fact that it was not correctly copied into the record,² or by the omission of the clerk to attest the record.³ But it must always be kept in view that these requirements as to signature, recording, and attestation, may, by the express terms of the statute, be made mandatory in their nature, and in that event a compliance with the statute is essential to the validity of the ordinance.⁴

Of the Power to impose Fines, Penalties, and Forfeitures.

§ 608 (336). **Common-Law Principles adopted.** — That by-laws or ordinances may not be inoperative or useless, it is necessary that *some penalty should be annexed to the breach of them*; and it is settled in England, in accordance with the principles of Magna Charta, that without the express sanction of parliament, no by-law can be enforced by disfranchisement of the offender, or by his imprisonment, or by forfeiture of his goods or property. Under incidental power to pass by-laws, a corporation may, in England, annex pecuniary penalties of a certain fixed and reasonable character, but without express authority given by a statute, the only penalty it can

ordinance passed by the council as required by the charter. *State v. Meier*, 72 Mo. App. 618. Where the mayor's name is signed to the ordinance and the signature is attested by the clerk, it will be presumed that the ordinance was rightfully signed, although the minutes do not affirmatively recite the mayor's presence at the meeting at which the ordinance was passed, provided always that there is no statutory requirement that the minutes should show that fact. *Aurora Water Co. v. Aurora*, 129 Mo. 540, 578. The signature of the record by the acting mayor who presided in the absence of the mayor is sufficient compliance with a statute requiring the record to be signed by the presiding officer. *Lackey v. Fayetteville Water Co.*, 80 Ark. 108.

¹ *Crebs v. Lebanon*, 98 Fed. Rep. 549.

² *Boehme v. Monroe*, 106 Mich. 401; *Kenaston v. Riker*, 146 Mich. 163, 167; *Fisher v. Graham*, 1 Cin. Super. Cts. (Ohio) 113.

³ *Portland v. Yick*, 44 Oreg. 439. Although the statute directs that an ordinance shall be recorded and attested before presentation to the mayor

for approval, it is only directory as to time and manner; and presentation and approval by the mayor before recording and attestation are a sufficient compliance with the requirements of the statute. *Landes v. State*, 160 Ind. 479. When a copy of the ordinance is produced, certified by the proper officer, in the absence of evidence to the contrary it will be presumed that it was duly recorded. *Bayard v. Baker*, 76 Iowa, 220. Where another officer is ex officio clerk of the council, his signature to an ordinance as "clerk of the council" is a proper authentication of it. *In re Guerrero*, 69 Cal. 88.

⁴ *Barber Asphalt Pav. Co. v. Hunt*, 100 Mo. 22; *Aurora Water Co. v. Aurora*, 129 Mo. 540, 578, cited *supra*. A statutory requirement that the ordinance and also the affidavit or proof of publication should be recorded construed to be mandatory, and a compliance therewith essential to the validity of the ordinance. *Schwartz v. Oshkosh*, 55 Wis. 490. Recording of an ordinance held to be expressly made a condition of the ordinance becoming operative. *Appeal of Verona*, 108 Pa. 83.

prescribe is a pecuniary one, usually called a fine. Therefore in the absence of a statute or special custom justifying it, a by-law cannot give a power of distress and sale of the goods of the offender, since such a power is contrary to the common law. And where a corporation is empowered to enforce its by-laws in a special manner, as by fine, it is limited to the manner prescribed. These safe, salutary, and enlightened principles of law have been recognized by the American courts as applicable to the ordinances of our municipal corporations, as the cases to which reference is made fully show.¹

§ 609 (337). **Statutory Regulation of Fines and Penalties under Ordinances.** — By the *Municipal Corporations Act*, the subject of by-laws and their penalties is regulated. It is declared "that it shall be lawful for the council of any borough to make such by-laws as shall to them seem meet for the good rule and government of the borough, and for the prevention and suppression of all such nuisances as are not already punishable in a summary manner by virtue of an act in force throughout such borough, and to appoint, by such by-laws, such fines as they shall deem necessary for the prevention and suppression of such offences; provided that no fine, to be so appointed, shall exceed the sum of five pounds, and that no such by-law shall be made, unless at least two-thirds of the whole number of the council shall be present."² Respecting the fines mentioned in this section, Mr. Rawlinson suggests the inquiry whether it be necessary or not that the *exact amount* of each fine should be mentioned in the by-law, the limit, to wit, £5, being fixed by the act. It is contended, he observes, by some persons, that the amount may be left open, and that a by-law, enacting that the offence shall be punishable by a fine not less than 10s. and not exceeding £5, would be valid. This would be convenient, but some have doubted whether the corporation could enforce it by the usual common-law remedies, viz., by an act of debt or assumpsit. It is believed, he adds, that by-laws have invariably fixed the exact sum; but, nevertheless, it would seem that

¹ Text cited and approved: *McInerney v. Denver*, 17 Colo. 302, 315; *Tomlin v. Cape May*, 63 N. J. L. 429, 433. In *Louisiana*, in a case where an ordinance required property owners to make their sidewalks conform to a uniform grade under pain of a fine or imprisonment, in default of payment of the fine, it was held by *Bermudez, C. J.*, citing this section, that "a municipal corporation has no right to enforce obedience to the ordinances which it has the power to pass, by fine or imprisonment, or other penalty, unless that right has been unquestionably conferred by the lawgiver; for this is inflicting a punishment for the commission or omission of an act declared an offence, a prerogative which, as a rule, appertains to the sovereignty only." *State v. Bright*, 38 La. An. 1. See also *Slessman v. Crozier*, 80 Ind. 487.

² 5 and 6 Wm. IV. chap. lxxvi. § 90; *ante*, § 53 and note; *post*, § 634.

a fine of £5, with power to the mayor or other officer to reduce it to any sum not exceeding a specified amount, would be good.¹ In this country, the practice, if not general, is at least not uncommon, to prescribe limits to fines, and allow them to be imposed within those limits, at the discretion of the magistrate or court entrusted with jurisdiction to hear complaints for breaches of municipal ordinances.²

§ 610 (338). **Implied Power to annex Pecuniary Penalties.**— Since an ordinance or by-law without a penalty would be nugatory,³ municipal corporations have an implied power to provide for their enforcement by reasonable and proper fines against those who break them.⁴ So the right to make by-laws gives to the corporation, without any express grant of power, the incidental right to enforce them by reasonable pecuniary penalties. What is reasonable depends upon the nature of the offence and the circumstances.⁵

¹ Rawlinson on Corp. (5th ed.), 165, 166, note; *post*, § 613; *Piper v. Chappell*, 14 M. & W. 624; *Peters v. London*, 2 Upper Can. Q. B. 543; *Fennell, In re*, 24 Upper Can. Q. B. 238, 243; *Snell, In re*, 30 Upper Can. Q. B. 81. See also *Biggar's Mun. Manual* (Canada, 1900), 963.

² In *England* it is held that where the statute gives a discretion, either as to the amount of the penalty or its application, the justice must, on the face of the conviction, show in what manner the discretion has been exercised. *King v. Dimpsey*, 2 Term R. 96; *King v. Symonds*, 1 East, 189; *Boothroyd, In re*, 15 M. & W. 1; *King v. Seale*, 8 East, 568, 573; *King v. Smith*, 5 M. & S. 133; *Queen v. Johnson*, 8 Q. B. 102; *Wray v. Toke*, 12 Q. B. 492. See also *King v. Wyatt*, 2 Ld. Raym. 1478; *King v. Priest*, 6 Term R. 538. The provision for a fine not exceeding \$500 for such trivial offences as most of those covered by the ordinance before the court (one prohibiting processions without the consent of the mayor, *ante*, § 589, note), the council exercising no discretion, but turning this great power over to the courts, without any classification, held void. How far a sliding scale of penalties is allowable not decided, but the court said they must be reasonable whether sliding or fixed. *Per Campbell, C. J., In re Frazee*, 63 Mich. 396, citing *Grand Rapids v. Hughes*, 15 Mich. 54; see *post*, §§ 612, 613, 636; *Biggar's Mun. Manual* (Canada, 1900), 964.

³ *Assaria v. Wells*, 68 Kan. 787; *In*

re Van Tuyl, 71 Kan. 659, 663; *Smith v. Gouldy*, 58 N. J. L. 562; *Massinger v. Millville*, 63 N. J. L. 123; *Tomlin v. Cape May*, 63 N. J. L. 429, citing text; *State v. Cleveland*, 3 R. I. 117. But no penalty can be enforced for an illegal exaction. *New York v. Third Avenue Railroad Co.*, 33 N. Y. 42; *New York v. Second Avenue Railroad Co.*, 32 N. Y. 261. "Municipal fine," as used in the Constitution of *California*, means a fine imposed by local laws of particular places, such as incorporated towns and cities, and not a fine imposed by the general laws of the State. *People v. Johnson*, 30 Cal. 98.

⁴ *Fisher v. Harrisburg*, 2 Grant (Pa.) Cas. 291; *Barter v. Commonwealth*, 3 Pa. (Pen. & W.) 253; *Trigally v. Memphis*, 6 Coldw. (Tenn.) 382; *McInerney v. Denver*, 17 Colo. 302, 315. The amount must be reasonable. *Zylstra v. Charleston*, 1 Bay (S. Car.), 382. The penalty, says Mr. Willcock, must be imposed on the person who violates the by-law. Thus, if goods be sold by an unauthorized person within the city, the penalty must be imposed on the seller, and not on the buyer; for how can he distinguish between those authorized to sell and those who are not? *Wille. on Corp.* 154, pl. 369, 370; *Cud-don v. Eastwick*, 1 Salk. 143, 192; s. c. 6 Mod. 124; and see also *Fazakerly v. Wiltshire*, 1 Stra. 469. The rule stated above, as to the person on whom penalties must be imposed, may be extended or enlarged by express provisions of the organic act of the corporation.

⁵ *Mayor, &c. of Mobile v. Yuille*, 3

§ 611 (339). **Charter Mode governs.** — Where the charter or organic act prescribes the *manner* in which by-laws are to be enforced, or the sanctions or *punishments* to be annexed to their violation, this constructively operates to negative the right of the corporation to proceed in any other manner or to inflict any other punishment.¹ Thus, in the leading case² on this subject, the charter

Ala. 137. A penalty, although small, fixed on every stroke of the hammer which an unauthorized person uses in his trade of a goldsmith, is unreasonable. Willc. 154, pl. 368. Same principle, Mayor, &c. of New York v. Ordrenan, 12 Johns. (N. Y.) 122. See *ante*, chap. xiii, Municipal Courts.

¹ *Ex parte* Moore, 62 Ala. 471; *McInerney v. Denver*, 17 Colo. 302, 315, citing text; *In re Van Tuyl*, 71 Kan. 659, 662, quoting text; *Lambert v. Rahway*, 58 N. J. L. 578, 582, citing text.

Under statutory authority to enforce ordinances "by a proper fine, imprisonment, or other penalties," the city cannot prescribe both fine and imprisonment as a punishment for a violation. The authority conferred is in the alternative. *McInerney v. Denver*, 17 Colo. 302. Where the statute required that all city ordinances enacted under it should impose as a penalty for each violation a fine of not less than \$100 or more than \$500 and imprisonment for not less than thirty days or more than six months for each offence and the payment of costs, an ordinance imposing as a penalty merely the prescribed fine and imprisonment without providing for the costs or commitment until fine and costs are paid, does not comply with the statute and is void. *In re Van Tuyl*, 71 Kan. 659. If the ordinance fix a penalty that is less than the minimum prescribed by the statute, the ordinance is void. *Assaria v. Wells*, 68 Kan. 787.

² *Kirk v. Nowill*, 1 Term R. 118, 124, *per Mansfield* and *Buller, JJ.*: followed in *Hart v. Albany*, 9 Wend. (N. Y.) 571, 588, 606; *Cotter v. Doty*, 5 Ohio, 394; *Heise v. Columbia*, 6 Rich. (S. Car.) Law, 404; *Miles v. Chamberlain*, 17 Wis. 446. In *Hart v. Albany*, 9 Wend. (N. Y.) 571, 588, 606, it was accordingly decided that a corporation having authority "to inflict penalties for the violation of any by-law, not exceeding \$25 for any one offence," could not pass a by-law subjecting property

to seizure and sale, or forfeiting it, even though it was used contrary to the by-law, which was in other respects valid, the remedy for enforcing their by-laws having been specified. *Hart v. Albany*, 9 Wend. (N. Y.) 571; *ante*, § 471; *post*, § 1417.

Where *specific modes* of procedure and penalties are prescribed against persons failing to take out license for keeping drinking-houses, as fines, suits, and prosecutions, a municipal corporation, in the absence of express grant, has no right to close the doors of a drinking-house *summarily*, because the keeper has failed to take out a license. *Bolte v. New Orleans*, 10 La. An. 321. That a municipal corporation *cannot annex other or greater penalties* than those authorized in its organic act, that power to punish by "fine" is exclusive, and that it is not competent to order a forfeiture in addition, see *Schroder v. City Council*, 2 Const. Rep. (S. Car.) 726; s. c. 3 Brev. 533; *McMullan v. Charleston*, 1 Bay (S. Car.), 46; *Zylstra v. Charleston*, *Id.* 382; *New Orleans v. Costello*, 14 La. An. 37; *Columbia v. Hunt*, 5 Rich. (S. Car.) 550, 558; *Kennedy v. Sowden*, 1 McMullan (S. Car.), 323. Compare *Crosby v. Warren*, 1 Rich. (S. Car.) Law, 385. An ordinance treated as wholly void because it fixed the minimum fine for an offence at five dollars when the law required it to be three dollars. *Petersburg v. Metzker*, 21 Ill. 205. A party cannot enjoin the collection of a fine and costs imposed for the violation of a city ordinance, on the ground of there being no offence charged or cause of action stated before the mayor. The remedy in *Indiana* in such case is by appeal. *Schwab v. Madison*, 49 Ind. 329. The city of *New Orleans* has power to inflict fines and imprisonment under its police power only, and cannot apply them to violators of ordinances for the raising of a revenue, — as for selling vegetables without paying for the privilege. *State v. Patamia*, 34 La. An. 750.

prescribed in what manner by-laws should be enforced, namely, by *fine* and *amercement*, or either, and it was decided that the corporation was precluded from declaring a *forfeiture* of property, or from inflicting any other punishment; and the doctrine of this case has been everywhere followed in the courts of this country.

§ 612 (340). **Same Subject.** — A charter of a city specifically enumerated various powers, which the council was expressly authorized to enforce by a penalty not exceeding one hundred dollars for their violation; and the same charter empowered the council to prevent and remove encroachments upon the streets, but was silent as to the imposition of penalties for a violation of its provisions. The council passed an ordinance *imposing a continuing penalty of ten dollars a day for every day's failure* to remove an encroachment, after notice; and it was held, and properly so, that it possessed no power to impose such a penalty; but the decision was put upon the ground that the specific enumeration of the powers which might be rendered effectual by penal provisions *was an implied exclusion* of the right to impose any penalties whatever in other cases.¹

§ 613 (341). **Penalty may be within Fixed Limits.** — A municipal corporation, with power to pass by-laws and to affix penalties, may, if not prohibited by the charter, or if the penalty is not fixed by the charter, make it *discretionary, within fixed reasonable limits*, for example, "not exceeding fifty dollars." The maximum limit must of course be reasonable. This enables the tribunal to adjust the penalty to the circumstances of the particular case, and is just and reasonable. The older English authorities, so far as they hold such a by-law void for uncertainty, are regarded as not sound in principle, and ought not to be followed.²

¹ *Grand Rapids v. Hughes*, 15 Mich. 54. Whether there is such an implied exclusion must depend in each case, we think, upon the supposed intention of the legislature, to be gathered from a survey of the whole charter. The authority to adopt an ordinance implies the right to enforce it by proper pecuniary penalties, and this right exists unless excluded by other provisions of the charter. *Supra*, § 610. In *Maryland*, it is held when a municipal corporation is seeking to enforce an ordinance which is void, that a court of equity has jurisdiction, at the suit of any person who is injuriously affected thereby, to stay its execution by in-

junction. *Baltimore v. Radecke*, 49 Md. 217. But see Index, *Equity; Injunction*. In *Illinois*, it has been held that a municipality has the power to provide a penalty for each day that a railroad company shall fail to comply with an ordinance changing the grade of a street. *Hampton v. Chicago, M. & St. P. R. Co.*, 125 Ill. App. 412.

² *Huntsville v. Phelps*, 27 Ala. 55, overruling, on this point, *Mobile v. Yuille*, 3 Ala. 137. Compare *Louisburg v. Harris*, 7 Jones Law (N. Car.), 281. See also *Piper v. Chappell*, 14 Mees. & W. 624, 649; *Butchers' Co. v. Bullock*, 3 B. & Pul. 434; *Grant on*

§ 614 (342). **Single Offence cannot be made Double.** — As the power to pass ordinances and to punish for their violation must be reasonably exercised, *the corporation cannot multiply one offence into many* and punish for each. Thus, where an authorized ordinance prohibited “any person from cutting down and making use of cedar and other trees,” within a specified locality, a complaint, charging the defendant “with having cut down a cedar tree at various times, and that he continued to do so, from time to time, until he had committed one hundred violations of the ordinance, by cutting down one hundred cedar trees,” was held to set forth but a *single* offence; for, said the court, “the matter charged is a trespass with a *continuando*, which in law is but one offence, and it may well be that every tree cut by the defendant was cut on *one* day, and, under the ordinance, the cutting of more trees than one, at *one time*, would be but one offence.”¹

§ 615 (343). **Limitation of Amount of Penalties.** — Where there is a limitation upon the corporation as to the *amount of penalties* to

Corp. 84; Fennell, *In re*, 24 Upper Can. Q. B. 238; State v. Cantieny, 34 Minn. 1; Atkins v. Phillips, 26 Fla. 281, 294, citing text; Poughkeepsie v. King, 38 N. Y. App. Div. 610.

New Jersey. The rule adopted in this State is laid down by Dixon, J., in Young & M. Amusement Co. v. Atlantic City, 60 N. J. L. 125, where he says that under the decisions of that State the city council or other governing body may, under statutory authority to exact penalties for violations of municipal ordinances, confer upon the court the power of enforcing the penalty within prescribed limits according to the circumstances of each case (see McConvill v. Jersey City, 39 N. J. L. 38; Leland v. Long Branch Com'rs, 42 N. J. L. 375; Atlantic City v. Crandol, 67 N. J. L. 488; Atlantic City v. France, 74 N. J. L. 389; 65 Atl. Rep. 894), unless the statute evinces an intention that the governing body should itself fix a precise sum. See State v. Zeigler, 32 N. J. L. 262; Melick v. Washington, 47 N. J. L. 254; Smith v. Clinton, 53 N. J. L. 329; Slocom v. Ocean Grove, 59 N. J. L. 110; Philadelphia & B. R. Co. v. Brigantine, 60 N. J. L. 127; Tomlin v. Cape May, 63 N. J. L. 429; Lambertville v. Applegate, 73 N. J. L. 110. When the statute confers discretion on the magistrate to fix a penalty within prescribed limits, the council cannot deprive him of this discretion by providing a fixed

penalty. Massinger v. Millville, 63 N. J. L. 123, 126.

North Carolina. In this State it is held that fines imposed by ordinance must be fixed in amount and cannot be left to the discretion of the court. Ordinances prescribing a fine of “not more than” a sum specified are therefore void for uncertainty and vagueness. State v. Cainan, 94 N. Car. 863; State v. Crenshaw, 94 N. Car. 877; State v. Worth, 95 N. Car. 615; State v. Rice, 97 N. Car. 421. But compare State v. Higgs, 126 N. Car. 1014, 1020. Where the charter empowered the city council to “ordain fixed penalties” it was held that the ordinance must prescribe the amount of the penalty. Poughkeepsie v. King, 38 N. Y. App. Div. 610.

A by-law fixing one penalty for the first offence, and a larger for the second, and a still larger one for every subsequent offence, does not appear to be bad for uncertainty. Butchers' Co. v. Bullock, 3 B. & Pul. 434. Where the penalty is fixed by by-law, it can only be changed by the same authority which affixed it. Rex v. Ashwell, 12 East, 22; Scarning v. Cryer, 3 Leon. 7; Moore, 75; Bendl. 159; Davies v. Lowden, Carter, 29. A penalty fixed either by the charter or by-law is essential. Bowman v. St. John, 43 Ill. 337; Ashton v. Ellsworth, 48 Ill. 299; *supra*, §§ 609, 610; *infra*, § 615.

¹ State v. Moultrieville, Rice (S. Car.) Law, 158.

be imposed for the infraction of by-laws, it cannot exceed the limit directly, nor can it do so indirectly by multiplying what is in substance one offence into several, or subdividing one transaction or violation into a number of offences, and annexing a penalty to each.¹ But where each offence is distinct, and the punishment for each is within the power of the corporation to impose, the punishment is not made illegal, though the separate fines in the aggregate exceed the limit allowed by the charter, and are imposed by the same magistrate or tribunal at one sitting.²

§ 616 (344). **Same Subject.** — By its charter, the *power of a city corporation to impose fines* for breaches of its ordinances was limited to one hundred dollars. By the charter the city had also the power to regulate the inspection of flour, and it passed an ordinance by which any person selling flour without inspection should be fined "five dollars for each barrel so sold." It was held that this ordinance, as to the penalty, was valid so far as to authorize a fine not exceeding one hundred dollars; that if a single sale exceeded twenty barrels, the fine could be but one hundred dollars, while if it was less than twenty barrels, the fine would be but five dollars on each barrel. The court observed that a recovery on a single transaction, where more than twenty barrels were sold, would bar any future proceeding for the balance.³

§ 617 (345). **Power of Forfeiture must be expressly conferred.** — A corporation, under a general power to make by-laws, cannot make a by-law ordaining a *forfeiture of property*. To warrant the exercise of such an extraordinary authority by a local and limited jurisdiction, the rule is reasonably adopted that it must be *plainly*, if not, indeed, *expressly* conferred by the legislature.⁴ And even if the

¹ New York v. Ordrenan, 12 Johns. (N. Y.) 122 (penalty for illegally keeping powder), citing and approving opinion of Lord Mansfield in Crepps v. Durden, Cowp. 640. See also Hart v. Albany, 9 Wend. 571, 588, 606; Zylstra v. Charleston, 1 Bay (S. Car.), 382; vide Stokes v. New York, 14 Wend. (N. Y.) 87. *Supra*, §§ 609, 613. *Continuing offences.* See Hampton v. Chicago, M. & St. P. R. Co., 118 Ill. App. 621; s. c. 125 Ill. App. 412; State v. Babcock, 112 Iowa, 250; Marshall v. Smith, L. R., 8 C. P. 416.

² Heise v. Columbia, 6 Rich. (S. Car.) Law, 404 (fines for violating liquor ordinance); compare State v. Moultrieville, Rice (S. Car.) Law, 158, *supra*.

³ Chicago v. Quimby, 38 Ill. 274.

⁴ Kirk v. Nowill, 1 Term R. 118, 124, *per Mansfield and Buller*, followed by Court of Errors of New York, in Hart v. Albany, 9 Wend. (N. Y.) 571, 588, *per Sutherland, J.*; p. 605, *per Edmonds*, Senator; Lambert v. Rahway, 58 N. J. L. 578, 582, quoting text; Cooley v. Albany, 132 N. Y. 145, aff'g 57 Hun (N. Y.), 327; Abbeville v. Leopard, 61 S. Car. 99; 2 Kyd on Corp. 110; Willcock on Municipal Corporations, 180, pl. 449; Angell & Ames on Corp. § 360; Cotter v. Doty, 5 Ohio, 394; White v. Tallman, 26 N. J. L. 67; Clerk v. Tucket, 3 Lev. 281; Lee v. Wallis, 1 Kenyon, 292; Adley v. Reeves, 2 Maule & S. 60; Phillips v.

power to declare a forfeiture is conferred, still no person can, by ordinance, be deprived of his property by forfeiture without notice or without legal investigation or adjudication; an ordinance in violation of this principle is void, as "contrary to the genius of our laws and institutions."¹ In England the power of municipal corporations to impose a forfeiture for offences created by ordinances or by-laws has been, in many cases, sanctioned by *usage*, without any express power in the charter to impose the forfeiture. But in this country, inasmuch as corporations derive all their power from charter or act of the legislature, the right to inflict a forfeiture must be plainly given, and cannot be derived from usage.²

§ 618 (346). **Power to fine does not include Power to forfeit.** — How strictly the courts hold that municipal corporations *cannot, in the absence of clear statute authority, pass by-laws ordaining a forfeiture*, is strikingly illustrated by the case of *Heise v. Town Council of Columbia*. The town council had power to enforce obedience to their ordinances "*by fine, not exceeding fifty dollars.*" Special authority was given to municipal corporations to grant licenses to retail liquor. The council passed an ordinance relating to this subject, the penalty for violating which was a "fine of not more than fifty dollars for each offence, and also a *forfeiture of the license.*" It was held that the license which was granted and paid for was essentially *property*; that the council could only impose *fines*, and that it had no power to ordain a forfeiture of the license, there being (in the opinion of the court) no difference between the forfeiture of a license and of goods and chattels.³

Allen, 41 Pa. St. 481. In further illustration, see *New York v. Ordrenan*, 12 Johns. (N. Y.) 122; *Dunham v. Rochester*, 5 Cowen (N. Y.), 462; *Baxter v. Commonwealth*, 3 Pa. (Pen. & W.) 253; *Bergen v. Clarkson*, 1 Halst. (N. J.) 352; *Taylor v. Carondelet* (forfeiture of lease), 22 Mo. 105, 112; *Mayor, &c. of Mobile v. Yuille*, 3 Ala. 137; *Miles v. Chamberlain*, 17 Wis. 446; *Donovan v. Vicksburg*, 29 Miss. 247; *Cincinnati v. Buckingham*, 10 Ohio, 257; *Wilcox v. Hemming*, 58 Wis. 144; *post*, § 620.

¹ *Cotter v. Doty*, 5 Ohio, 394, 398; *Rosebaugh v. Saffin*, 10 Ohio, 31; *Slessman v. Crozier*, 80 Ind. 487.

² *Taylor v. Carondelet*, 22 Mo. 105, 112; *Kirk v. Nowill*, 1 Term R. 118; *Adley v. Reeves*, 2 Maule & Sel. 60; *Varden v. Mount*, 78 Ky. 86, citing text; *Armstrong v. Brown*, 105 Ky. 81.

³ *Heise v. Columbia*, 6 Rich. (S. Car.) Law, 404. See also to the same effect, *Shreveport v. Draiss*, 111 La. 511, citing and approving text; *Johnson v. Daw*, 53 Mo. App. 372, approving text; *Lambert v. Rahway*, 58 N. J. L. 578, 582, citing text; *People v. Department of Health*, 117 N. Y. App. Div. 856, 859, citing text. As to revocation of unexpired license for sale of intoxicating liquors, see *State v. Cook*, 24 Minn. 247. License to sell liquor under the laws of the State is not a contract, and may be terminated by a repeal of the law. *Fell v. State*, 42 Md. 71; *State v. Bonnell*, 119 Ind. 494. The revocation by a municipal corporation of a license to sell intoxicating liquors upon certain specified conditions, a violation of which, according to the terms of the license, should have the effect to revoke it, is not a *forfeiture* beyond the powers

§ 619 (347). **Judicial Procedure necessary in Some Instances.**—An ordinance of the city of New Orleans *authorizing without any prior judicial proceedings, a sale, under the orders of the mayor, of all property suffered to remain on the levee beyond a specified period*, is invalid, since it makes the corporation judges and parties in the same cause, and enforces a forfeiture, and divests the owner of his property without a trial in due course of law. Such a power is not similar to that exercised by a corporation in removing nuisances, as that power arises from necessity and ceases with that necessity. It would be competent for the corporation to ordain that the property should be removed at the expense of the proprietor, and to recover these expenses, and any fine which might be imposed, by judicial proceedings.¹

§ 620 (348). **Forfeiture of Animals at Large; Notice; Legal Proceedings.**—The right to denounce a *forfeiture against animals running at large* in a town or city, contrary to the provisions of ordinances forbidding it, must be plainly conferred or it will not be held to exist.² This is in accordance with the rule of the English courts, that a statute will not be taken to invest, by implication, a municipal corporation with the extraordinary powers of forfeiting the property of the subject, and that, if it be intended that any such power shall be given, it must be by express words to that effect. The cases agree in holding that when the power to denounce the forfeiture against such animals is given, *there should be notice, either actual or constructive, or prior legal proceedings*. The view of the courts will be best understood by referring to some of the cases upon the subject. In Mississippi, an ordinance authorizing the seizure and sale of hogs running at large, without notice or trial, or opportunity for

of the corporation. *Hurber v. Baugh*, 43 Iowa, 514.

¹ *Lanfear v. New Orleans*, 4 La. 97. Compare with *Guillotte v. New Orleans*, 12 La. An. 432, in which it was held that an ordinance providing a forfeiture for the use of the city workhouse, of bread illegally baked in violation of an authorized by-law of the corporation, is not contrary to a constitutional provision declaring that vested rights shall not be divested unless for purposes of public utility and for adequate compensation previously made. It may be observed that the court, without any special discussion, assumed that power "to regulate everything which relates to bakers" gave authority to denounce

a forfeiture of bread baked contrary to the provisions of the ordinance of the city. See, on this point, *Mobile v. Yuille*, 3 Ala. 137. Assize of bread has been deemed necessary from an early period in England. *Burn, J.*, title "Bread." Construction of English statute regulating sale of bread. *Queen v. Wood*, L. R. 4 Q. B. 559; *Queen v. Kennett*, L. R. 4 Q. B. 567; *Aerated Bread Co. v. Gregg*, L. R. 8 Q. B. 355.

² *Varden v. Mount*, 78 Ky. 86; *Wilcox v. Hemming*, 58 Wis. 144; *Knoxville v. King*, 7 Lea (Tenn.), 441, approving the text; *Johnson v. Daw*, 53 Mo. App. 372, approving the text.

trial, and providing that one half of the proceeds of the sales should go to the hospital and the other half to the city marshal, was held to be in violation of the constitutional provision that no person "can be deprived of his property but by due course of law," and securing right to a jury trial.¹

§ 621 (349). **Same Subject.** — In a similar case in Ohio, Grimke, J., delivering opinion of the court, observes: "The ordinance commands the marshal to seize and impound the hogs, and then, without any reserve, *without any notice*, by means of which the owner might be able to exculpate himself, directs them to be sold and the proceeds placed in the city treasury. Such an ordinance is as contrary to the spirit of the charter (Cincinnati) as it is alien from the general genius of our institutions."²

§ 622 (350). **Same Subject; Notice.** — In North Carolina the general principle was declared that an ordinance of an incorporated town which authorizes the property of one man to be taken from him and given to another, without any *notice* to the owner or trial of his rights, was unlawful. The town authorities, under power given to make ordinances for the removal of nuisances and for the good government of the town, passed an ordinance to this effect: "That every hog at large in the said town shall be taken up and penned, and advertised to be sold on the third day; and unless the owner should pay the charges (specified in the ordinance) for taking up and keeping

¹ *Donovan v. Vicksburg*, 29 Miss. 247. See to same effect *Poppen v. Holmes*, 44 Ill. 362; *Darst v. People*, 51 Ill. 286; *Heise v. Columbia*, 6 Rich. 404; *Whitfield v. Longest*, 6 Ire. (N. Car.) Law, 268; *McKee v. McKee*, 8 B. Mon. (Ky.) 433; *Jarman v. Patterson*, 7 Mon. (Ky.) 644; *Varden v. Mount*, 78 Ky. 86; *Paducah v. Ragsdale*, 122 Ky. 425; 92 S. W. Rep. 13, citing text. Power to impose penalties on the owners of animals running at large excludes, by implication, the power to enforce a by-law upon the subject in any other way; as, for example, by a sale of the animals found at large. *Miles v. Chamberlain*, 17 Wis. 446; *supra*, §§ 610, 611; *Brophy v. Hyatt*, 10 Col. 223; *Cartersville v. Lanham*, 67 Ga. 753. An ordinance directing the impounding and sale of animals for costs and expenses, but not imposing a penalty, held valid under a charter authorizing the impounding and sale "for any penalty imposed by any ordinance or regulation, and all costs." *Fort Smith v. Dodson*, 46 Ark. 296. Such an ordinance is valid, and takes effect whether the owner resides in the town or not. *Rose v. Hardie*, 98 N. Car. 44; *infra*, § 628, note.

² *Rosebaugh v. Saffin*, 10 Ohio, 31, 37. However it may be when the power to forfeit without notice or prior legal proceedings is *explicitly conferred*, it is clear that the power, unless plainly and expressly given, cannot be exercised without such notice and previous adjudication; but with these the remedy may, if needful, be "prompt and strong." *Cincinnati v. Buckingham*, 10 Ohio, 257, 262, *per Lane*, C. J. What is a *running at large*. *Kinder v. Gillespie*, 63 Ill. 88; *Case v. Hall*, 21 Ill. 632. Text cited and approved in *Lambert v. Rahway*, 58 N. J. L. 578, 583, holding that the common council in exercising a power to revoke a license acts judicially, and the licensee is entitled to notice and a hearing.

such hog, and a sale is effected, the money arising therefrom, after paying the charges, shall be paid over to the owner of the said hog." The validity of this ordinance was drawn in question, and two points were ruled by the Supreme Court: 1. That the ordinance was reasonable, and the corporation, under the power above referred to, had authority to pass it; 2. That it sufficiently provided for notice to the owner by the impounding of the animal, and the three days' public advertisement, and that personal notice was not necessary.¹ In a subsequent case in the same court a similar ordinance was sustained. It was objected that it was invalid, because it provided for no judicial decision condemning the property to be sold. This objection the court regarded as insufficient, "since the owner may, if he choose, have a full investigation of the case by bringing an action of replevin, as in any other case of distress."²

§ 623 (351). **Same Subject.** — In South Carolina it has been held that under authority to enforce by-laws by fine, an ordinance, otherwise legal, which authorized the marshal to kill hogs running at large, contrary to the ordinance, and appropriate them to his own use, was void.³

¹ *Shaw v. Kennedy* N. Car., Term R. 158; *Hellen v. Noe*, 3 Ire. (N. Car.) Law, 493. Same principle; *Spitler v. Young*, 63 Mo. 42, holding that such an ordinance was unauthorized as a sanitary or police regulation under power to abate nuisances. See also *Paducah v. Ragsdale*, 122 Ky. 425; 92 S.W. Rep. 13.

² *Whitfield v. Longest*, 6 Ire. (N. Car.) Law, 268. Similar ordinances have been sustained. *Gosselink v. Campbell*, 4 Iowa, 296; *Gilchrist v. Schindling*, 12 Kan. 263; *Jeans v. Morrison*, 99 Mo. App. 208; *Folmar v. Curtis*, 86 Ala. 354. *Contra*, *Willis v. Legris*, 45 Ill. 289; *Bullock v. Geomble*, *Ib.* 218; *Poppen v. Holmes*, 44 Ill. 362. But see *Hart v. Albany*, 9 Wend. (N. Y.) 571; *White v. Tallman*, 26 N. J. L. 67; *Phillips v. Allen*, 41 Pa. St. 481; *Moore v. State*, 11 Lea. 35; *Knoxville v. King*, 7 Lea. 441. Power must be strictly pursued, or the sale will be void, and the officer a trespasser. *Clark v. Lewis*, 35 Ill. 417. See *Friday v. Floyd*, 63 Ill. 50, three judges dissenting. Sale is void where two animals belonging to different owners are sold at once. *Ib.*

³ *McRae v. O'Lain*, cited *Kennedy v. Sowden*, 1 McMullan (S. Car.) Law, 323. But authority to impose "fines

and penalties" authorizes a fine against those who violate the ordinance forbidding hogs running at large, and the seizure, impounding, and sale (upon notice) of the animals to pay the fine, whether they belong to residents or non-residents. *Kennedy v. Sowden*, 1 McMullan (S. Car.) Law, 323, *supra*; s. r. *Crosby v. Warren*, 1 Rich. (S. Car.) Law, 385, *Wardlaw, J.*, dissenting; *McKee v. McKee*, 8 B. Mon. (Ky.) 433; see *Kinder v. Gillespie*, 63 Ill. 88. But it seems doubtful, upon the principles adopted in the construction of powers of this character, whether authority to impose fines and penalties extends any further than to the imposition of pecuniary fines and penalties. See *Mobile v. Yuille*, 3 Ala. 137; *White v. Tallman*, 26 N. J. L. 67. The power to forfeit, like the power to tax, should be given either expressly, or, at all events, by necessary implication. And it has been held that it cannot be implied from the power "to impose reasonable fines," and to cause "all such fines and all such forfeitures and penalties as may be incurred under the laws and ordinances of the corporation, to be assessed, levied, and collected." *Cotter v. Doty*, 5 Ohio, 394.

§ 624 (352). **Equity will not ordinarily relieve against Valid Forfeitures.** — A forfeiture imposed by a municipal corporation, under legislative authority, for a violation of a valid by-law, and inflicted as a penalty for such violation, *cannot be relieved against in equity*, unless, perhaps, where peculiar circumstances furnish grounds for equitable interposition, the general doctrine being that equity may relieve against forfeitures declared by contract, but not against those expressly declared or authorized by statute.¹

§ 625 (353). **Power to enforce by Imprisonment must be expressly given.** — In this country it is not unusual to provide, in the organic act of municipal corporations, that if fines for violation of by-laws or ordinances are not paid, *the offender may be committed to prison* for a limited period. And in respect to some offences public in their character, the power to imprison in the first instance is often conferred.² It is scarcely necessary to add that unless the authority be plainly given, it does not exist; and when given, before it can be exercised there must be a judicial ascertainment by a competent tribunal or magistrate of the guilt of the party.³

¹ Taylor v. Carondelet, 22 Mo. 105 (forfeiture clause in lease); Peachy v. Somerset, 1 Str. 447; Gorman v. Low, 2 Edw. Ch. (N. Y.) 324; Keating v. Sparrow, 1 Ball & Beat. 367; Maryland v. Baltimore & O. R. Co., 3 How. (U. S.) 534.

² Barter v. Commonwealth, 3 Pa. 253; New Orleans v. Costello, 14 La. An. 37; Burlington v. Kellar, 18 Iowa, 59; London v. Wood, 12 Mod. 674; Bab v. Clerk, F. Moore, 411; Clarke's Case, 5 Co. 64; 1 Roll. Abr. 364; Com. Dig. By-Law, E. 1; Chilton v. London, &c. R. Co., 16 M. & W. 212; King v. Merchant Taylors' Co., 2 Lev. 200; *Ex parte* Bollig, 31 Ill. 88; Flora v. Sachs, 64 Ind. 155; Topeka v. Boutwell, 53 Kan. 20; Burlington v. Stockwell, 5 Kan. App. 569; In *Kansas*, cities have the power to punish by fine and imprisonment violations of ordinances imposing license taxes on occupations. Lebanon v. Zanditon, 75 Kan. 273; Fretwell v. Troy, 18 Kan. 271.

³ Burnett, *In re*, 30 Ala. 461. *Ex parte* Moore, 62 Ala. 471; *In re* Semple, 10 Kan. App. 156; State v. Bright, 38 La. An. 1; Bolton v. Vellines, 94 Va. 393, citing text.

Where the charter authorizes the mayor and city council, on conviction of any person for violation of an ordi-

nance, "to fine or imprison, or to fine and imprison, or to sentence to labor, and in the event the fine and costs are not paid to require the offender to work out the fine and costs under the direction of the city authorities," a *money fine* and a *sentence to labor* cannot be imposed in one and the same case, unless the labor is added only as a mode of enforcing payment of the fine. *Ex parte* Anniston, 84 Ala. 21; *Ex parte* Reynolds, 87 Ala. 138. It has been held that express statutory authority is necessary to the validity of a provision of an ordinance authorizing persons violating the same to be committed to the chain gang to work on the city streets. Carr v. Conyers, 84 Ga. 287; Williams v. Sewell, 121 Ga. 665. But if the council should pass an ordinance providing as authorized by the charter not only a fine as a punishment for a violation, but also for imprisonment without any authority in the charter, the *unauthorized provision* is separable from the authorized provision for punishment by fine, and may be rejected without rendering the entire ordinance void. Doran v. Camden, 64 N. J. L. 666; Sterling v. Camden, 65 N. J. L. 190; Marcovitz v. Collins, 65 N. J. L. 193.

Charter power to punish violations

§ 626. **Power to impose Costs as Part of Penalty.** — If the ordinance does not contain any provision *for the payment of costs*, none are recoverable, although the municipality may by statute have authority to require the payment of costs as a part of the penalty.¹ But

of ordinances "by fines, imprisonment, labor, or other penalty prescribed by ordinance" will authorize the city council to prescribe as punishment *either fine or imprisonment* (not both), and not even imprisonment as means of enforcing payment of a fine. *Brieswick v. Brunswick*, 51 Ga. 639. But in *California*, the court seems to have recognized the implied or incidental authority, of the city council to provide for commitment as a means of enforcing payment of a valid fine. In *Ex parte Green*, 94 Cal. 387, the statute authorized the city "to impose fines and penalties, and forfeitures for any and all violations of ordinances, and for any breach or violation of any ordinance to fix the penalty by fine or imprisonment or both." An ordinance provided that violations should be punishable by imprisonment for ten days and by fine of a specified amount, and that judgment of a fine should direct that in default of payment the defendant should be committed to jail until the fine be satisfied by one day's imprisonment for every two dollars of fine remaining unpaid. The provision for commitment was sustained as incident to and a valid exercise of the power to enforce and collect fines. *Sharpstein, J.*, said, — "The power to impose fines is clearly conferred, but no mode is provided for their collection. We think in such a case it is clearly within the power of the municipal corporation to adopt any reasonable mode for the enforcement of the payment of any fine that it is authorized to impose. The payment of fines has always been enforced by imprisonment." See also *Ex parte Slattery*, 3 Ark. 484.

It has been declared that the power to commit an offender where a fine is authorized to be imposed can only be exercised by a commitment until the fine and costs be paid, and not by way of punishment to the offender for the offence committed. *Tomlin v. Cape May*, 63 N. J. L. 429, 434. See also *Calhoun v. Little*, 106 Ga. 336; *Bayonne v. Herdt*, 40 N. J. L. 264; *Bregguglia v. Vineland*, 53 N. J. L. 168. But it is otherwise when the statute expressly authorizes commitment for a term as

an alternative to the imposition of a fine. *Leonard v. Eatonton*, 126 Ga. 63; *Shuler v. Willis*, 126 Ga. 73.

Fines for the violation of ordinances, held, under special charter provisions, collectible by commitment of the persons, or by *fiery facias*. *Huddleson v. Ruffin*, 6 Ohio St. 604. The power to punish offenders by fine or imprisonment, conferred upon a municipal corporation, does not include the authority to coerce the payment of a fine by imprisonment. *Brieswick v. Brunswick*, 51 Ga. 639. Where an ordinance provided that a convicted person should forfeit a sum "not exceeding five hundred dollars, and may be imprisoned not exceeding sixty days, or both," a sentence to pay a fine of one hundred dollars or perform sixty days' work on the public streets, was held to be void, the latter clause being unauthorized by the ordinance, and the whole sentence being uncertain and in the alternative. *Ex parte Martini*, 23 Fla. 343. Authority to enforce penalties for violations of ordinances by "*distress and sale*" of property must be expressly or plainly granted. *White v. Tallman*, 26 N. J. L. 67; *Bergen v. Clarkson*, 1 Halst. (N. J.) 352.

In a civil suit for a penalty for violation of an ordinance, imprisonment cannot be adjudged against the defendant. *Kinmundy v. Mahan*, 72 Ill. 462. A law authorizing a municipal corporation to recover a fine for breach of a police regulation does not, without express provision therefor, authorize the arrest and criminal prosecution of the offender. *State v. Ruff*, 30 La. An. 497. And in England, likewise, such a power cannot be conferred by the crown and can only exist by authority of parliament or a special custom. *Clerk v. Tucket*, 3 Lev. 281; s. c. 2 Vent. 183; *Lee v. Wallis*, 1 Kenyon, 292; *Sayer*, 263; *Adley v. Reeves*, 2 Maule & Sel. 60; *Willc.* 179; *Glover*, 311. Verbal order of police magistrate will not justify police officer in holding a person in custody for the non-payment of a fine imposed for the breach of a municipal ordinance. *Odell v. Schroeder*, 58 Ill. 353.

¹ *Leonard v. Eatonton*, 126 Ga. 63.

the power to impose costs as a part of the penalty cannot be implied; it must be plainly, if not expressly, conferred, and a provision imposing costs as a part of the penalty, made without statutory authority, is void.¹

An ordinance containing an unauthorized provision imposing costs is not thereby rendered void in its entirety. The unauthorized provision may be rejected and the remainder of the ordinance stand.²

On whom Ordinances are binding, and who must notice them.

§ 627 (354). **Who bound.** — In England the by-laws of a municipal corporation bind not only the members, but, if they are general in their nature and purposes, and not limited to any particular class or description, but intended to extend to all persons coming within the local jurisdiction of the corporation, *they bind all*, whether members or strangers, and *all must take notice of them* at their peril. And by-laws made by a municipal corporation with respect to a liberty or franchise granted them, with local jurisdiction beyond the limits of the municipality, are as binding upon persons going into the liberty, as the by-laws of the city upon those who come within its walls.³

§ 628 (355). **Same Subject.** — So, also, *in this country* it is settled that valid ordinances bind not only the inhabitants of the corporation, but also strangers or non-residents coming within its limits. These, for the time being, are regarded as inhabitants, and liable in the same manner for violations of ordinances.⁴ So far is plain. But suppose a person living without the limits of the corporation suffers his cattle or property to stray into it and violate its ordinances. Here two

¹ *Leonard v. Eatonton*, 126 Ga. 63; *Moody v. Williamsburgh*, 120 Ky. 192; 88 S. W. Rep. 1075; *State v. Cantieny*, 34 Minn. 1, 7; *Bayonne v. Herdt*, 40 N. J. L. 264.

² *State v. Cantieny*, 34 Minn. 1, 7.
³ Willc. 105, 107; *Glover*, 289, 290; *London v. Vanacre*, 1 Ld. Raym. 496; *Salk*, 143; *Pierce v. Bartrum*, Cowp. 270; *Fazakerly v. Wiltshire*, 1 Stra. 469; *Kirk v. Nowill*, 1 Term R. 118; *Butchers' Co. v. Mercy*, 1 H. Bl. 370. *Commonwealth v. Plaisted*, 148 Mass. 375, 382. *Do not bind beyond limits of authorized jurisdiction.* See 3 Mod. 158; *T. Jones*, 144; 2 Brownl. 177; *Hob. 211*; *Hutt. 6*; 11 Rep. 53; *Godb. 252*. An ordinance passed in 1834, prohibiting the erection of "stables, &c., in the interior of the city of New Orleans, or any of its incorporated suburbs," held not to extend to the city of Lafayette, subsequently added, by act of the legislature, to the city of New Orleans. *New Orleans v. Anderson*, 9 La. An. 323. See *infra*, § 628.

⁴ *Heland v. Lowell*, 3 Allen (Mass.), 407; *Whitfield v. Longest*, 6 Ire. Law (N. Car.), 268 (approving *Pierce v. Bartrum*, Cowp. 270); *Commonwealth v. Plaisted*, 148 Mass. 375, 382, citing text. See also *Buffalo v. Webster*, 10 Wend. (N. Y.) 100; *Com'rs of Wilmington v. Roby*, 8 Ire. Law (N. Car.), 250; *Com'rs of Plymouth v. Pettijohn*, 4 Dev. Law, 591; *Strauss v. Pontiac*, 40 Ill. 301; *Charleston v. Pepper*, 1 Rich. (S. Car.) Law, 364; *Charleston v. King*, 4 McCord (S. Car.), 487; *Marietta v. Fearing*, 4 Ohio, 427; *Dodge v. Gridley*,

questions may arise: 1. Can such property, being *within* the corporation, be dealt with the same as if it belonged to an inhabitant of the corporation? It is held that it can.¹ 2. Can such *non-resident* owner be made amenable *personally* to a penalty to the corporation? In other words, has a corporation power, unless expressly conferred, to provide for collecting a penalty from a non-resident who suffers his property to violate an ordinance, but who himself was at the time without the corporate limits? This remains, perhaps, to be settled; though it is certain that ordinances will not be construed to extend to persons living without the corporation and not being within it, unless such an intention plainly appears.²

§ 629 (356). **Notice.** — All persons upon whom ordinances are binding *are bound to take notice* of them.³ But where a party is

10 Ohio, 173; *Horney v. Sloan*, 1 Smith (Ind.), 136; *Kennedy v. Sowden*, 1 McMullan (S. Car.), 323; *Bott v. Pratt*, 33 Minn. 323; *Knoxville v. King*, 7 Lea, 441. *Taxation* of non-residents using streets. *Post*, § 1166, note. When the power of a municipal corporation to license the owners and drivers of milk wagons and other vehicles is not expressly restricted to those residing within the city limits, there is no unjust or unfair discrimination in exacting a license of all enjoying such use of the streets, and a *milkman residing outside the city*, but driving his milk wagon therein, *may be taxed* under the ordinance. *Mason v. Cumberland*, 92 Md. 451, citing *Tomlinson v. Indianapolis*, 144 Ind. 142.

¹ *Whitfield v. Longest*, 6 Ire. Law (N. Car.), 268; *Gosselink v. Campbell*, 4 Iowa, 296, 300; *Reed v. People*, 1 Park. Cr. Rep. 481; *Rose v. Hardie*, 98 N. Car. 44; *Jeans v. Morrison*, 99 Mo. App. 208; *Folmar v. Curtis*, 86 Ala. 354, citing text. *Supra*, § 620, note. The point was also ruled the same way in *Spitler v. Young*, 63 Mo. 42; but the ordinance was construed not to apply to a case where the hogs owned outside of the corporation escaped from a pen in consequence of a flood, over which the owner had no control, which washed the pen away, and where the owner was using diligence to reclaim them. *Wagner, J.*, says: "While the hogs in this case were found in the streets, yet they were not there within the meaning and spirit of the ordinance, which was designed to prohibit hogs from running at large in the ordinary sense."

² *Plymouth v. Pettijohn*, 4 Dev. Law, 591. Inability to punish non-resident owner criminally in respect to property within corporate limits, see *Reed v. People*, 1 Park. Cr. Rep. 481. Power "to make such prudential rules and regulations as may seem necessary for the better improving of the *common lands* of a town," &c., extends only to regulations as between those who have the right to enjoy them in common, but does not confer the power of imposing a penalty for *trespasses by strangers*; for such acts the town must pursue its common-law remedy. *Foster v. Rhoad*, 19 Johns. (N. Y.) 191. See also *People v. Works*, 7 Wend. (N. Y.) 486. *Holladay v. Marsh*, 3 Wend. (N. Y.) 142. City held not to have power to require a license tax from non-resident owners of wagons engaged in hauling into and out of the city for hire. *St. Charles v. Nolle*, 51 Mo. 122. See Index, *Vehicles*. Ordinances cannot have an *extra-territorial* effect, unless the power be plainly conferred upon the corporation. *Strauss v. Pontiac* (liquor ordinance), 40 Ill. 301; *Gosselink v. Campbell*, 4 Iowa, 296; *Robb v. Indianapolis*, 38 Ind. 49; *Chicago Packing Co. v. Chicago*, 88 Ill. 221. Whether a party *resides within the limits* embraced by an ordinance is a question of fact. *Louisiana Bd. of Health v. Pooley*, 11 La. An. 743; *Police Jury v. Villaviabo*, 12 La. An. 788; *New Orleans v. Boudro*, 14 La. An. 303. See *supra*, § 627.

³ *Palmyra v. Morton* (sidewalk ordinance), 25 Mo. 593; *Buffalo v. Webster*, 10 Wend. (N. Y.) 100; *Commonwealth v. Plaisted*, 148 Mass. 375,

liable to a penalty if he does not do a given act upon notice, a newspaper notice is not sufficient, unless that mode is pointed out by the law, or general power is given to the corporation embracing within it the authority to prescribe the kind and manner of notice.¹

Ordinances relating to Public Offences.

§ 630 (366). **Distinction between Laws and By-Laws; Concurrent Prohibitions, &c.** — Statute law and by-laws are intended to meet different wants and exigencies, and to serve different purposes. The former, when general in its nature and operation, is intended to furnish a rule for the government of the people of the State everywhere. The latter, made by the corporation under derivative authority, are local regulations for the government of the inhabitants or the regulation of the local concerns of the incorporated place; and of course they must be void, unless specially authorized by the charter or organic act of the corporation, whenever they are repugnant to, or inconsistent with, the general law of the land. No *implied* power to pass by-laws, and no express *general* grant of the power, can authorize a by-law which conflicts with the statutes of the State, or with the general principles of the common law adopted or in force in the State.²

382, citing text; *Emporia v. Becker*, 76 Kan. 181; 90 Pac. Rep. 978. See *Reed v. People*, 1 Park. Cr. Rep. 481; *City of London v. Vanacre*, 12 Mod. 270, 272; *Glover on Corp.*, 207, 290; *Knoxville v. King*, 7 Lea (Tenn.), 441, citing text; *Faribault v. Wilson*, 34 Minn. 254 (as all persons within the city limits are bound to take notice of the ordinances, a complaint setting forth a violation of an ordinance need not recite it, — a reference to its number is sufficient). *Infra*, § 639. Where a city having an ordinance prohibiting the storage of fertilizers within the corporate limits, allowed, without objection or warning, a railroad company to erect expensive storehouses to accommodate its traffic in such merchandise, it was held that the city was estopped from asserting its ordinance against the company; and that the railroad, being bound to deliver its freight in the city, was not included in the terms of the ordinance. *Mayor of Athens v. Georgia R. R.*, 72 Ga. 800. As to estoppel see also *Atlanta v. Gate City Gas-Light Co.*, 71 Ga. 106; *post*, §§ 1042, 1457.

In *North Birmingham Street Rail-*

way Co. v. Calderwood, 89 Ala. 247, a personal injury case, plaintiff is held to be charged with knowledge of a rule prescribed by ordinance that street cars be stopped on the farther side of the intersecting street to receive and deliver passengers.

¹ *Keckely v. St. John's Par. Commissioners of Roads*, 4 McCord (S. Car.), 257.

² *Ante*, §§ 587, 589, 590-602; see also *post*, § 746 *et seq.*, 749 *et seq.*, and cases; *New Hampton v. Conroy*, 56 Iowa, 498; *Foster v. Brown*, 55 Iowa, 686; *State v. Lee*, 29 Minn. 445. An ordinance authorizing the licensing of an occupation which is illegal and criminal under the general law of the State is null and void. A license issued under such an ordinance is no defence against an indictment under the general law. *State v. Lindsay*, 34 Ark. 372 (keeping a gaming table).

An ordinance making that which is a crime under the general law an offence against the town, held to be void. *State v. Keith*, 94 N. Car. 933 (resisting officer), citing *Town of Washington v. Hammond*, 76 N. Car. 33; *State v. Langston*, 88 N. Car. 692; *State v.*

§ 631 (367). **Same Subject.** — The laws of the State operate within the limits of municipal corporations and upon their inhabitants the same as elsewhere, unless it is otherwise clearly provided in the charter, or by some statute of the State; and unless so provided, *in case of conflict between laws and by-laws*, the latter must give way. But the State may, and as to local matters frequently does, except municipal corporations from the operation of its laws, and either provides a special law for them or authorizes them to provide special regulations for themselves; and when this is done there is no conflict. But these local laws and regulations are at all times subject to the paramount authority of the legislature. Questions of difficulty have arisen in consequence of grants of power to municipal corporations to make ordinances *respecting matters and acts already regulated by general statute*, and, if criminal in their nature, punishable under the laws of the State. Hence, the same act comes to be forbidden by general statute and by the ordinance of a municipal corporation, each providing a separate and different punishment. The same transaction may, if complex in its nature, be in one part of it an offence against the general law, and in another against the by-law; but such cases present no difficulty. But can the same act be twice punished, once under the ordinance and once under the statute? The cases on this subject cannot be reconciled. Some hold that the same act may be a double offence, one against the State and one against the corporation. Others regard the act as constituting a single offence, and hold that it can be punished but once, and may be thus punished by whichever party first acquires jurisdiction.

Brittain, 89 N. Car. 574; Centreville v. Miller, 57 Iowa, 56; People v. Brown, 2 Utah, 462 (an ordinance creating and punishing the offence of assault and battery declared void). But see *Ex parte* Douglass, 1 Utah, 108, where an ordinance to punish persons keeping a house for gaming purposes was held to be authorized by the charter of Salt Lake City, though the offence was punishable by the general law of the State. In *Indiana*, a statute forbidding towns to punish offences which are provided for by general law, is held constitutional. *Jett v. Richmond*, 73 Ind. 316; *Indianapolis v. Huegele*, 115 Ind. 581.

Missouri. The courts of this State have recognized the power of the legislature to surrender exclusive control of misdemeanors to municipali-

ties, and the legislature has from time to time exercised that right. But when exclusive control is not clearly surrendered, each jurisdiction may make and enforce laws concurrently. *Harrison v. State*, 9 Mo. 526, 530; *Baldwin v. Green*, 10 Mo. 410; *State v. Binder*, 38 Mo. 450; *State v. Clarke*, 54 Mo. 17; *State v. Vic De Bar*, 58 Mo. 396; *State v. Harper*, 58 Mo. 531; *State v. Gordon*, 60 Mo. 383; *State v. Wister*, 62 Mo. 592; *State v. Willard*, 39 Mo. App. 251; *Kerney v. Barber Asphalt Pav. Co.*, 86 Mo. App. 573; *State v. Kessells*, 120 Mo. App. 233. By statute a municipal corporation had "*exclusive power to restrain, regulate, license, tax, or suppress dram shops.*" It was held that an ordinance of the municipality authorizing the sale of liquors on Sunday superseded

§ 632 (368). **Author's Conclusions.** — In view of the somewhat strict construction of grants of corporate powers, elsewhere explained and illustrated, and of the subordinate nature and purposes of by-laws, *the following rules*, although seeming to rest on sound principles, are, in view of the decisions, stated with some distrust of their entire correctness: I. A general grant of power, such as mere authority to make by-laws, or authority to make by-laws for the good government of the place, and the like, should not be held to confer authority upon the corporation to make an ordinance punishing an act — for example, an assault and battery — which is made punishable as a criminal offence by the laws of the State.¹ The intention of the State that the general laws shall not extend to the inhabitants of municipal corporations, or that these corporations shall have the power, by ordinance, to supersede the State law, will not be inferred from grants of power general in their character; nor will such authority in the corporation be held to exist as an implied or incidental right. II. Where the act is, in its nature, one which constitutes two offences, one against the State and one against the municipal government, the latter may be constitutionally authorized to punish it, though it be also an offence under the State law; but the legislative intention that this may be done ought to be manifest and unmistakable, or the power in the corporation should be held not to exist.² III. Where the act or matter covered by the charter

a statutory provision making it a misdemeanor to do so. *State v. Kessells*, 120 Mo. App. 233; 96 S. W. Rep. 494.

¹ Text approved *State v. Langston*, 88 N. Car. 692; *Moran v. Atlanta*, 102 Ga. 840, 843, quoting and approving text.

² *Hughes v. People*, 8 Colo. 536, 538, citing text; *Hood v. Von Glahn*, 88 Ga. 405; *Moran v. Atlanta*, 102 Ga. 840, 844, quoting text; *Ex parte Bourgeoise*, 60 Miss. 663, 670, citing text.

Georgia. An act that is already made penal by a State statute may be prohibited by ordinance, when express statutory authority therefor is conferred upon the municipality. *Hood v. Von Glahn*, 88 Ga. 405; *Littlejohn v. Stells*, 123 Ga. 427. But it cannot be done unless there is express and specific legislative authority therefor. *Moran v. Atlanta*, 102 Ga. 840; *Kassell v. Savannah*, 109 Ga. 491; *Penniston v. Newnan*, 117 Ga. 700; *Thrower v. Atlanta*, 124 Ga. 1. The general welfare clause is not sufficient to confer

authority to enact such an ordinance. *Moran v. Atlanta*, 102 Ga. 840. The *general welfare clause* in a charter does not authorize the passage of an ordinance prescribing a different *mode of trial and punishment* in addition to that provided for by the general criminal code of the State, for harboring and enticing seamen. *Savannah v. Hussey*, 21 Ga. 80. The power of municipal corporations to legislate respecting offences fully covered by the State law is denied, and the general subject is largely and satisfactorily discussed; and it is well remarked that, in such cases, "the law of the State is the law of the corporation; and they cannot make another law of themselves." The following is extracted from the opinion delivered by a very able judge: "Under the general grant of power [to pass all such ordinances as may seem necessary for the security, welfare, &c., of the city] the city authorities may cover all [proper] cases not provided for by the paramount authorities of the State. All those ordinances regulating came-

or ordinance, and by the State law, is not essentially criminal in its nature, and is one which is generally confided to the supervision and control of the local government of cities and towns, but is also of a nature to require general legislation, the intention that the municipal government should have power to make new, further, and more definite regulations, and enforce them by appropriate penalties, will be inferred from language which would not be sufficient were the matter one not specially relating to corporate duties, and fully provided for by the general laws. Such are the general principles which may be extracted from the authorities, but the exact state of the law will more satisfactorily appear, and indeed can only be seen, by reference to the adjudicated cases; accordingly, the leading cases upon the subject are stated in the note,¹ and in

teries, commons, markets, vehicles, fires, exhibitions, lamps, licenses, water works, watch, police, city taxes, city officers, health, nuisances, &c., are legitimate and proper. Nay, I might go further, and concede that where a State law defines an offence generally, and prescribes a punishment, without reference to the place where it is committed, in town or country, and the act, when committed in the streets and public places of the city, would be attended with circumstances of aggravation, such as an affray, for instance, the corporate authorities, with a view to suppress this special mischief, might probably provide against it by ordinance. And this is going quite far enough." But I deny that "a municipal corporation can legislate *criminally* upon a case fully covered by the State law, though aware that decisions may be found to support" that view. *Per Lumpkin, J.*, in *Savannah v. Hussey*, 21 Ga. 80, 86. Where *an act amounts to an indictable offence*, it cannot, without express statutory authority therefor, be punished under municipal ordinances, but the offender must be bound over to the proper court; if it does not amount to an indictable offence, the offender may be punished under the ordinances of the municipality, and if it is a nuisance, steps may also be taken to have it abated. *Vason v. Augusta*, 38 Ga. 542; *Reich v. State*, 53 Ga. 73.

¹ *Smith, In re*, Hempst. 201; *Mayor, &c. of Savannah v. Hussey*, 21 Ga. 80; *Brownville v. Cook*, 4 Neb. 101; *St. Charles v. Meyer*, 58 Mo. 86; *New Orleans v. Miller*, 7 La. An. 651; *Municipality No. 1 v. Wilson*, 5 La. An. 747;

State v. Cowen, 29 Mo. 330 (furious driving); *St. Louis v. Cafferata*, 24 Mo. 94 (Sunday ordinances); *Amboy v. Sleeper*, 31 Ill. 499; *State v. Ledford*, 3 Mo. 102; *Independence v. Moore*, 32 Mo. 392; *McLaughlin v. Stevens*, 2 Cranch C. C. 148; *St. Louis v. Bents*, 11 Mo. 61 (ordinance against vagrants); *United States v. Holly*, 3 Cranch C. C. 656; *Jefferson City v. Courtmire*, 7 Mo. 683 (ordinance against riots); *Davis v. State*, 4 Stew. & Port. (Ala.) 83; *State v. Plunkett*, 3 Harrison (N. J.), 5; *Rice v. State*, 3 Kan. 141; *Rogers v. Jones*, 1 Wend. (N. Y.) 237; *Mayor, &c. of New York v. Hyatt*, 3 E. D. Smith (N. Y.), 156; *Borough of York v. Forscht*, 23 Pa. St. 391; *March v. Commonwealth*, 12 B. Mon. (Ky.) 25; *Louisburg Com'rs v. Harris*, 7 Jones Law, 281; *Brooklyn v. Toynbee*, 31 Barb. (N. Y.) 282; *Davenport v. Bird*, 34 Iowa, 524; *Zylstra v. Charleston*, 1 Bay (S. Car.), 382; *Petersburgh v. Metzker*, 21 Ill. 205; *Howe v. Treasurer of Plainfield*, 37 N. J. L. 145; *Barter v. Commonwealth*, 3 Pa. 253; *State v. Clarke*, 25 N. J. L. 54; *State v. Pollard*, 6 R. I. 290; *People v. Jackson*, 8 Mich. 110; *post*, §§ 637, 686; *State v. Topeka*, 36 Kan. 76; *In re Sic*, 73 Cal. 142, approving text; *Ex parte Bourgeoise*, 60 Miss. 663; *Louisville v. Wehmhoff*, 116 Ky. 812.

Treating of the constitutional question involved, Mr. Justice *Cooley* remarks that, although the decisions are not uniform, the clear weight of authority is, "that the same act may constitute an offence both against the State and the municipal corporation,

some of its aspects the matter is further considered in the chapter on Municipal Courts.

and both may punish it without violation of any constitutional principle." Const. Lim. 199; *s. p.* *March v. Commonwealth*, 12 B. Mon. (Ky.) 25, 29, *per Simpson*, C. J.; *Howe v. Plainfield*, 37 N. J. L. 145, *supra*; *Brownville v. Cook*, 4 Neb. 101. In *England*, a by-law imposing a penalty on a corporator for refusing to serve in a corporate office, is valid, notwithstanding the party may be indicted for the same refusal, as he may be in all cases of municipal offices necessary or proper to carry on the government of the corporation. Grant on Corp. 82. A distinction was there early made between grave offences classified as *pleas* of the crown, and triable upon an issue of not guilty between the king and the defendant, and lesser or petty offences punishable by fine or amercement upon *presentment* in court leet, or inferior jurisdictions. See Hale, P. C., Vol. I. chap. lii.; Vol. II. chap. xix.; Norton's Com. London, 370, 453.

The history of *Courts of Summary Jurisdiction* in England, and an outline of their jurisdiction under the Summary Jurisdiction Act of 1879, will be found in Mr. Justice Stephen's *History of Criminal Law*, Vol. I. chap. iv. *Post*, §§ 745, 749, 750, and chapter on Municipal Courts.

In *Alabama*, it is held that a municipal corporation with power to enact ordinances "for the good government of the place, not contravening the laws of the State," may pass an ordinance imposing a fine for an assault and battery within its limits, and a punishment under the State law for the same act is no bar to a prosecution under the ordinance. *Collier*, C. J., delivering the opinion of the court, says: "The object of the power conferred by the charter, and the purpose of the ordinance itself, was not to punish an offence against the criminal justice of the country, but to provide a mere police regulation for the enforcement of good order and quiet within the limits of the corporation. . . . The offences against the corporation and the State are distinguishable and wholly disconnected, and the prosecution at the suit of each proceeds upon a different hypothesis: the one contemplates the observance of the peace and good order of the city; the other

has a more enlarged object in view, — the maintenance of the peace and dignity of the State." Mayor, &c. of *Mobile v. Allaire*, 14 Ala. 400. If the principle stated in the text be correct, the soundness of this decision under the powers conferred upon the corporation may admit of doubt, but the same view had been previously taken in the same court in *Mobile v. Rouse* (liquor law), 8 Ala. 515; and see *Moore v. State*, 16 Ala. 411; *Greensboro v. Mullens*, 13 Ala. 341; *post*, §§ 729, 745, 749, 750.

In *Texas*, it is held that an offence committed against the proper police regulations of a municipal corporation, which at the same time violates the penal laws, can legally be prosecuted under either, and a prosecution under one will be no bar to a legal prosecution under the other. *Hamilton v. State*, 3 Tex. App. 643. But in *Ex parte Fagg*, 38 Tex. Crim. Rep. 573, it was held that an act giving a city power to prosecute in the city court for an offence against the State was in violation of the section of the constitution requiring prosecution of offences against the State to be in the name of the State.

Extent of police power. *Shafer v. Mumma*, 17 Md. 331; *ante*, §§ 301, 304, 661, 662. As to ordinances prohibiting singing, speech-making, &c., in the streets, see *ante*, § 589; *Re Frazee*, 63 Mich. 396; *People v. Rochester*, 44 Hun (N. Y.), 166.

Authority to pass ordinances "to preserve the health and comfort of the town" does not empower the corporation to pass an ordinance to prevent or punish breaches of the peace. *Raleigh v. Dougherty*, 3 Humph. (Tenn.) 11. See chapter on Municipal Courts, *post*.

Where gambling and the keeping of gambling-houses are made public offences by the State laws, offenders may be prosecuted in the State courts for the violation of these laws, notwithstanding the organic acts of cities may give to the city council power "to restrain, prohibit, and suppress games and gambling-houses." In thus holding, the court adds, "It is not necessary, in this case, to decide whether both the State and the city can punish for the same act; but we

§ 633. **Ordinances denouncing Statutory Offences.** — The general conclusions stated in the preceding section have been carefully re-

have no doubt that the one which shall first obtain jurisdiction of the person of the accused may punish to the extent of its power." *Rice v. State*, 3 Kan. 141. The same point has been decided the same way in a later case, by the Supreme Court of *Minnesota*. *State v. Crummey*, 17 Minn. 72. Gambling being punishable under the general law, a city council "invested with authority to make ordinances to secure the inhabitants against fire, against violations of the law and the public peace, to suppress riots, gambling, drunkenness, indecent and disorderly conduct, to punish lewd behavior in public places, . . . and, generally, to provide for the safety, prosperity, and good order of the city," possesses, by virtue thereof, no power to make the keeping of any gambling device a misdemeanor, and to punish the same. *Mount Pleasant v. Breeze*, 11 Iowa, 399. This case was approved in *In re Lee Tong*, 18 Fed. Rep. 253. A power to suppress gambling does not include a power to license it. *Goeter v. State*, 45 Ark. 454.

Police officers in *Indiana* held to have no power to seize and destroy gambling apparatus without an ordinance being passed, but no opinion was expressed as to the validity of such an ordinance. *Ridgeway v. West*, 60 Ind. 371. Power to suppress gambling-houses. *Mississippi Society of Arts, &c. v. Musgrove*, 44 Miss. 820; *Moore v. State*, 48 Miss. 147.

In *Missouri*, it is held that where the same act (as, for example, *furious driving* in highways and public places) is a violation of a valid municipal ordinance and of the general criminal statutes of the State, the offender can be punished but once; and hence, to an indictment in the State court, he may plead a former conviction under the ordinance of the municipal corporation. *State v. Cowen*, 29 Mo. 330. But *quare*. *Supra*, § 631. The opinion in this case assumes, without discussion, that the offence is single. *Ib.* The later, and it would seem the correct doctrine on this subject, is thus expressed by *Wagner, J.*, in *State v. Gordon*, 60 Mo. 383, 385: "The legislature has the undoubted right, in reference to statutory misdemeanors, to say in what particular jurisdiction

they shall be tried, and to make that jurisdiction exclusive of all others. When the power to hear and determine these minor offences is given to a municipal corporation, but no words of exclusion or restriction are used, the remedies between the State and corporation will be construed to be concurrent; but where the manifest intention is that the prosecution shall be limited exclusively to one jurisdiction, that intention must prevail."

In *State v. Wister*, 62 Mo. 592, the defendant, indicted for keeping a bawdy house, pleaded *autrefois convict*, upon a complaint before the city recorder. As the charter did not confer upon the city exclusive cognizance of this class of offences, the plea was held bad, although the recorder was invested with "exclusive jurisdiction of all cases arising under any ordinance of the city." *s. p.* *State v. Harper*, 58 Mo. 531. In *State v. Gordon*, 60 Mo. 383, the charter in terms conferred exclusive jurisdiction on the municipal authorities in respect of a certain class of misdemeanors, in which was included the one in question in this case.

In *Nebraska*, the doctrine is maintained that "the same act may constitute an offence against both the State and the municipal government, and both may punish it without infringing any constitutional right." *Brownville v. Cook*, 4 Neb. 101, 105, *per Lake, C. J.* In this case an ordinance was sustained punishing "wilful, malicious, and mischievous meddling with or trespasses upon property." The ordinance was more specific than the criminal code of the State on this subject, but this was not made the basis of the decision.

In *Minnesota*, it is held that the legislature may authorize a city to impose new and additional penalties for acts (In this case the selling of liquors on Sunday) already made penal by the general laws of the State. *State v. Ludwig*, 21 Minn. 202. "The principle established by the weight of authority, and we think in accordance with sound reason, is that the legislature of the State may authorize a municipal government to impose new and additional remedies for acts already penal by the laws of the State. *Per McMillan, C. J.*, citing *State v.*

considered, and they are, we think, correct. But they do not embrace all the cases which in their essential nature or under varying constitutional and statutory provisions may arise. We concur in the opinion, that there are many acts of such a nature that they *may*, if the legislature has so provided, be an offence against the State at large, and also against the special and local government of the municipality.

Charles, 16 Minn. 474; Brooklyn v. Toynbee, 31 Barb. (N. Y.) 282; 1 Dillon on Mun. Corp. § 632; Cooley, Const. Lim., p. 199, and notes 1 and 2."

In *Michigan*, in *Slaughter v. People*, 2 Doug. (Mich.) 334, the principle was decided that it was *not competent* to punish, under a city ordinance, an act which was indictable. Illustrating the difference between prosecutions, under special penal provisions of a city charter, of acts with specified fines and penalties affixed by the charter, but which acts are breaches of the law of the State wherever committed, and ordinary prosecutions under municipal ordinances, see *Wayne County v. Detroit*, 17 Mich. 390; *People v. Detroit*, 18 Mich. 445; *People v. Jackson*, 8 Mich. 110; *post*, chap. xvii.

In *Indiana*, it was first held that where the act complained of is indictable as a criminal offence against the laws of the State, a person could not be punished for such act under or by virtue of the ordinances of a city. *Indianapolis v. Blythe*, 2 Ind. 75. In this case the city unsuccessfully sought to recover a penalty prescribed by ordinance for an assault and battery committed by the defendant within the city. Same principle, *Madison v. Hatcher*, 8 Blackf. (Ind.) 341. But these cases were overruled by *Ambrose v. State*, 6 Ind. 351, in which it was held that a single act might constitute two offences, one against the State and one against the municipal government, and "that each might punish in its own mode, by its own officers, the same act as an offence against each." *Perkins, J.*, in *Waldo v. Wallace*, 12 Ind. 569, where prior cases in that State are referred to. See also *Lawrenceburg v. Wuest*, 16 Ind. 337; *Fox v. State*, 5 How. 410; *Moore v. People*, 14 How. (U. S.) 13; *post*, § 749.

In *Louisiana*, municipal corporations are held to have no power to impose a penalty on that which is made punishable as a criminal offence by the laws of the State. But it is

admitted that there is a class of offences against public order not made punishable by the State law, which it is within the power of such corporation to suppress. *New Orleans v. Miller*, 7 La. An. 651; *Municipality No. 1 v. Wilson*, 5 La. An. 747. This case seems to concede that the city corporation cannot punish for an act identical with that punished by the State law. See also *Louisburg v. Harris*, 7 Jones Law (N. Car.), 281; *People v. Jackson*, 8 Mich. 110. The charter of a city authorized the common council to pass ordinances upon certain subjects pertaining to the police, good order, and welfare of the city, and provided that a violation of certain of such ordinances should be a misdemeanor, and might be prosecuted before the police court of the city like other offences, which court might inflict the penalty named in such ordinance, provided that no penalty should exceed the sum of fifty dollars for a single offence. It was held that the charter did not attempt to confer upon the common council the power to define and determine crime, and was not therefore unconstitutional. *State v. Tryon*, 39 Conn. 183.

The Constitution of *California* (art. xi, § 11) ordains that cities and towns may "pass and enforce within their limits such local police, sanitary, and other regulations as do not conflict with general laws." An ordinance of a city aimed at opium dens was held to be invalid because it punished precisely the same acts made punishable by the Penal Code. Text, § 632, quoted, and the court adds, "These rules express the law as we understand it." *Re Sic*, 73 Cal. 142. *Re Johnson*, *Ib.* 228 (ordinance prohibiting persons to visit, for purposes of prostitution, houses of ill-fame sustained, not being in conflict with the general law of the State); *Re Campbell* (ordinance to suppress tippling-houses sustained), 74 Cal. 20; *Lane, Ex parte*, 76 Cal. 587; *post*, § 753, note.

Accordingly, where an act is prohibited both by statute and by ordinance, it *may* constitute two offences, one against the State and the other against the city or town, and where such is the case a conviction of one may not be pleaded as constituting former jeopardy when the offender is prosecuted for the other, and where such is the case the weight of authority also seems to hold that power to enact ordinances with reference thereto may be included in the general powers conferred on cities and towns by statute. This complex subject is fully illustrated in the notes to this and the preceding sections.

¹ *Wright v. Anniston*, 151 Ala. 465; 44 So. Rep. 151; *Mayor, &c. of Mobile v. Allaire*, 14 Ala. 400; *Harris v. State*, 128 Ala. 41; *Talladega v. Fitzpatrick*, 133 Ala. 613, 616; *Black v. State*, 144 Ala. 92; *Van Buren v. Wells*, 53 Ark. 368; *Hughes v. People*, 8 Colo. 536; *McInerney v. Denver*, 17 Colo. 302, 308; *Theisen v. McDavid*, 34 Fla. 440; *Wragg v. Penn Tp.*, 94 Ill. 11; *Robbins v. People*, 95 Ill. 175; *Hankins v. People*, 106 Ill. 628, 637; *Waldo v. Wallace*, 12 Ind. 569, 584; *Williams v. Warsaw*, 60 Ind. 457; *Schmidt v. Indianapolis*, 168 Ind. 631; 80 N. E. Rep. 632; *Bloomfield v. Trimble*, 54 Iowa, 399; *Neola v. Reichart*, 131 Iowa, 492; *State v. Topeka*, 36 Kan. 76; *Kemper v. Commonwealth*, 85 Ky. 219; *Berry v. Brislan*, 86 Ky. 5; *Fortner v. Duncan*, 91 Ky. 171; *Respass v. Commonwealth*, 107 Ky. 139, 142; *Lucas v. Commonwealth*, 118 Ky. 818, 821; *State v. Fourcade*, 45 La. An. 717; *Shafer v. Mumma*, 17 Md. 331; *People v. Hanrahan*, 75 Mich. 611; *People v. Detroit White Lead Works*, 82 Mich. 471; *Alma v. Clow*, 146 Mich. 443; *State v. Oleson*, 26 Minn. 507; *State v. Lee*, 29 Minn. 445, 453; *State v. Harris*, 50 Minn. 128, 136; *State v. Lindquist*, 77 Minn. 540, 542; *Johnson v. State*, 59 Miss. 543; *St. Louis v. Cafferata*, 24 Mo. 94, 96; *State v. Gustin*, 152 Mo. 108; *State v. Muir*, 164 Mo. 610, aff'g 86 Mo. App. 643; *St. Louis v. De Lassus*, 205 Mo. 578; *Lebanon v. Gordon*, 99 Mo. App. 277; *Brownville v. Cook*, 4 Neb. 101; *Howe v. Treas'r of Plainfield*, 37 N. J. L. 145; *Riley v. Trenton*, 51 N. J. L. 498; *Polinsky v. People*, 11 Hun (N. Y.), 390; 73 N. Y. 65; *Koch v. State*, 53 Ohio St. 433; *State v. Sly*, 4 Oreg. 277; *State v. Bergman*, 6 Oreg. 341; *Wong v. Astoria*, 13 Oreg. 538; *State v. Williams*, 11 S. Car. 288, 292; *Anderson v. O'Donnell*, 29 S. Car. 355, 368; *Greenville v. Kem-*

mis, 58 S. Car. 427, 432, 434; *Abbeville v. Leopard*, 61 S. Car. 99, 105; *Greenwood v. State*, 6 Baxt. (Tenn.) 567; *Hamilton v. State*, 3 Tex. App. 643; *Ogden v. Madison*, 111 Wis. 413. *Contra: In re Sic*, 73 Cal. 142; *State v. Cowen*, 29 Mo. 330; *Ex parte Fagg*, 38 Tex. Crim. R. 573; *Ex parte Coombs*, 38 Tex. Crim. R. 648; *Ex parte Cross*, 44 Tex. Crim. R. 376. In *Van Buren v. Wells*, 53 Ark. 368, it was held that under the general power to pass ordinances for the safety, health, and prosperity of the inhabitants, a municipal corporation may adopt an ordinance punishing disturbances of the peace, carrying concealed weapons, keeping saloons open on Sunday and other offences, although they are already offences against the State under statutes of general application. The court declared that express and specific grant of authority is not necessary. In *Greenville v. Kemmis*, 58 S. Car. 427, an ordinance was enacted under the general welfare clause prohibiting gambling, and it was held to be valid, although the State law covered the same offences.

California. By the constitution it is provided that any municipal corporation "may make and enforce within its limits all such local sanitary and other regulations as are not in conflict with general laws," but it has been held that under this provision of the constitution a city cannot pass an ordinance to punish the identical offence which is punishable by a statute applicable to the State generally. *In re Sic*, 73 Cal. 142. See also *Ex parte Mansfield*, 106 Cal. 400, 405. But in *Ex parte Taylor*, 87 Cal. 91, an ordinance forbidding the obstructing of a city street which provided a modified penalty was sustained over the objection that a statutory enactment covered the same subject. In *Ex parte*

Mode of enforcing Ordinances.

§ 634 (408). **In England; Civil Actions and Complaints.** — In the old corporations in England, by-laws were usually made in virtue of their implied power; they did not extend to matters criminal in their nature, and could only be enforced, unless by virtue of a statute or valid custom, by fines, or pecuniary penalties, commonly for a small sum, and always, or almost always, in a fixed or certain

Hong Shen, 98 Cal. 681, the court held that the provisions of an ordinance regulating the sale of opium were in addition to the provisions of the statutory law on the subject and were valid.

Iowa. In this State it is held that municipal ordinances may declare acts offences against the municipality, and may prescribe punishments therefor when the same acts are denounced as misdemeanors by the statute of the State, and punish accordingly, (1) provided such power is specifically conferred or (2) when the subject of the ordinance is fairly within the powers which are conferred upon the municipality. The mere fact that the matter has been covered by statute is not regarded as sufficient to invalidate the ordinance. *Bloomfield v. Trimble*, 54 Iowa, 399; *Neola v. Reichart*, 131 Iowa, 492. The remarks of the court in *Foster v. Brown*, 55 Iowa, 486, challenging the policy of permitting cities to undertake the punishment of acts by other penalties than those denounced on wrong-doers by the State as tending to impair the administration of criminal justice, have not been adhered to. Hence, in this State it has been held that an ordinance denouncing intoxication is valid, although there is a statute to the same effect. *Bloomfield v. Trimble*, 54 Iowa, 399. An ordinance prohibiting any person from beating, striking, or fighting another within the corporate limits has also been held not to be inconsistent with statutes denouncing assaults, batteries, and affrays. *Avoca v. Heller*, 129 Iowa, 227. An ordinance prohibiting gambling was also held to be expressly authorized by statute, and therefore to be valid irrespective of the provisions of the State law on the same subject. *Blodgett v. McVey*, 131 Iowa, 552. Under the power to adopt ordinances to provide for the safety, morals, order, and comfort of cities and towns, a town may enact an ordinance denouncing assaults,

affrays, and the use of blasphemous language, although these offences are already punishable by a statute which prescribes the same penalties therefor. *Neola v. Reichart*, 131 Iowa, 492. But in *Iowa City v. McInnerny*, 114 Iowa, 586, it was held that an ordinance prohibiting keeping a saloon open on election day enacted under statutory authority "to adopt from time to time rules and ordinances for further regulating and controlling such traffic, not in conflict with the provisions of this chapter," was inconsistent with a statute which punished the forbidden act by a much heavier penalty and was invalid.

Kentucky. The Constitution of this State provides that no municipal ordinance shall fix a penalty for violations thereof which may be less than that imposed by statute for the same offence. An ordinance was adopted imposing a license tax on peddlers and providing for a penalty for peddling without a license. It was held that it was not within the constitutional provision, although the statute provided for prosecution for peddling without a license. The court declared that the constitutional provision had no application to purely local matters such as the non-payment of a local license tax and fines for violation of ordinances imposing the tax. *Commonwealth v. Merz*, 125 Ky. 97; 100 S. W. Rep. 333. See also *Carlisle v. Heckinger*, 103 Ky. 381.

Mississippi. In this State a statute declares that offences against the laws of the State amounting to misdemeanors shall, when provided by a general ordinance of the municipality, be offences against it when committed within its bounds. It was held that this statutory provision limits the jurisdiction of the municipality to misdemeanors, and the municipality cannot enact an ordinance declaring that all acts punishable by the laws of the State shall, when committed within the mu-

amount.¹ So, by the Municipal Corporations Act of 1835, the council are empowered to make such by-laws as to them shall seem meet for the good rule and government of the borough, and for the prevention and suppression of all such nuisances as are not punishable by act of parliament in force in the borough, and to appoint such *finés* as they shall deem necessary for the prevention and suppression of such offences, with the proviso that no fines shall exceed the sum of five pounds.² The act provides that prosecutions for a breach of by-laws made under it shall be commenced within three months after the commission of the offence; that the charge shall be made on oath; that a summons shall issue and be served, with power to the magistrate to proceed without the appearance of the defendant, or to issue a warrant for his arrest; that if convicted, the penalty shall be paid, either immediately or within such period as the magistrate shall think fit; that it may be levied by distress and sale of the goods and chattels of the offender, and for want of sufficient distress the offender may be imprisoned for a term not exceeding one month; the imprisonment to cease upon payment of the sum due.³ It is suggested that the remedy thus prescribed is cumulative, and will not debar the corporation from availing itself of the usual common-law mode of enforcing a by-law by action of debt or *assumpsit*.⁴ But the point seems not to have been yet adjudged.

§ 635 (409). **Same Subject.** — Aside from statutory regulation, the general method of enforcing a by-law in England is, as just stated, by bringing, in the name of the proper party or corporation, an action, in the proper court, against the person who has violated the by-law, to *recover the penalty* which it imposes; and this action may be either *debt* or *assumpsit*. By the common law, *assumpsit* may be maintained for the breach of any duty which the defendant has been legally liable to perform in favor of the plaintiff, the law imply-

nity, be offences against it. Such an ordinance includes felonies over which the municipality has no jurisdiction. *Oakland v. Miller*, 90 Miss. 275; 43 So. Rep. 467.

¹ *Gee v. Wilden*, Lutw. 1320, 1324; *Wood v. Searl*, Bridg. 139; *Piper v. Chappell*, 14 M. & W. 624; *Rawlinson on Corp.*, 665, note; *post*, § 740 *et seq.* See *post*, chapter on Municipal Courts, §§ 742, 744, 749.

² 5 and 6 Wm. IV., chap. lxxvi. § 90; *ante*, §§ 53, 608, 609, 712; *post*, § 742.

³ 5 and 6 Wm. IV., chap. lxxvi. § 139; §§ 187-193; *supra*, § 507.

⁴ *Rawlinson on Corp.* (5th ed.) 167, note. See *Adley v. Reeves*, 2 Maule & Sel. 60, 61; *Bodwic v. Fennell*, 1 Wils. 233. On the other hand, Mr. Grant is of opinion that the remedy prescribed by the act is exclusive, and supersedes the common-law remedy of debt or *assumpsit* for the amount of the fine or penalty. *Grant on Corp.* 364; *supra*, §§ 609, 613.

ing a promise to perform the particular act, and hence no principle was violated in holding that assumpsit would lie to recover the penalty of a by-law. As the penalty was for a sum certain, and was considered to be in the nature of liquidated damages, an action of debt would also lie to recover the amount of the penalty; but where the by-law itself provided that the penalty should be recovered by debt, then that form of action alone could be maintained. But, aside from statute authority or a valid custom, it was not competent for the by-law to provide that its penalty should be recovered by "distress and sale" of goods, that being contrary to the common law.¹

§ 636 (410). **Same Subject; In America.** — In *this country*, the courts hold that where the *mode of enforcement is prescribed by the charter*, that mode must be pursued;² but if the *mode or form of action is not prescribed*, then the recovery of the penalty or fine for the violation of a valid municipal ordinance may be as at common law, by an action of debt or assumpsit, or where these forms are abrogated, by a *civil action* in substance the same.³ And where such an action is brought, the proceeding is civil and not criminal, and the rules of procedure in civil cases, unless otherwise provided, are applicable to it.⁴ The penalties to ordinances are often fixed upon

¹ Willc. 164-181; 1 Saund. Pl. & Ev. 683; 2 Wheat. Selw. 1178; 2 Chitty Pl. 401, where form of declaration in debt is given; *Adley v. Reeves*, 2 M. & S. 60. The law implies a promise on the part of a corporator to pay all penalties incurred for his violation of by-laws; and if the mode of enforcing such penalties is not pointed out, the corporation may sue therefor in any competent court. *Columbia v. Harrison*, 2 Const. (S. Car.) 213, *per Nott, J.*; *Brookville v. Gagle*, 73 Ind. 117; *supra*, §§ 608-618.

² *Weeks v. Forman*, 16 N. J. L. 237; *State v. Zeigler*, 32 N. J. L. 262; *Ewbanks v. Ashley*, 36 Ill. 177; *Israel v. Jacksonville*, 2 Ill. 290; *Williamson v. Commonwealth*, 4 B. Mon. (Ky.) 146, 151; *Commonwealth v. Fahey*, 5 Cush. (Mass.) 408; *Commonwealth v. Smith*, 111 Mass. 407; *Commonwealth v. Rawson*, 183 Mass. 491. An action may be brought for the fines and penalties incurred for the violation of ordinances, and it is not necessary that the fine be assessed before the suit is brought. *King v. Jacksonville*, 3 Ill. 306. In *Weeks v. Forman*, 16 N. J. L. 237, it was held that although certain corporate officers were *ex-officio* justices

of the peace within the city, with power to take cognizance of violations of by-laws, they could not entertain or try actions of debt, to recover a debt or penalty for a breach of an ordinance, although it was conceded that they had jurisdiction of the *quasi* criminal proceeding founded upon a complaint or information, resulting in what is technically called a *conviction*; but *quarre. Supra*, §§ 608-625.

³ *Ewbanks v. Ashley*, 36 Ill. 177; *Israel v. Jacksonville*, 2 Ill. 290; *Coates v. New York*, 7 Cow. (N. Y.) 585, 608. Unless it is otherwise provided by statute or charter, it is considered that corporations have an inherent power to provide for the recovery of a penalty by an action of debt in their own courts. *Hesketh v. Braddock*, 3 Burr. 1847, 1858; *Barter v. Commonwealth*, 3 Pa. 253. Where a city, by ordinance, requires the taking out of licenses to carry on business, it has no right of action for the amount of such licenses before they are taken out, but is confined to enforcing the penalty for doing business without license. *Santa Cruz v. Santa Cruz R. R. Co.*, 56 Cal. 143; *supra*, § 613.

⁴ *Ib.*; *Municipality No. 1 v. Cutting*,

a movable scale; and this would appear to be done under the supposition that they will be enforced, not by a common-law action in the common-law courts to recover the amount of the penalty, but by a complaint or proceeding before the proper municipal magistrate, who will, within the prescribed limits, determine the amount of the fine or penalty to be paid, by reference to the circumstances of the particular case.¹

§ 637 (411). **Nature of Proceeding, Civil or Criminal.** — Where, instead of a civil action to recover the pecuniary fine or penalty, the proceeding is in the nature of a complaint for the violation of the ordinance, this has sometimes been considered to be a criminal or quasi criminal, and not a civil, proceeding. The cases on this subject are not harmonious, but the difference in them depends, to a large extent, upon the character of the act or offence charged, the nature of the charter, and of the legislation in the particular State as to the extent of jurisdiction intended to be conferred upon the municipal authorities.² The Constitution of Georgia declares that “*trial by*

4 La. An. 335; *Lewiston v. Proctor*, 27 Ill. 414; *Quincy v. Ballance*, 30 Ill. 185; *Davenport v. Bird*, 34 Iowa, 524; *Williamson v. Commonwealth*, 4 B. Mon. (Ky.) 146, 151; *Jenkins v. Cheyenne*, 1 Wy. Ter. 287; *St. Louis v. Vert*, 84 Mo. 204; *Miller v. O'Reilly*, 84 Ind. 168; *Brophy v. Perth Amboy*, 44 N. J. L. 217, approving text; *Huron v. Carter*, 5 S. Dak. 4.

¹ *Ante*, §§ 609, 613. Court held not to be authorized to inquire into the reasonableness of an ordinance fixing a fine within the prescribed statutory limit. *Haynes v. Cape May*, 50 N. J. L. 55. If the statute under which the conviction takes place applies the penalty with certainty, it is sufficient for the justice to award the penalty to be paid and applied according to law. *Queen v. Barrett*, 1 Salk. 383; *King v. Seale*, 8 East, 568; *King v. Thompson*, 2 T. R. 18; *King v. Hyde*, 21 L. J. Mag. Cas. 94; *Boothroyd, In re*, 15 M. & W. 1; *Queen v. Cridland*, 7 E. & B. 853; *Queen v. Johnson*, 8 Q. B. 102. See also *King v. Glossop*, 4 B. & Ald. 616; *Brown v. Nicholson*, 5 C. B. n. s. 468; *Seamen's Hospital Society v. Liverpool*, 4 Ex. 180; *Wray v. Ellis*, 1 E. & E. 276. If there be any material variance between the conviction and the statute as to the appropriation of the penalty, the conviction will be bad. *Griffith v. Harries*, 2 M. & W. 335.

Chaddock v. Wilbraham, 5 C. B. 645. A city ordinance prescribing a term of imprisonment which may, but does not necessarily, exceed that authorized by the Constitution, may be enforced within the constitutional limit. *Keokuk v. Dressell*, 47 Iowa, 597. Ordinance held void because the fine or penalty was uncertain in amount, the provision being that the offender should be fined not exceeding five dollars, and one dollar for each day's neglect to do a certain act. *State v. Rice*, 97 N. Car. 421.

² *Wayne County v. Detroit*, 17 Mich. 390; *People v. Detroit*, 18 Mich. 445; *Davenport v. Bird*, 34 Iowa, 524; *Charleston v. Oliver*, 16 S. Car. 49, which was an action for carrying on business without license, in which the municipal court held the defendant liable “for the amount of the license and penalty, and, in default of payment, to an imprisonment of thirty days.” The court said that “where, as in this case, no mode of enforcement is prescribed by the charter, we see no reason why the mode pursued in this case is not sufficient,” citing the text. See chapter on Municipal Courts, *post*, § 744, and note, § 749 *et seq.*, and notes; *supra*, §§ 619, 630, 632, and note. Many decisions hold that a proceeding against a person for violating an ordinance is civil in character and

jury, as heretofore used in this State, shall remain inviolate." It was claimed that the legislature could not constitutionally confer on the city council the power to pass an ordinance inflicting a fine for its violation, where the guilt of a party was to be tried by the council, without a jury. The court held that the objection was not sound, observing that *violations of ordinances are not criminal cases* within the meaning of the State Constitution, and "that, inasmuch as the right of trial by jury existed in England, and was secured by *Magna Charta*, and municipal corporations in that country enforced their by-laws by *pecuniary penalties in a summary manner*, and the same right being conferred upon similar corporations in this State anterior to the adoption of the Constitution, and constantly exercised, 'the right of trial by jury, as heretofore used in this State,' was not violated by the city council of Augusta, by

not criminal, although the payment of penalty may be enforced by arrest and detention of the person. *Fortune v. Wilburton*, 142 Fed. Rep. 114; *Goshen v. Croxton*, 34 Ind. 239; *Greensburgh v. Corwin*, 58 Ind. 518; *Brookville v. Gagle*, 73 Ind. 117; *Hardenbrook v. Ligonier*, 95 Ind. 70, 72; *Hammond v. N. Y., Chicago & St. L. R. Co.*, 126 Ind. 597, 598; *Shea v. Muncie*, 148 Ind. 14, 33; *Hammond v. N. Y. C. & St. L. R. Co.*, 5 Ind. App. 526; *Kansas City v. Clark*, 68 Mo. 588; *St. Louis v. Knox*, 74 Mo. 79; *Ex parte Hollwedell*, 74 Mo. 395; *St. Louis v. Weitzel*, 130 Mo. 600, 612; *Gallatin v. Tarwater*, 143 Mo. 40, 46; *State v. Renick*, 157 Mo. 292; *Delaney v. Kansas City Police Ct.*, 167 Mo. 667, 678; *In re Miller*, 44 Mo. App. 125; *De Soto v. Brown*, 44 Mo. App. 148, 152; *Canton v. Ligon*, 71 Mo. App. 407; *Cassville v. Jimerson*, 75 Mo. App. 426; *State v. Muir*, 86 Mo. App. 642, 648; *In re Jones*, 90 Mo. App. 318; *Mexico v. Harris*, 115 Mo. App. 707; *Bristol v. Burrow*, 5 Lea (Tenn.), 128; *Sutton v. McConnell*, 46 Wis. 269; *Chafin v. Waukesha County*, 62 Wis. 463, 467; *Nickell v. Waukesha County*, 62 Wis. 469.

A prosecution for violating an ordinance said to be *quasi-criminal* in its nature. *Selma v. Shivers*, 150 Ala. 502; 43 So. Rep. 565. A prosecution begun by the arrest of the offender held to be in the nature of a criminal proceeding. *Russellville v. Edwards*, 80 Ark. 314. See also *Du Val v. Hot Springs*, 34 Ark. 560.

Georgia. The violation of a municipal ordinance is a "crime" within the

purview of a Constitutional provision forbidding "slavery or involuntary servitude, save as a punishment for crime after legal conviction thereof," notwithstanding it may be summarily prosecuted in a police court without a jury. *Pearson v. Wimbish*, 124 Ga. 701, 709. See also as to the criminal nature of the proceeding, *Hawkinsville v. Ethridge*, 96 Ga. 326; *Paulk v. Sycamore*, 104 Ga. 24; *Barnett v. Atlanta*, 109 Ga. 166; *Macon v. Wood*, 109 Ga. 149.

In *Michigan*, it is held that cases under municipal ordinances do not rise to the dignity of criminal prosecutions and that neither a writ of error nor exceptions before sentence will lie. *In re Cox*, 129 Mich. 635, 637, citing text; *People v. Jackson*, 8 Mich. 110; *Cooper v. People*, 41 Mich. 403; *Webster v. Lansing*, 47 Mich. 192. See also *People v. Vinton*, 82 Mich. 39, 45; *Northville v. Westfall*, 75 Mich. 603.

Minnesota. In this State it is held that municipal ordinances are not criminal statutes; violations thereof are not crimes, nor are such violations governed by the rules of criminal law except in certain exceptional particulars. *State v. Robitshek*, 60 Minn. 123, 124. But for the purposes of a constitutional provision that "no person shall be held to answer for a criminal offence unless on the presentment or indictment of a grand jury, except . . . in cases cognizable by justices of the peace," violations of municipal ordinances punishable by fine or imprisonment are criminal offences, and when the punishment which may be inflicted

the imposition of the penalty for the breach of the *local police* regulations of that city.”¹

§ 638 (412). **Same Subject; In Massachusetts.** — On the other hand, in Massachusetts, prosecutions for breaches of by-laws or ordinances made to enforce police regulations are regarded as *substantially public prosecutions*, and in such prosecutions it is competent, though confessed not to be very just, to disallow the defendant costs. Applying this doctrine, it is held that a statute providing that prosecutions for violations of city ordinances in the name of the State or commonwealth is not unconstitutional, notwithstanding the result is that the defendant does not recover costs on acquittal.²

exceeds the jurisdiction of a justice of the peace as defined by the Constitution, the prosecution can only be by indictment. *State v. West*, 42 Minn. 147.

¹ *Williams v. Augusta* (gunpowder ordinance), 4 Ga. 509, *per Warner, J.*, approving *Low v. Com'rs of Pilotage*, R. M. Charl. (Ga.) 302; *Flint River Steamboat Co. v. Foster*, 5 Ga. 194; *Floyd v. Eatonton Com'rs*, 14 Ga. 354; *ante*, § 749 *et seq.*, and notes; *Kip v. Paterson*, 26 N. J. L. 298; *Keeler v. Milledge*, 24 N. J. L. 142; *Shafer v. Mumma*, 17 Md. 331. “Summary convictions for petty offences against statutes were always sustained, and they were never supposed to be in conflict with the common-law right to a trial by jury.” *Per Strong, J.*, *Byers v. Commonwealth*, 42 Pa. St. 89, 94. In the case last cited, the extent of the right of jury trial at common law is learnedly examined by Mr. Justice *Strong*. See also *Dunmore Borough*, 52 Pa. St. 374; *Rhines v. Clark*, 51 Pa. St. 96. Compare *Plimpton v. Somerset*, 33 Vt. 283. See *post*, *Municipal Courts*, § 749 *et seq.* History of Courts of Summary Jurisdiction in England and extent of their powers under the Summary Jurisdiction Act of 1879, see 1 Stephen, *Hist. of Criminal Law*, chap. iv.

A statute requiring security for costs in prosecutions for “penal statutes” does not embrace prosecutions under city ordinances which impose penalties for their violation, such ordinances not being “statutes” within the meaning of the act. *Lewiston v. Proctor*, 27 Ill. 414; *s. v. Quincy v. Ballance*, 30 Ill. 185. Further, as to the nature of the proceeding and kind of process. *Alton v. Kirsch*, 68 Ill. 261; and see also *Municipality No. 1 v. Cutting*, 4 La.

An. 335; *Ewbanks v. Ashley*, 36 Ill. 177; *Wayne County v. Detroit*, 17 Mich. 390; *People v. Detroit*, 18 Mich. 415, construing the phrase “penal laws,” as used in the *Michigan Constitution*. Phrase “municipal fine,” in the *Constitution of California*, construed. *People v. Johnson*, 30 Cal. 98. Violations of ordinances imposing fines and penalties are in the nature of torts, and actions for such violations may be prosecuted against one or more of the offending parties; they need not all be joined. *Jacksonville v. Holland*, 19 Ill. 271. The defendant in such a prosecution cannot raise the question whether the charter of the city is forfeited. *Whalin v. McComb*, 76 Ill. 49.

² *Goddard, In re*, 16 Pick. (Mass.) 504; *Commonwealth v. Worcester*, 3 Pick. (Mass.) 462. “If,” says Chief Justice *Shaw*, in the case first cited, “the prosecution were to enforce a private right by the city, there would be weight in the objection, and it would stand on different grounds.” 16 Pick. 504. See *Commonwealth v. Gay*, 5 Pick. (Mass.) 44; *Commonwealth v. Fahey*, 5 Cush. (Mass.) 408. Similar observations in relation to making sidewalks, by *Ford, J.*, in *Paxson v. Sweet*, 16 N. J. Eq. 196. So, in *New Hampshire*, a public prosecution for an offence made penal by a city ordinance because of its supposed evil consequences to society — as, for example, the offence of unlawfully keeping a bowling-alley — is considered to be a criminal, and not a civil, proceeding. *State v. Stearns*, 31 N. H. 106. In *Alabama* such a prosecution is considered quasi criminal, and the defendant cannot testify in his own behalf as he may in a civil action. *Mobile v. Jones*,

§ 639 (413). **Mode of pleading Ordinances.** — The courts, unless they are the courts of the municipality, *do not judicially notice the ordinances* of a municipal corporation, unless directed by charter or statute to do so.¹ Therefore, such ordinances, when sought to be en-

42 Ala. 630; *supra*, § 637. *Fink v. Milwaukee*, 17 Wis. 26, is decided upon the basis that a prosecution of a party for the violation of a city ordinance, where the penalty is a fine, is a criminal prosecution to which the Bill of Rights applies, which declares that "in all criminal prosecutions the accused shall be entitled to demand the nature and cause of the accusation against him." But a principle so broad, it is believed by the author, can hardly be maintained where the act charged is not a crime at common law or in its essential nature. See chapter on Municipal Courts, *post*. In *Indiana*, an action to recover the penalty of a by-law, though a warrant for the arrest of the defendant be issued and served, is considered to be a *civil suit*, and governed by the rules of practice in such suits. *Goshen v. Croxton*, 34 Ind. 239.

In *Emporia v. Volmer*, 12 Kan. 622, it was decided that the provision of the Constitution, that all prosecutions shall be in the name of the State, did not include prosecutions by a municipality in its own courts for a violation of its ordinances, and that such prosecutions might be in the name of the municipality. But in *Neitzel v. Concordia*, 14 Kan. 446, it was held, without professing to overrule the previous decision, that a prosecution in a municipal court, under a city ordinance, for a matter made penal by the laws of the State or because of its evil consequences, was a criminal proceeding. Whether the rule would be the same if the prosecution was to enforce a private right of the city, the court left open for further consideration. *Ante*, § 630; *post*, §§ 677, 746, 749.

¹ See *ante*, § 231; *Elizabethtown v. Leffler*, 23 Ill. 90; *Mooney v. Kennett*, 19 Mo. 551; *New Orleans v. Boudro*, 14 La. An. 303; *Harker v. New York*, 17 Wend. (N. Y.) 199; *Case v. Mobile*, 30 Ala. 538; *People v. Mayor, &c. of New York*, 7 How. Pr. R. (N. Y.) 81; *Cox v. St. Louis*, 11 Mo. 431; *Garvin v. Wells*, 8 Iowa, 286; *Goodrich v. Brown*, 30 Iowa, 291; *Austin v. Walton*, 68 Tex. 507; *Wheeling v. Black*, 25 W. Va. 266; *People v. Buchanan*, 1 Idaho, 681; *Gardner v. State*, 80 Ark. 264; *Strick-*

land v. Little Rock, 68 Ark. 483; *Tulare v. Hevren*, 126 Cal. 226; *Illinois Central R. Co. v. Ashline*, 171 Ill. 313; *Bailey v. Kansas City*, 189 Mo. 503; *Butler v. Robinson*, 75 Mo. 192; *St. Louis v. Roche*, 128 Mo. 541; *Tarkio v. Loyd*, 179 Mo. 600; *Charleston v. Ashley Phosphate Co.*, 34 S. Car. 541; *International & G. N. R. Co. v. Hall*, 35 Tex. Civ. App. 545; *Brush El. Light & Power Co. v. Lefevre*, 93 Tex. 604; *Pettit v. May*, 34 Wis. 666, 674; *Stittgen v. Rundle*, 99 Wis. 78. But if the ordinance is used as a mere matter of evidence, there is no reason why it should be pleaded. *Bailey v. Kansas City*, 189 Mo. 503; *Robertson v. Wabash, St. L. & R. R. Co.*, 84 Mo. 119; *Danker v. Goodwin Mfg. Co.*, 102 Mo. App. 723.

A municipal court must take *judicial notice* of a city ordinance. *Ex parte Davis*, 115 Cal. 445. When a general law provides that its provisions may be adopted by any city by ordinance as an addition to or in lieu of the provisions of the charter, and that such ordinance shall to that extent operate as an amendment to the charter, the court will take *judicial notice* of an amendment so effected. *Davey v. Janesville*, 111 Wis. 628.

In *England*, when an action on a by-law founded on a custom is brought in a *court of the municipality*, the court will take judicial notice of it, but in an action in the *superior courts* the custom and the by-law must be set out, for these courts will not take notice of them. *Willc.* 166, pl. 403; *Ib.* 172, pl. 423; *Ib.* 173, pl. 425; *Bradnoc's Case*, 1 Vent. 196; *Barber Surgeons v. Pelson*, 2 Lev. 252; *Norris v. Staps*, Hob. 210.

In *Conboy v. Iowa City*, 2 Iowa, 90, it was held that the mayor, on whom was conferred exclusive jurisdiction of the violation of the ordinances of the city, was authorized to take judicial notice, *ex officio*, of the city ordinances. The provision of a city charter that its published and printed ordinances shall be received in evidence in all courts without proof does not dispense with the necessity of making them part of the record in order to bring them to the knowledge of an appellate court. *Cox*

forced by action, or when set up by the defendant as a protection, should be set out or stated in substance in the pleading. It has been sometimes decided that it is not sufficient that they be referred to generally by the title or section. It is, however, believed to be sufficient, in the absence of special legislative provision prescribing the manner of pleading, to set forth the legal substance of that part of the ordinance alleged to have been violated, it being advisable, for purposes of identification, to refer also to the title, date, and section. The liberal rules of pleading and practice which characterize modern judicial proceedings should extend to, and doubtless would be held to embrace, suits and prosecutions to enforce the by-laws or ordinances of municipal corporations.¹

v. St. Louis, 11 Mo. 431; *New Orleans v. Boudro*, 14 La. An. 303.

¹ *Harker v. New York*, 17 Wend. (N. Y.) 199. Text cited, *Emporia v. Volmer*, 12 Kan. 622, 628. See *Stokes v. Corporation of New York*, 14 Wend. (N. Y.) 87; *Mooney v. Kennett*, 19 Mo. 551; *Austin v. Walton*, 68 Tex. 507; *Fairmont v. Meyer*, 83 Minn. 456; *ante*, § 629, note. In justifying, the defendant must set out in his plea or answer the ordinance, or so much thereof as will show on what the defence rests. *Ib.*; *Keeler v. Milledge*, 24 N. J. L. 142. It is sufficient to set out the substance of that part of the ordinance which has been violated, with a reference to the title, date, and section. *Ib.* Approved, *Kip v. Paterson*, 26 N. J. L. 298. Regularly, the by-law or its substance should be set forth. *Case v. Mobile*, 30 Ala. 538; *Charleston v. Chur*, 2 Bailey (S. Car.), 164; *Illinois Cent. R. Co. v. Ashline*, 171 Ill. 313. In *Welch v. Mastin*, 98 Mo. App. 273, it was held that an ordinance was sufficiently pleaded by reference to number and title. Only title, date, and authority for passage need be pleaded when ordinance is only relied on to show negligence. *Nohrden v. North Eastern R. Co.*, 54 S. Car. 492, distinguishing *Charleston v. Ashley Phosphate Co.*, 34 S. Car. 541, where it was held that in an action to enforce the ordinance it should be set out in full or in substance. Where title and day of passage are required by the statute, a complaint pleading an ordinance as "Ordinance No. 66" is not sufficient. *Tulare v. Hevren*, 126 Cal. 226, citing text.

By-law need not be pleaded in full; complaint is sufficient if it refers to the

ordinance and alleges facts showing a violation thereof. *Lane, Ex parte*, 76 Cal. 587; *infra*, § 640, note. Defective pleading of an ordinance held to be waived by a plea of not guilty and going to trial on the merits. *State v. Reckards*, 21 Minn. 47. When an ordinance is pleaded, though in a defective manner, the court, on the trial, may properly admit it in evidence. *Illinois Cent. R. Co. v. Ashline*, 171 Ill. 313.

In *England*, the by-law itself must be fully set out in an action of *debt* upon it, and not by way of recital; but in *assumpsit* upon the same by-law, latitude is allowed. *Willcock*, 173, pl. 425. But in this country it is said that "it is not necessary to hold to the strictness anciently required." *Keeler v. Milledge*, 24 N. J. L. 142.

In *Missouri*, by statute, fines and penalties accruing to any town may be recovered by *civil* action; but the complaint, while it need not contain all the requisites of an indictment, must specify the offence with reasonable certainty. *St. Louis v. Smith*, 10 Mo. 438. This is the true rule. Hence a complaint charging only that "the defendant committed an offence [naming it] contrary to an ordinance of the town," is insufficient. *Memphis v. O'Connor*, 53 Mo. 468. So a charge that "the defendant knowingly associated with thieves previous to August 21, 1871," is too vague, no place being named and the names of the thieves not being given. *St. Louis v. Fitz*, 53 Mo. 582.

In *Indiana*, before the act of 1867, it was necessary to file with the complaint a copy of the ordinance or section thereof alleged to have been violated. *Green v. Indianapolis*, 25 Ind. 490; *Whitson v. Franklin*, 34 Ind. 392. On

§ 640 (414). **Requisites of Complaints.** — Under a charter authorizing “complaint” to be made of the violation of ordinances, but not prescribing the mode or requisites, a complaint is not in the nature of an information by a common informer, and the same strictness is not required as in an information or indictment. “It is sufficient if it sets out with clearness the offence charged, and the substance of that part of the ordinance which has been violated, with a reference to the title, date, or section.”¹

demurrer to a complaint which does not set out the ordinance alleged to be violated, but refers only to the number of the section, the validity of the ordinance was presumed. *Frankfort v. Aughe*, 114 Ind. 77.

In *North Carolina*, it is held not to be necessary to set forth an ordinance alleged to have been violated; it is sufficient to refer to it by *indicia*, pointing it out with reasonable certainty. *State v. Cainan*, 94 N. Car. 863. Unless required by law or ordinance a complaint, *not under oath*, will not necessarily vitiate the proceedings if the magistrate has jurisdiction of the subject. *Alton v. Kirsch*, 68 Ill. 261. Several breaches of an ordinance may be sued for in one suit, if the judgment does not exceed the amount of the magistrate's jurisdiction. *Hensoldt v. Petersburg*, 63 Ill. 111. Where a charter provides that “a warrant shall issue in favor of a city . . . for a violation of any ordinance when, &c., or upon affirmation by the city attorney,” there is no authority for a deputy city attorney to swear to a complaint; power thus provided must be exercised by the city attorney in person.” *Kansas City v. Flanagan*, 69 Mo. 22.

¹ *Keeler v. Milledge*, 24 N. J. L. 142. *Approved*, *Kip v. Paterson*, 26 N. J. L. 298; *Charleston City Council v. Seeba*, 4 Strob. (S. Car.) Law, 319; *Commonwealth v. Bean*; *Thach*. (Mass. Crim. Cas.) 85. Compare *Fink v. Milwaukee*, 17 Wis. 26; see also, *Commonwealth v. Bean*, 14 Gray (Mass.), 52; *Deitz v. Central*, 1 Colo. 323; *Napman v. People*, 19 Mich. 352; *Goshen v. Croxton*, 34 Ind. 239; *Frankfort v. Aughe*, 114 Ind. 77; *Whitson v. Franklin*, 34 Ind. 392; *State v. Cainan*, 94 N. Car. 863; *Nordine v. Union*, 13 Oreg. 587; *Braisted v. People*, 38 Colo. 49; *Durango v. Reinsberg*, 16 Colo. 327; *Gallatin v. Tarwater*, 143 Mo. 40, 46; *Nichols v. Salem*, 49 Oreg. 298; 89 Pac. Rep. 804.

Where the process did not state what

ordinance had been violated, nor the time or manner, the proceedings were held defective. *Marshall v. Cadwalder*, 36 N. J. L. 283; *Hendersonville v. McMinn*, 82 N. Car. 532. The complaint need not state the number of the section violated. *Meyer v. Bridgeton*, 37 N. J. L. 160. The ordinance need not be recited in full. *Emporia v. Volmer*, 12 Kan. 622; *Goldthwaite v. Montgomery*, 50 Ala. 486; *St. Louis v. Smith*, 10 Mo. 438; *supra*, § 639, and note.

Complaint held to be sufficient when it described the act complained of in the language of the ordinance. *St. Louis v. Knox*, 74 Mo. 79; *St. Louis v. Weitzel*, 130 Mo. 600, 612; *Gallatin v. Tarwater*, 143 Mo. 40, 46; *Louisiana v. Anderson*, 100 Mo. App. 341.

An allegation in a pleading that an ordinance was duly passed held to imply, by necessity, that all essential antecedents for its legal enactment had been observed. *Becker v. Washington*, 94 Mo. 375. By statute, prosecutions for the violations of the ordinances of Boston may be prosecuted in the name of the Commonwealth; and it is decided that in a complaint for such a violation it is not sufficient that it concludes “against the form of the by-laws of the said city,” but it must conclude also against the form of the statute. *Commonwealth v. Gay*, 5 Pick. (Mass.) 44; *Commonwealth v. Worcester*, 3 Pick. (Mass.) 462. Complaint must be in the name of the treasurer of the city or town, and not in that of the commonwealth, for violation of health ordinances, since the statute of 1849, ch. cexi. § 7. *Commonwealth v. Fahey*, 5 Cush. (Mass.) 408. Policemen, marshals, and other officers of a municipal corporation, where such a course is not repugnant to the Constitution or general law of the State, may be empowered by an ordinance to arrest offenders without warrant, for breaches of ordinances committed in their presence. *Bryan v. Bates*, 15 Ill. 87; *Main v. McCarty*, 15

§ 641 (415). **Same Subject.** — In an action or proceeding to recover a penalty for the violation of a by-law or ordinance of a corporation, *the declaration or complaint should state facts* which make the liability of the defendant distinctly to appear.¹ And regularly, as before stated, the by-law should be set forth or its substance stated, as well as the breach and the plaintiff's right to sue for the penalty. But where the charter or organic act of the corporation will be judicially noticed, it cannot be necessary to set out, as it has been held to be in England, the authority of the corporation to make the by-law.²

§ 642 (416). **Action in Corporate Name; Prescribed Method to be strictly followed; Demand; Notice.** — Where the penalty is given in general terms, it is understood to be to the use of the corporation, and the action or prosecution must be by and in the *name of the corporation*.³ In England, it was the practice, in many cases, to appoint in the by-law the penalty to be sued for in the name of the

Ill. 441; *State v. Lafferty*, 5 Harring. (Del.) 491; *ante*, §§ 390, 391. City council held to have power to provide by ordinance that no prosecution for any violation thereof shall be commenced *except upon the complaint of a police officer*. *State v. Robitshek*, 60 Minn. 123.

A city ordinance providing that any person who shall refuse to obey an order at a fire given by any officer duly authorized, "may be arrested and detained in custody *until the fire is extinguished*," is unconstitutional, because the person is deprived of his liberty without due process of law, and because his right to trial by jury is invaded. The court distinguish between an arrest of this kind and where the purpose of the arrest is preliminary to and contemplates a judicial examination. *Judson v. Reardon*, 16 Minn. 431. Under the charter of Newark a violator of an ordinance of that city cannot, without his consent, be brought into court for trial, unless by a warrant or summons. *Newark v. Murphy*, 40 N. J. L. 145; *ante*, §§ 390, 391; *Mitchell v. Lemon*, 34 Md. 176; *Butolph v. Blust*, 5 Lansing (N. Y.), 84. Requisites of *warrants* for the violation of municipal ordinances. *White v. Washington*, 2 Cranch C. C. 337. Other cases: *Ib.* 356; *Ib.* 459; 4 Cranch C. C. 103; *Ib.* 582; *Prell v. McDonald*, 7 Kan. 426. A penalty cannot be imposed without notice. *Alexandria v. Bethlehem*, 29

N. J. L. 375. Sufficiency of *notice* to the accused under special charter provisions, *Keeler v. Milledge*, 24 N. J. L. 142. Essentials of *summary convictions*. *Commonwealth v. Borden*, 61 Pa. St. 272.

¹ Saund. Pl. & Ev. 324; *Comyns Dig.* tit. *Pleader* (2 W. 11); *Feltmakers v. Davis*, 1 Bos. & Pul. 98; *Piper v. Chappell*, 14 M. & W. 623; *Case v. Mobile*, 30 Ala. 538; *Coates v. New York*, 7 Cow. (N. Y.) 585, 608, where the substance of a declaration in debt is given; *Charleston v. Chur*, 2 Bailey (S. Car.), 164; *Krickle v. Commonwealth*, 1 B. Mon. (Ky.) 361. Pleader need not negative exception in a proviso to the enacting clause of an ordinance or in a subsequent section, this being a matter of defence. *Lynch v. People*, 16 Mich. 472. See *Roberson v. Lambertville*, 38 N. J. L. 69; *McGear v. Bridgeton*, 33 N. J. L. 213; *Farwell v. Smith*, 16 N. J. L. 133. The conviction must be for the same offence for which the defendant is prosecuted. *Columbus v. Arnold*, 30 Ga. 517. The complaint must set forth the nature or cause of the accusation. *Telheard v. Bay St. Louis*, 87 Miss. 580.

² *Norris v. Staps*, Hob. 210.

³ *Bodwic v. Fennell*, 1 Wils. 233; *Vintners' Co. v. Passey*, 1 Burr. 237; *Glover*, 313; 2 Kyd. 157; *Graves v. Colby*, 9 Ad. & El. 356; *Williamson v. Commonwealth*, 4 B. Mon. (Ky.) 146, 151; *ante*, chap. x.

chamberlain, treasurer, or some other officer of the corporation; and though the power of thus suing for the penalty could not be given to a mere stranger, yet it was not absolutely necessary that the penalty should be given to the corporation, but it might be given to the informer.¹ Whenever the mode of enforcing obedience to a by-law is prescribed by such by-law, that mode must be strictly pursued, and the plaintiff (where the rules of common-law pleading prevail) must be the party to whom the penalty is given. Where it is given to the chamberlain for the use of the corporation, the action must be in the name of the chamberlain, and not in that of the corporation. And when the chamberlain may sue, he need not set out his election or appointment, but may aver generally that he is chamberlain, and set forth his right to sue and to recover.² Unless the ordinance show that it was intended that no action for a penalty should lie without a previous demand, it is not necessary to aver one.³ Nor is it necessary to aver that the defendant had notice of the ordinance, for this is conclusively presumed with respect to all on whom it is binding.⁴

§ 643 (417). **Mode of Procedure, Defences, Evidence, &c.** — In prosecutions to enforce ordinances, the *ordinary rules of evidence* apply, except so far as specially modified by statute; and it is not competent for a municipal corporation, without express authority, to make or alter the rules of evidence or of law.⁵ It is, however, competent for a city to provide by general ordinance, after suit commenced to recover a penalty for acting without a license, that the granting of a license, though by its terms it takes effect from a day previous to the commission of the offence, shall not (as might otherwise be the case) *release or waive the penalty*.⁶

¹ Glover, 313, 314, 315; Feltmakers' Co. v. Davis, 1 B. & P. 98; Bodwic v. Fennell, 1 Wils. 233; Totterdell v. Glazby, 2 Wils. 266; Hesketh v. Braddock, 3 Burr. 1847; Wood v. Searl, Bridg. 139; Graves v. Colby, 9 Ad. & El. 356.

² Harris v. Wakeman, Say. 254; Exeter v. Starre, 2 Show. 159. Under constituent act, town treasurer held entitled to sue in his own name for penalties. Watts v. Scott, 1 Dev. (N. Car.) 291; Commonwealth v. Fahey, 5 Cush. (Mass.) 408.

³ Butchers' Co. v. Bullock, 3 Bos. & P. 434, 437.

⁴ London v. Bernardiston, 1 Lev. 16; James v. Putney, Cro. Car. 498.

⁵ Charleston v. Dunn, 1 McCord (S. Car.), 333; Fitch v. Pinckard, 5 Ill. 76. The defendant's admission of a violation of an ordinance is competent evidence. Columbia v. Harrison, 2 Const. R. (S. Car.) 213. It has been held that the city council in adopting an ordinance may provide what shall be a *prima facie* case, and place upon the defendant the burden of showing that the case comes within the exceptions specified in the ordinance. Commonwealth v. Price, 123 Ky. 163; 94 S. W. Rep. 32.

⁶ City Council v. Schmidt, 11 Rich. (S. Car.) Law, 343; City Council v. Corleis, 2 Bailey (S. Car.), 189. Commented on by O'Neill, J., in City

§ 644 (418). **Corporate Existence not to be questioned in such Actions.** — In proceedings to enforce ordinances, the *illegality* of the *corporate organization* cannot be shown to defeat a recovery; in such a collateral proceeding, evidence that the corporation is acting as such is all that is required.¹

§ 645 (419). **Ratification of Illegal Ordinances by Legislature.** — The legislature may ratify ordinances not otherwise binding; and offenders should thereafter be prosecuted under the *ordinances*, and not under the validating act.²

§ 646 (420). **Ordinances to be construed reasonably.** — In prosecutions or actions to enforce ordinances, or in considering the question of their validity, *courts will give them a reasonable construction*,

Council v. Feekman, 3 Rich. (S. Car.) Law, 385. And see case last cited as to other circumstances, in which it was held that a prior penalty was not waived by a subsequent acceptance of the amount of a license for a year.

A license granted by a *de facto* officer of a municipal corporation is valid; if the city receives and retains the money, it is estopped from maintaining an action for selling liquor without license. *Martel v. East St. Louis*, 94 Ill. 67.

Any positive acts (*infra vires*) by municipal officers which may have induced the action of the adverse party, and where it would be inequitable to permit the corporation to stultify itself, by retracting what its officers had done, will work an estoppel. *Martel v. East St. Louis*, 94 Ill. 67; *Roby v. Chicago*, 64 Ill. 447; *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 25; *Logan County v. Lincoln*, 81 Ill. 156.

¹ *Hamilton v. Carthage*, 24 Ill. 22; *Mendota v. Thompson*, 20 Ill. 197; *Coles County v. Allison*, 23 Ill. 383; *Decorah v. Gillis*, 10 Iowa, 224; *Kettering v. Jacksonville*, 50 Ill. 39; *Tisdale v. Minnonk*, 46 Ill. 9; *Hardenbrook v. Ligonier*, 95 Ind. 70.

² *Truchelut v. Charleston*, 1 Nott & McC. (S. Car.) 227; *Lennon v. New York*, 55 N. Y. 361; *People v. Davis*, 78 N. Y. App. Div. 570; *ante*, chap. iv. § 129, and note. *Post*, § 948, *Logansport v. Crockett*, 64 Ind. 319, approving text. In *State v. Plainfield*, 38 N. J. L. 95, where an ordinance was void for want of proper notice to the persons interested, it was held that the error could not be remedied by subsequent

legislation. But see cases cited *post*, § 1469. And in *New Jersey* also it has been frequently held that the legislature may validate informal or irregular municipal action, when the matters dispensed with or cured did not relate to the jurisdiction of the courts. *Bergen v. State*, 32 N. J. L. 490; *State v. Union*, 33 N. J. L. 350; *State v. Newark*, 34 N. J. L. 236. See Index, *Curative Acts*.

A statutory provision that ordinances "now in force" should remain in force until altered or repealed by ordinance does not validate a void ordinance. *East Tennessee Tel. Co. v. Russellville*, 106 Ky. 667. The legislature may ratify a void ordinance so as to vest title to tide lands in a grantee of the town under such ordinance. *Oakland v. Oakland Water Front Co.*, 118 Cal. 160.

But the word "ordinance" does not, in its ordinary use or signification, include a grant of lands. Hence, a statute amending a charter and ratifying and confirming the ordinances of the municipality should be construed to apply exclusively to ordinances properly so-called, *i. e.*, to the local laws of the municipality, and not to ordinances which are mere grants or attempted grants of the lands of the corporation, — to ordinances adopted in pursuance of the legislative authority of the council, and not to ordinances which were in effect mere conveyances or attempted conveyances of the property interest of the municipality in its lands. *Oakland v. Oakland Water Front Co.*, 118 Cal. 160, 193, 194.

and will incline to sustain rather than to overthrow them; and especially is this so where the question depends upon their being reasonable or otherwise. Thus, if by one construction an ordinance will be valid, and by another void, the courts will, if possible, adopt the former.¹ But an ordinance which transcends the power vested in the body which passed it is void, and may be taken advantage of by plea or answer to an action to recover the penalty, or other proceedings to enforce it.² Its validity may also be tested in proper cases by suits against the corporation or its officers for acts done under it,³ or by a return to a *mandamus* where the party justifies his

¹ *Durango v. Chapman*, 27 Colo. 169, 172, citing text; *Harmon v. Chicago*, 140 Ill. 374, 396; *Berry v. Chicago*, 192 Ill. 154, 156; *Attorney-General v. Remick*, 73 N. H. 25, 30, quoting text.

² *Commonwealth v. Robertson*, 5 Cush. (Mass.) 438, 442; *Vinters' Co. v. Passey*, 1 Burr. 237; *Poulter's Co. v. Phillips*, 6 Bing. N. C. 315; *Taylor's of Ipswich*, 11 Rep. 54 a; *Norris v. Staps*, Hob. 210; *Tobacco Pipe Makers Co. v. Woodroffe*, 7 Barn. & C. 838; *Moir v. Munday, Sayer*, 181, 185; *Rounds v. Mumford*, 2 R. I. 154; *Blanchard v. Benton*, 109 Ill. App. 569; *Von Diest v. San Antonio Traction Co.*, 33 Tex. Civ. App. 577.

The rules for the construction of ordinances are the same as for statutes. *Matter of Yick Wo*, 68 Cal. 294; *Dennings v. Yount*, 62 Kan. 217.

Where the legislature has conferred full and exclusive jurisdiction on a municipal corporation over a certain subject, the acts of the corporation will be supported by every fair intendment and presumption. *Baltimore v. Clunet*, 23 Md. 449. The title and the body of the ordinance may be taken together to give it the necessary certainty to sustain it. *Martindale v. Palmer*, 52 Ind. 411. In view of the inartificial character of town by-laws, they are especially entitled to a reasonable construction. *Whitlock v. West*, 26 Conn. 406; *Willc. Mun. Corp.* 159, pl. 382. By-laws with penalties are not properly penal statutes. The penalty is in the nature of liquidated damages, established as such in lieu of damages which a court would be authorized to assess. Therefore the strict rules by which the validity of penal statutes are to be tested are not to be applied to the by-laws or ordinances of municipal corporations.

It is well remarked that "the by-laws of very few of these corporations could stand such a test. They should receive a reasonable construction, and their terms must not be strictly scrutinized for the purpose of making them void." *Per Eustis, C. J.*, *Municipality No. 1 v. Cutting*, 4 La. An. 335; *Merriam v. New Orleans*, 14 La. An. 318; s. r. *Loze v. New Orleans*, 2 La. 427.

Penal ordinances are to be strictly construed and will not be held to create a liability where the words used do not clearly fix it. *Krickle v. Commonwealth*, 1 B. Mon. (Ky.) 361; *Pacific v. Seifert*, 79 Mo. 210; *Glen Ridge Board of Health v. Werner*, 67 N. J. L. 103; *Montgomery v. Louisville & N. R. Co.*, 84 Ala. 127; *State v. Dineen*, 203 Mo. 628.

Ordinances *prescribing fire limits* and prohibiting the erection of wooden buildings therein are in derogation of common right and must be strictly construed. *Montgomery v. Louisville & N. R. Co.*, 84 Ala. 127; *Houlton v. Titcomb*, 102 Me. 273. See also § 727, *post*.

In *State v. Paris Ry. Co.*, 55 Tex. 76, the court, referring to an ordinance authorizing a railroad company to extend its track to a certain point, said: "There is no ambiguity in the ordinance authorizing its explanation by parol evidence of representations made prior to its passage, or of the actual intention or understanding of those by whom it was passed, as to the precise point at which the road was to be constructed." *Contemporaneous construction* often of great weight in interpreting doubtful provisions. *State v. Severance*, 49 Mo. 401; *Sylvania v. Hilton*, 123 Ga. 754; *Mobile v. Louisville, & N. R. Co.*, 84 Ala. 115; *ante*, § 241, note; § 354, note.

³ *Moir v. Munday, Sayer*, 181, 185;

refusal to comply with the writ on the ground that the ordinance is invalid,¹ or, as elsewhere shown, in cases of equitable cognizance, by bill in chancery to enjoin proceedings thereunder.

§ 647 (421). **Ordinances void in Part.** — If *part of a by-law be void*, another essential and connected part of the same by-law is also void.² But it must be essential and connected to have this effect.³ But if the invalid provisions *are separable* from and independent of the valid provisions, and can be so severed without defeating the object of the legislative body, the valid provisions of the ordinance will be sustained and given their appropriate effect.⁴ Thus, if an

St. Charles v. Meyer, 58 Mo. 86. See protective provisions to corporate officers and agents in Municipal Corporations, Act 5 and 6 Wm. IV. chap. lxxvi. §§ 132, 133. In the *Ontario Municipal Act*, § 378, Biggar's Mun. Manual (Canada, 1900), p. 374, there is what the author would suppose to be a very useful provision to test summarily the validity of by-laws, to the effect that a resident of a municipality or any other person interested in a by-law, order, or resolution may, within one year, apply to High Court of Justice to have it quashed, and the court, after notice to the corporation, may quash the by-law, order, or resolution, in whole or in part, for illegality. Construction of provision, see Biggar's Mun. Manual (Canada, 1900), pp. 375 *et seq.*

¹ Rex v. Harrison, 3 Burr. 1328; Grant on Corp. 89. An ordinance may be void for uncertainty in its provisions, as, for example, one which alters street grades, without referring to any plan or establishing new grades. Kearney v. Andrews, 10 N. J. Eq. 70.

² Austin v. Murray, 16 Pick. (Mass.) 126; Com. Dig. *By-law*, chap. vii.; Rex v. Faversham Fishermen's Co., 8 Term Rep. 356. See Commonwealth v. Stodder, 2 Cush. (Mass.) 562; Fisher v. McGirr, 1 Gray (Mass.), 1; Warren v. Charleston, 2 Gray (Mass.), 84; Commonwealth v. Hitchings, 5 Gray (Mass.), 482; Hershoff v. Beverly, 45 N. J. L. 288.

³ Villavaso v. Barthet, 39 La. An. 247; Jacksonville v. Ledwith, 26 Fla. 163, 212, citing text; Blackshear v. Strickland, 126 Ga. 492; Lucas v. Macomb, 49 Ill. App. 60; Chicago v. Stratton, 58 Ill. App. 539; Peoria v.

Gugenheim, 61 Ill. App. 374; Chicago v. Gunning System, 119 Ill. App. 377, *aff'd* 214 Ill. 628; Grenada v. Wood, 81 Miss. 308; Kirkwood v. Meramec Highlands Co., 94 Mo. App. 637; Lane v. Concord, 70 N. H. 485; *In re* Wygant, 39 Oreg. 429.

⁴ *Ex parte* Cowert, 92 Ala. 94; *Ex parte* Bizzell, 112 Ala. 210; Lackey v. Fayetteville Water Co., 80 Ark. 108; Wallace v. Cubanola, 70 Ark. 395; Ft. Smith v. Scruggs, 70 Ark. 549; *Ex parte* Haskell, 112 Cal. 412; San Luis Obispo v. Greenberg, 120 Cal. 300; Tampa v. Salomonson, 35 Fla. 446; Canova v. Williams, 41 Fla. 509; State v. Dillon, 42 Fla. 95; Fichtenberg v. Atlanta, 126 Ga. 62; Belleville v. Citizens Horse R. Co., 152 Ill. 171; Shannon v. Hinsdale, 180 Ill. 202, 207; Alton v. Foster, 74 Ill. App. 511; Schofield v. Tampico, 98 Ill. App. 324; Imes v. Chicago, B. & Q. R. Co., 105 Ill. App. 37; Chicago & J. El. R. Co. v. Freeman, 125 Ill. App. 318; Indianapolis v. Bieler, 138 Ind. 30; Eureka v. Jackson, 8 Kan. App. 49; Baker v. Lexington (Ky.), 53 S. W. Rep. 16; Moody v. Williamsburg, 120 Ky. 192; 88 S. W. Rep. 1075; State v. Riley, 49 La. An. 1617; New Orleans v. Kientsz, 52 La. An. 950, 954; Detroit v. Fort Wayne & B. I. R. Co., 95 Mich. 456; Wykoff v. Healey, 57 Minn. 14; State v. Stone, 96 Minn. 482; Minces v. Schoenig, 72 Minn. 528; St. Louis v. Liessing, 190 Mo. 464; St. Louis v. Grafeman Dairy Co., 190 Mo. 492; Lamar v. Weidman, 57 Mo. App. 507; *In re* Langston, 55 Neb. 310; Staats v. Washington, 45 N. J. L. 318; Morgan v. Orange, 50 N. J. L. 389; Haynes v. Cape May, 52 N. J. L. 180; Kolb v. Boonton, 64 N. J. L. 163, 165; Doran v. Camden, 64 N. J. L. 666; Duryee v. Mayor, &c. of New York,

ordinance, or even the same section of an ordinance, contains two separate prohibitions relating to different acts, with distinct penalties for each, one of which is valid and the other void, the ordinance may be enforced as to that portion of it which is valid.¹ Similarly if the provision of the ordinance fixing the penalty contains a penalty which it is not within the authority of the municipality to impose as well as a penalty which may be imposed, *e. g.*, if the ordinance, besides imposing a fine, contains an unauthorized provision subjecting the accused to imprisonment, the part of the penalty which is authorized may be sustained, whilst the unauthorized part will be held to be void.²

96 N. Y. 477, 492; *Wade v. Nunnally*, 19 Tex. Civ. App. 256; *Ex parte Henson*, 49 Tex. Crim. Rep. 177; 90 S. W. Rep. 874; *Eureka City v. Wilson*, 15 Utah, 67; *Danville v. Hatcher*, 101 Va. 523; *Hillman v. Seattle*, 33 Wash. 14; *Biggar's Mun. Manual* (Canada, 1900), p. 333.

¹ *Commonwealth v. Dow*, 10 Met. (Mass.) 382; *Amesbury v. Bowditch M. F. Insurance Co.*, 6 Gray (Mass.), 596; *Warren v. Charlestown*, 2 Gray (Mass.), 84; *Shelton v. Mobile* (market ordinance), 30 Ala. 540; *Rogers v. Jones*, 1 Wend. (N. Y.) 237; *Thomas v. Mount Vernon*, 9 Ohio, 290; 1 Stra. 469; *Sir T. Raym.* 288, 294; *Sayer*, 256; 1 B. & Ad. 95; 7 Term R. 549; *Staats v. Washington*, 45 N. J. L. 318; *Piqua v. Zimmerlin*, 35 Ohio St. 507; *State v. Kantler*, 33 Minn. 69. Where a charter authorized the penalty of fine and imprisonment, an ordinance imposing in addition thereto "costs of prosecution" was declared void as to such addition, but valid as to the remainder. *State v. Cantieny*, 34 Minn. 1. "If a by-law be entire, each part having a general influence over the rest, and one part of it be void, the entire by-law is void." *Willcock on Corp.* 160, pl. 384; approved, *Municipality No. 2 v. Morgan*, 1 La. An. 111, 116; *Ex parte Mayor, &c. of Florence*, 78 Ala. 419; *Rau v. Little Rock*, 34 Ark. 303. "But if a by-law consist of several distinct and independent parts, although one or more of them may be void, the rest are equally valid as though the void clauses had been omitted." *Willcock*, 161, pl. 389; *Fitzsachery v. Wiltshire*, 11 Mod. 353; *Lee v. Walis*, 1 Kenyon, 292.

In a leading case, *Rex v. Faversham Fishermen's Co.*, 8 D. & E. T. R. 356,

Lord Kenyon said: "With regard to the form of the by-law indeed, though a by-law may be good in part and bad in part, yet it can be so only when the two parts are entire and distinct from each other." Approved, *Municipality No. 2 v. Morgan*, 1 La. An. 111, 116. The fact that certain provisions of an ordinance are void does not authorize the court to declare void those provisions which relate to the subject matter of the ordinance, when they are distinct and separate from those which are void and useless. *State v. Hardy*, 7 Neb. 377. It is stated in *Grant on Corporations*, 88, that it is "now fully settled that a by-law that is void in part is void wholly; *e. g.*, if the penalty be unreasonable the rest of the by-law is vitiated thereby, and becomes wholly inoperative and null." Citing *Com. Dig. By-Law*, chap. vii.; *Colchester v. Godwin*, Carter, 121; *Elwood v. Bullock*, 6 Q. B. 383; *Clarke v. Tucket*, 2 Vent. 182; *Rex v. Atwood*, 4 B. & Ad. 481. But the rule in the text is well sustained, and is reasonable; and it is not true that the void part of a by-law will make null, complete and independent parts of the same by-law which would otherwise be good. *State v. Clarke*, 54 Mo. 17, 36. The act authorizing a sewerage system being unconstitutional in part, so that the scheme adopted could not be made available, the undertaking was arrested. *State v. Chamberlin*, 37 N. J. L. 388.

² *In re Mansfield*, 106 Cal. 400; *Ex parte Christenson*, 85 Cal. 208; *Augusta v. Clark*, 124 Ga. 254; *Clearwater v. Bowman*, 72 Kan. 92; *Moody v. Williamsburg*, 120 Ky. 192; 88 S. W. Rep. 1075; *Magneau v. Fremont*, 30 Neb. 843, 854; *Bailey v. State*, 30 Neb. 855; *Sterling v. Camden*, 65 N. J. L. 190; *Doran v. Camden*, 64 N. J. L. 666

§ 648 (422). **Proof of Ordinances.** — When not specially regulated by charter or statute, the *proof of ordinances* must be by the production of the originals or the books in which they are registered, as these are the primary evidence.¹ Printed copies, or authenticated copies, are often made competent evidence by the legislature.²

(disapproving on this point *Tomlin v. Cape May*, 63 N. J. L. 429).

But if the entire penalty imposed is affected with illegality, the ordinance may be held to be nugatory for failure to impose a penalty. See *Massinger v. Millville*, 63 N. J. L. 123; *Smith v. Gouldy*, 58 N. J. L. 562. See also § 610, *ante*. Where a city ordinance imposed an occupation tax, and the only method provided for its enforcement was illegal, it was held that the whole ordinance was thereby rendered inoperative. *Omaha v. Harmon*, 58 Neb. 339; *German American Fire Ins. Co. v. Minden*, 51 Neb. 870.

¹ *Lumbard v. Aldrich*, 8 N. H. 31; *Stevens v. Chicago*, 48 Ill. 498; *Moor v. Newfield*, 4 Me. 44; *Hallowell & A. Bank v. Hamlin*, 14 Mass. 178; *Case of Thetford*, 12 Vin. Abr. 90; *ante*, § 557, note; *infra*, § 649; *McCaffrey v. Thomas*, 4 Pennell (Del.), 437; *Metropolitan St. R. Co. v. Johnson*, 90 Ga. 500; *Tipton v. Norman*, 72 Mo. 380; *Stewart v. Clinton*, 79 Mo. 603; *Webb City v. Parker*, 103 Mo. App. 295, citing text; *Shaw v. N. Y. Central & H. R. R. Co.*, 85 N. Y. App. Div. 137.

In *Information against Oliver*, 21 S. Car. 319, *McGowan, J.*, said, that in a municipal court "it was no more necessary to offer proof of a public ordinance, under the seal of the city council, than in the courts of the State to prove a public act of the legislature. Municipal ordinances are private laws when brought before the superior judiciary of a State, but not when brought before a city court." See chapter on Corporate Records and Documents, *ante*, § 550, *et seq.* Proof may be made by the clerk that he posted up copies of an ordinance appearing on the records, without producing such copies or accounting for their absence. *Teft v. Size*, 10 Ill. 432.

Existence of an ordinance may be proved by the "ordinance book" of the town, in which it is recorded, unless the point at issue involves, not merely its *prima facie* existence as a law, but the proper and regular enactment of the ordinance, in which case a different

mode of proof must be resorted to: *Barnes v. Alexander City*, 89 Ala. 602.

As to promulgation and publication of ordinance; *Charleston v. Chur*, 2 Bailey (S. Car.), 164; *Kittering v. Jacksonville*, 50 Ill. 39; *Napa v. East-erby*, 76 Cal. 222; *Nevin v. Roach*, 86 Ky. 492; *Downing v. Miltonvale* (record of ayes and nays), 36 Kan. 740; *Brophy v. Hyatt* (record of ayes and nays), 10 Colo. 223; *Sullivan v. Lead-ville*, 11 Colo. 483; *Carroll v. Irvington* (what is sufficient publication), 50 N. J. L. 361; *supra*, §§ 603-607; *infra*, § 649; *Chicago & A. R. Co. v. Engle*, 76 Ill. 317.

Where the charter provides that the printed volume of city ordinances shall be evidence in all courts, the ordinances printed therein will be judicially noticed the same as public statutes. *Nap-man v. People*, 19 Mich. 352; *St. Louis v. St. Louis Railroad Co.*, 89 Mo. 44. In *Kansas*, the appellate court, upon the trial of an appeal from a conviction under an ordinance, will take judicial notice of the existence and substance of the ordinance. *Downing v. Miltonvale*, 36 Kan. 740; *ante*, § 231.

² As to proof by a printed book purporting or shown to be printed by authority, see *Western & A. R. Co. v. Hix*, 104 Ga. 11; *Chicago & A. R. Co. v. Wilson*, 225 Ill. 50; *Chicago, B. & Q. R. Co. v. Thorson*, 68 Ill. App. 288, 291; *Illinois Cent. R. Co. v. Burke*, 112 Ill. App. 415; *Canton v. Ligon*, 71 Mo. App. 407; *Starks v. State*, 38 Tex. Crim. Rep. 233; *International & G. N. R. Co. v. Hall*, 35 Tex. Civ. App. 545; *Texarkana & F. S. R. Co. v. Frugia*, 43 Tex. Civ. App. 573; 95 S. W. Rep. 563. Unless the statute, besides making a book purporting to be printed by authority admissible, dispenses with proof that it has been printed by authority, the production of the book is not enough; it must be proved that it was printed and published by authority. *International & G. N. R. Co. v. Hall*, 35 Tex. Civ. App. 545.

Proof by producing *certified copy*.

19 (423). **Presumption of Validity.**— It will be *presumed* an ordinance is valid, and the burden of establishing invalidity is on the person asserting it.¹ Where authority to pass an ordinance given subject was conditioned that it should be first submitted to the voters of the municipality and adopted by a majority vote, in prosecution for a breach thereof it was held that the further production of the charter, that an ordinance might be proved by a copy of it duly certified, &c., did not dispense with the necessity of proving that the ordinance was submitted to the voters and adopted, and that it had been published as required by law, the only effect of the charter provision being to dispense with the production of the original ordinance by making the certified copy evidence.²

50. **Injunction against Enforcement of Ordinances.**— The general rule is that, in the absence of irreparable injury to property, inadequacy of any remedy at law, or other recognized ground of equitable jurisdiction, *the enforcement of a municipal ordinance should not be restrained* where the question involved is simply whether a person claiming to be aggrieved has been guilty of an offence, or is liable for penalties for violations of the ordinance. The remedy of the ordinance comes directly before the court in the case of prosecution for an offence or an action to recover a penalty, and that question can properly be determined by a court of law it is not in itself form a proper subject of equity jurisdiction.³

People v. Chicago, 225 Ill. 218; *Ill. Cent. R. Co. v. Kief*, 111 Ill. App. 1008. The statutory method of proof has been held not to be exclusive. The offence may be proved either in the statutory method or by common-law methods. *Johnson v. Finley*, 54 Neb. 170. See also *Birmingham v. Tayloe*, 112 Cal. 412; *People v. Chicago*, 140 Ill. 374; *People v. Chicago, B. & Q. R. Co.*, 189 Ill. 132. *Chicago & A. R. Co. v. Carlinville*, 200 Ill. 314, aff'd 103 Ill. App. 251; *Chicago & A. R. Co. v. Averill*, 224 Ill. 516; *Snouffer v. Cedar Rapids & M. R. Co.*, 118 Iowa, 287; *St. Louis v. St. Louis Theatre Co.*, 202 Mo. 690; *Paxon v. Sweet*, 16 N. J. Eq. 196; *State v. Trenton*, 53 N. J. L. 132. ² *Schott v. People*, 89 Ill. 195. *Scholfield, J.*, adds: "Municipal corporations exercise only delegated and limited powers, and, in the absence of express statutory provisions to that effect, courts are authorized to indulge in no presumptions in favor of the validity of their ordinances. If in conformity with the express or necessarily implied grant of the charter, they are valid; otherwise not." ³ *Burnett v. Craig*, 30 Ala. 135; *Moses v. Mobile*, 52 Ala. 198; *For-*

But if a private property right of the person aggrieved, or any civil right which is guaranteed by the constitution or by statute, will be affected by the enforcement of the ordinance, and the party aggrieved has no other adequate remedy for the prevention of irreparable injury, the courts sustain the right to relief by injunction.¹

cheimer v. Mobile, 84 Ala. 126; Old Dominion Tel. Co. v. Powers, 140 Ala. 220, 225; Brown v. Birmingham, 140 Ala. 590; Denver v. Beede, 25 Colo. 172; Olympic Club Assoc. v. Speer, 29 Colo. 158; Dunham v. New Britain, 55 Conn. 378; Gault v. Wallis, 53 Ga. 675; Phillips v. Stone Mountain, 61 Ga. 386; Garrison v. Atlanta, 68 Ga. 64; Pope v. Savannah, 74 Ga. 365; Moultrie v. Patterson, 109 Ga. 370; Yates v. Batavia, 79 Ill. 500; Poyer v. Des Plaines, 123 Ill. 111; Chicago Public Stock Exchange v. McClaughry, 148 Ill. 372; Chicago, B. & Q. R. Co., v. Ottawa, 148 Ill. 397; Dolton v. Dolton, 201 Ill. 155, 165; Klinesmith v. Harrison, 18 Ill. App. 467; Skakel v. Roche, 27 Ill. App. 423; Brown v. Catlettsburg, 11 Bush (Ky.), 435; Ludlow & C. Coal Co. v. Ludlow, 102 Ky. 354; West v. Mayor, &c. of New York, 10 Paige (N. Y.), 539; Marvin Safe Co. v. Mayor, &c. of New York, 38 Hun (N. Y.), 146; Coykendall v. Hood, 36 N. Y. App. Div. 558; Cohen v. Goldsboro, 77 N. Car. 2; St. Peters Episcopal Church v. Washington, 109 N. Car. 21; Wade v. Nunnally, 19 Tex. Civ. App. 256. See also Hine v. New Haven, 40 Conn. 478; State v. Wood, 155 Mo. 426; Morris Canal Bank Co. v. Jersey City, 12 N. J. Eq. 252; Jersey City v. Lembeck, 31 N. J. Eq. 255, 268. See Index, *Equity; Injunction; Public Utilities*.

A person who is in prison or detained for an alleged violation of a void ordinance is entitled to be discharged on *habeas corpus*. *In re Van Tuyl*, 71 Kan. 659, 664.

As a general rule, an injunction will not lie at the instance of the city to enforce a municipal ordinance unless the act sought to be enjoined, besides being a violation of the ordinance, is in fact a nuisance. *New Rochelle v. Lang*, 75 Hun (N. Y.), 608; *Mt. Vernon v. Seeley*, 74 N. Y. App. Div. 50. See also *Hudson v. Thorne*, 7 Paige (N. Y.), 261; *Brockport v. Johnston*, 13 Abb. N. Cas. (N. Y.) 468. But the legislature has the power to confer the right to such remedy on the city.

City of New York v. Wineburgh Advertising Co., 122 N. Y. App. Div. 748.

¹ *Page v. Baltimore*, 34 Md. 558; *Baltimore v. Radecke*, 49 Md. 217, 232; *Baltimore v. Scharf*, 54 Md. 499; *Deems v. Baltimore*, 80 Md. 164.

Under the principles stated in the text injunctive relief has been held to have been properly granted under a great variety of circumstances, some of which are noted herein.

Use of real property. Ordinance prohibiting slaughter-houses, except within prescribed limits, without consent of council; *Barthet v. New Orleans*, 24 Fed. Rep. 563. Ordinance affecting right to maintain market house; *Quintini v. Bay St. Louis*, 64 Miss. 483; *Guillotte v. New Orleans*, 12 La. An. 432. Ordinance prohibiting cemetery within city limits; *Austin v. Austin City Cemetery Assoc.*, 87 Tex. 330. Wrongful enforcement of fire limit ordinance against railroad depot buildings; *Montgomery v. Louisville & N. R. Co.*, 84 Ala. 127. Ordinance requiring consents of adjoining owners to alteration of buildings; *Wood v. Chicago*, 205 Ill. 70. Ordinance declaring building to be a nuisance; *Boyd v. Frankfort*, 117 Ky. 199.

Abutting owners. Ordinance for improvement of street; *Dennison v. Kansas City*, 95 Mo. 416. Ordinance assessing cost of sewer; *Harper's Appeal*, 109 Pa. 9. Ordinance for paving street; *Holland v. Baltimore*, 11 Md. 186; *Baltimore v. Scharf*, 54 Md. 499. Street opening ordinance; *Page v. Baltimore*, 34 Md. 558. Ordinance regulating use of streets at suit of person irretrievably and specially injured sustained; *Cicero Lumber Co. v. Cicero*, 176 Ill. 9.

License and occupation taxes on businesses. *Southern Express Co. v. Ensley*, 116 Fed. Rep. 756; *Hutchinson v. Beckham*, 118 Fed. Rep. 399; *Nashville, C. & St. L. R. Co. v. Attalla*, 118 Ala. 363; *Gould v. Atlanta*, 55 Ga. 678; *Atlanta v. Jacobs*, 125 Ga. 523. Ordinance requiring license for auto-

In a number of cases the prevention of a *multiplicity of suits* has been sustained as sufficient ground for granting an injunction at the instance of persons whose rights are impaired by it.¹

mobiles; *Chicago v. Banker*, 112 Ill. App. 94.

Ordinances affecting railroad and other franchises. *Cleveland City R. Co. v. Cleveland*, 94 Fed. Rep. 385; *Camden Interstate R. Co. v. Catlettsburg*, 129 Fed. Rep. 421; *Mobile v. Louisville & N. R. Co.*, 84 Ala. 115; *Montgomery v. Louisville & N. R. Co.*, 84 Ala. 127; *Platte & D. Canal & Milling Co. v. Lee*, 2 Colo. App. 184; *Atlanta v. Gate City G. L. Co.*, 71 Ga. 106, 126; *Rushville v. Rushville Nat'l Gas Co.*, 132 Ind. 575, 587; *Morris Canal & B. Co. v. Jersey City*, 12 N. J. Eq. 252; *Cape May & S. L. R. Co. v. Cape May*, 35 N. J. Eq. 419; *North Jersey St. R. Co. v. So. Orange*, 58 N. J. Eq. 83.

Ordinances regulating rates and fares. *Cleveland v. Cleveland City R. Co.*, 194 U. S. 517; *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. Rep. 720; *Ozark-Bell Tel. Co. v. Springfield*, 140 Fed. Rep. 666. See further as to the province of the court and its jurisdiction over statutes and ordinances regulating rates and fares, *post*, Chapter on Public Utilities.

Injunction sustained against revocation of permit for boiler; *Baltimore v. Radecke*, 49 Md. 217, 232; also against destruction of inspected milk; *Deems v. Baltimore*, 80 Md. 164. "The mere fact that an act is criminal does not divest the jurisdiction of equity to prevent it by injunction, if it be also a violation of property rights, and the party aggrieved has no other adequate remedy for the prevention of irreparable injury, which will result from the failure of a court of law to redress such rights." *Mobile v. Louisville & N. R. Co.*, 84 Ala. 115, 126.

In *Atlanta v. Gate City Gas Light Co.*, 71 Ga. 106, where a suit was brought to restrain the enforcement of a municipal ordinance affecting the franchise of the gas light company to lay gas mains, the court held that while equity would not interfere by injunction with the prosecution of a criminal proceeding not touching the enjoyment of property, it would do so where it was evident that private property and civil rights were invaded

by such means. It declared that where it is manifest that a prosecution and arrest are threatened for an alleged violation of city ordinances for the purpose of preventing the exercise of civil rights conferred by law, injunction is a proper remedy to prevent injury to the party thus menaced.

An action in the nature of *quo warranto* asking that the city council be ousted from its power to pass the alleged ordinance will not lie. The remedy is to resist enforcement of the ordinance, or by *quo warranto* against persons assuming to act in an official capacity by virtue of the ordinance. *State v. Newark*, 57 Ohio St. 430.

¹ *Hutchinson v. Beckham*, 118 Fed. Rep. 399; *Poyer v. Des Plaines*, 123 Ill. 111; *Chicago v. Collins*, 175 Ill. 445, 451; *Wilkie v. Chicago*, 188 Ill. 444; *Davis v. Fasig*, 128 Ind. 271; *Rushville v. Rushville Nat'l Gas Co.*, 132 Ind. 575, 587; *Newport v. Newport & C. Bridge Co.*, 90 Ky. 193; *South Covington & C. St. R. Co. v. Berry*, 93 Ky. 43; *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323.

In *Chicago v. Collins*, 175 Ill. 445, 451, an action was brought by three hundred and seventy-three residents and tax payers, alleging that they were all owners of bicycles, to restrain the enforcement of an ordinance alleged to impose a void wheelmen's tax. It was held that the danger of a multiplicity of suits existed and that the court had jurisdiction to enjoin enforcement. In *Wilkie v. Chicago*, 188 Ill. 444, it was held that a suit by a number of plumbers to test the validity of a licensing ordinance was properly brought to prevent a multiplicity of actions. In *Third Avenue R. Co. v. Mayor, &c. of New York*, 54 N. Y. 159, an action was brought to restrain the defendants from prosecuting more than one of seventy-seven actions to recover penalties for violation of a municipal ordinance until one of such actions could be finally heard and determined. It was held that an injunction would lie.

But in *Alabama* it has been said that a multiplicity of prosecutions for violations of an ordinance will not

give equity jurisdiction. *Brown v. Birmingham*, 140 Ala. 590, 600; *Old Dominion Tel. Co. v. Powers*, 140 Ala. 220. But in a suit for an injunction a court of equity cannot determine whether a valid ordinance has been violated. It can merely determine whether the ordinance is valid or void. *Chicago v. Collins*, 175 Ill. 445, 451; *Davis v. Fasig*, 128 Ind. 271; *In Gould v. Atlanta*, 55 Ga. 678, the court sustained an injunction against the enforcement of an illegal ordinance imposing a tax on occupations when it was shown that the ordinance subjected the party to numerous successive levies with large fines; that the local authorities threatened the repetition of a levy and that large business interests were endangered.

CHAPTER XVI

ORDINANCES EXERCISING THE POLICE POWER

	Section		Section
Subject outlined	660	Regulation of Height of Build-	
Nature of License Power	661	ings	696
Same Subject; Regulation of		Regulation of Signs and Bill	
Occupations	662, 663, 664	Boards	697
Scope of Power to regulate	665	Regulation of Tenement Houses	698
Scope of Power to regulate Oc-		Markets; Power to establish and	
cupations	666	regulate	699-704
Right must be plainly conferred	667	Construction of Special Powers	
Monopolies Invalid	668	in Relation to Markets	705
Intoxicating Liquors	669	Market Stands in Streets	706
Effect of General Laws respect-		Power to tax Marketmen must	
ing the Liquor Trade	670	be plainly conferred	707
Power to license Sale of Liquor		Power to regulate Markets is a	
under the General Welfare		Police Power	708
Clause	671	Inspection Ordinances	709
Regulation of Saloons, &c., under		Weighing	710, 711
General Welfare Clause	672	Police Regulations respecting the	
Intoxicating Liquors; Power to		Public Peace and Safety; Use	
prohibit Sale	673	of Streets	712
Same Subject; Power to regulate	674	Same Subject; Salutary By-	
Same Subject; Qualifications of		laws	713
Dealers	675	Use of Streets; Regulation of	
Same Subject; License Fees	676	Automobiles	714
Health Ordinances	677	Use of Streets for removing Build-	
Removal and Disposal of Garbage		ings	715
and Refuse Matter	678	Ordinances regulating the Speed	
Removal and Disposal of Car-		of Trains	716
casses of Animals	679	Regulation of Operation of Rail-	
Quarantine Regulations	680	roads	717
Hospitals	681	Ordinances under Police Power	
Cemeteries and Burials	682, 683	and General Welfare Clause	718
Nuisances, and of the Power to		Observance of the Sabbath	719
prevent and abate	684	Limitation of Power under the	
General Power over Nuisances	685	General Welfare Clause	720
Suppression of Houses of Ill-fame	686	Shade Trees in Streets	721
Nuisances upon Rivers within		Vagrants; Powers under Au-	
City Limits	687	thority to regulate the Police	722
Power to demolish; Indictment	688	Strays	723
Extent of Authority over Nui-		Regulation of Dogs	724
sances	689	Power under Authority to pre-	
Scope of Power to abate Nui-		serve Good Order, &c.	725
sances	690	Storage of Gunpowder	726
Slaughter-Houses	691	Public Safety; Fire Limits	727
Stables	692	Same Subject; Hoistways	728
Keeping Hogs and Swine	693	Preservation of Order	729
Suppression of the Smoke Nui-		Gaming and Gambling Houses	730
sance	694	Billiards and Pool Tables; Bowl-	
Regulation of the Use and Con-		ing Alleys	731
trol of Private Property	695		

§ 660. **Subject outlined.** — We have already discussed the general nature and scope of the *police power* of the State and the *limitations* thereon.¹ The natural and appropriate, although not the exclusive, function of ordinances is in legislation by the people of the locality, or their duly constituted representatives, for the conduct or government of the municipality and its inhabitants.² Such legislation usually relates to the exercise of the police power delegated to the municipality by the legislature, and is the means by which the municipality exercises the powers of restraint over the inhabitants and the use of property within the territorial limits, which are confided to the municipal government for the general good of the city and its inhabitants. The suppression of nuisances, the preservation of the public health, the prevention of fires, the regulation of trades and occupations and of the use and storage of dangerous articles, the establishment and control of markets, the suppression of disorderly conduct and breaches of the peace and other similar matters, when regulated, controlled, or directed by ordinances, are the result of the exercise by the municipality of the police power of the State under a delegation thereof by statute or by charter. The limitations of the police power have never been defined, and it is probable that no general limit can be placed upon it other than the requirement that its exercise must be confined to those matters which have a real and substantial relation to the public welfare. In this chapter we shall discuss the power of the municipality to legislate concerning particular matters in the exercise of the police power delegated to it by the State, and in the treatment of the different subjects concerning which legislation has been had, the limitations of the police power in regard to the matters discussed will appear in the decisions of the courts.

Ordinances relating to the Licensing, Regulation, and Taxing of Trades and Occupations.

§ 661 (357). **Nature of License Power.** — Charters not unfrequently confer upon the corporation the power "to license and regulate" or to "license, regulate, and tax" certain avocations and employments, and to "tax and restrain" or "prohibit" exhibitions, shows, places of amusement, and the like; and unless there is some specific limitation on the authority of the legislature in this respect, such provisions are constitutional.³ Where, by the charter of a city,

¹ *Ante*, §§ 301, 302.

² *Ante*, §§ 570, 572.

³ *Coal-Float v. Jeffersonville*, 112 Ind. 15, 20, quoting text; *Bostick v. State*, 47 Ark. 126, 130; *Mount Pleasant v. Clutch*, 6 Iowa, 546. In *Mobile*

the power to license a particular occupation within its limits is given to the common council, such power involves the necessity of determining with reasonable certainty both the extent and duration of the license and the sum to be paid therefor; and must be exercised by the common council, and cannot be delegated by it, in whole or in part, to any person or authority.¹ Concerning *useful trades and*

v. Yuille, 3 Ala. 137, it was determined that there was nothing in the Constitution of the State which would invalidate a grant of power to a municipal corporation "to license bakers, and regulate the weight and price of bread, and to prohibit the baking, for sale, except by those licensed." Such a grant of power does not unlawfully interfere with the right of citizens to pursue their lawful occupations. In *Boston v. Schaffer*, 9 Pick. (Mass.) 415, it was decided that it is competent for the legislature to grant a city or town power to require the payment of money as the condition of exercising particular employments, *e. g.* giving theatrical or other exhibitions. This is not in the nature of a *tax*, which must be general, but of an excise on special vocations. Approved, *Cincinnati v. Bryson*, 15 Ohio, 625; *New Orleans v. Turpin* (auctioneers), 13 La. An. 56; *Municipality v. Dubois* (livery-stable keeper), 10 La. An. 56; *Charity Hospital v. Stickney*, 2 La. An. 550; *Slaughter v. Commonwealth*, 13 Gratt. (Va.) 767; *Carroll v. Tuscaloosa*, 12 Ala. 173; *Merriam v. New Orleans*, 14 La. An. 318; *Wynne v. Wright*, 1 Dev. & B. (N. Car.) Law, 19; *Savannah v. Hartridge*, 8 Ga. 23; *Cincinnati v. Bryson*, 15 Ohio, 625, dissenting opinion of *Burchard, J.*; *Collins v. Louisville*, 2 B. Mon. (Ky.) 134; *The Germania v. State*, 7 Md. 1; *Lucas v. Lottery Com'rs*, 11 Gill & Johns. (Md.) 506; *Sears v. West*, 1 Murph. (N. Car.) 291; *People v. Thurber*, 13 Ill. 554, 557; *Savannah v. Charlton*, 36 Ga. 460. Forbidding driving of carts without license. Who are cartmen? *Brooklyn v. Breslin*, 57 N. Y. 591; *post*, § 1411; *East St. Louis v. School Trustees*, 102 Ill. 489; *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560 (the Illinois Constitution of 1870 did not affect the power of the legislature in regard to conferring the right upon cities to require licenses); *State v. Hayne*, 4 S. Car. 403; *State v. Columbia*, 6 S. Car. 1; *Charleston v. Oliver*, 16 S. Car. 49; *United States Distilling Co. v. Chicago*, 112 Ill. 19 (brewers and distillers); *Information against Oliver*, 21

S. Car. 318; *Van Hook v. Selma*, 70 Ala. 361; *People v. Mulholland*, 82 N. Y. 324 (delivering milk from vehicles). A power to "levy a license tax" is discretionary and not mandatory. Under it a city may abstain from taxing any occupation. *New Orleans v. Mûlé*, 38 La. An. 826; see chapter on Taxation, *post*; *ante*, § 276; *Kniper v. Louisville*, 7 Bush (Ky.), 599.

The cases show some diversity of opinion as to the right to *tax particular employments* as distinguished from property; but the correct view, it is submitted by the author, is this: Unless specially restrained by the Constitution, the legislature may provide for the taxing of any occupation or trade, and may confer this power upon municipal corporations. But such taxes are apt to be inequitable, and the principle not free from danger of great abuse. Hence ordinances of this character ought not to be sustained, unless the authority be expressly or otherwise unequivocally conferred. *Newton v. Atchison*, 31 Kan. 151 (quoting the foregoing with approval). In this case a license tax upon merchants, graduated according to their average stock on hand, was held valid, and not in any illegal sense double taxation. In *Tulloss v. Sedan*, 31 Kan. 165, the same court held a *license tax upon druggists*, which was much larger for those not having permits to sell liquors than for those having such permits, was not illegal or void.

¹ *Darling v. St. Paul*, 19 Minn. 389; *State v. Glavin*, 67 Conn. 29, 34, citing text; *Mt. Clemens v. Sherbert*, 122 Mich. 674. Compare this case, however, with *Decorah v. Dunston*, 38 Iowa, 96, in which it was held that where an incorporated town had the power to regulate and license auction sales, &c., and to pass all ordinances necessary to exercise that power, an ordinance authorizing the mayor to fix the amount of the license within a specified sum was held not to be invalid. The general doctrine on the subject of the *delegation of municipal powers* is elsewhere dis-

employments, a distinction is to be observed between the power to "license" and the power to "tax." In such cases the former right, unless such appears to have been the legislative intent, does not give the authority to prohibit, or to use the license as a mode of taxation with a view to revenue, but a reasonable fee for the license and the labor attending its issue may be charged.¹ Respecting *amusements, exhibitions, &c.*, the authority of the corporation under the power to license has been regarded as greater than when the same word is employed as to trades and occupations.² Words of

cussed; and the line drawn between duties of a ministerial and executive character which may be delegated, and legislative or discretionary powers which may not be delegated. See Index, *Delegation of Power*. An ordinance which required the recommendation of twelve citizens and taxpayers in the block where it was proposed to establish a *laundry*, before the authorities should issue a license therefor, held illegal. *In re Quong Woo*, 13 Fed. Rep. 229; *supra*, § 589, and note; *ante*, § 244; *post*, §§ 1236, 1447.

¹ *State v. Bean*, 91 N. Car. 554 (quoting text, and holding that a power to license the carrying on of trades, &c., is a *police power*, and does not confer power to use the license as a mode of raising revenue); *Van Hook v. Selma*, 70 Ala. 361, 364, quoting text; *Fort Smith v. Ayers*, 43 Ark. 82; *Brewster v. Pine Bluff*, 70 Ark. 28; *New Haven v. New Haven Water Co.*, 44 Conn. 105, 108; *State v. Glavin*, 67 Conn. 29, 34; *Ottumwa v. Zekind*, 95 Iowa, 622, 626, citing text; *Commonwealth v. Plaisted*, 148 Mass. 375, 382, citing text; *Chaddock v. Day*, 75 Mich. 527; *Saginaw v. Saginaw Circuit Judge*, 106 Mich. 32; *St. Paul v. Dow*, 37 Minn. 20, 22, citing text; *Jackson v. Newman*, 59 Miss. 385; *Pitts v. Vicksburg*, 72 Miss. 181; *Benson v. Hoboken*, 33 N. J. L. 280; *New York v. Second Ave. R. Co.*, 32 N. Y. 261; *New York v. Hexamer*, 59 N. Y. App. Div. 4, 9; *Buffalo v. Hill*, 79 N. Y. App. Div. 402, 404. See also *Welch v. Hotchkiss*, 39 Conn. 140; *Sipe v. Murphy*, 49 Ohio St. 536; *Ex parte Miranda*, 73 Cal. 365; *O'Maley v. Freeport*, 96 Pa. St. 24; *Vansant v. Harlem Stage Co.*, 59 Md. 330; *Mühlenbrinck v. Long Branch Com'rs*, 42 N. J. L. 364. Compare *Flanagan v. Plainfield*, 44 N. J. L. 118; *Clark v. New Brunswick*, 43 N. J. L. 118. Where a charter provided that licenses should

be *proportioned to the amount of business*, an ordinance varying the amount according to the number of persons employed was held lawful. *Ex parte Sisto Li Protti*, 68 Cal. 635. One who transacts business both as a *wholesale and retail merchant* may be required to take out licenses in each capacity. *New Orleans v. Koen*, 38 La. An. 328.

² *Ash v. People*, 11 Mich. 347; *ante*, § 115; *Youngblood v. Sexton* (distinction between license and taxation), 32 Mich. 406; *St. Paul v. Tredeger*, 25 Minn. 248; *Ex parte Ackerman*, 6 Cal. App. 5; 91 Pac. Rep. 429; *Wells v. Torrey*, 144 Mich. 689; *St. Paul v. Tredeger*, 25 Minn. 248, approving text; *Bennett v. People*, 30 Ill. 389; *East St. Louis v. Wehrung*, 46 Ill. 392; *Savannah v. Charlton*, 36 Ga. 460; *Darling v. St. Paul*, 19 Minn. 389, citing text; *post*, chap. xxvii. Power "to exact license money" and "to regulate" the sale of liquors held not to confer power to *prohibit* the sale thereof. *Sweet v. Wabash*, 41 Ind. 7; *Essex Freeholders v. Barber*, 18 N. J. L. 64; *Carroll v. Tuscaloosa*, 12 Ala. n. s. 173; *Greensboro v. Mullins*, 13 Ala. n. s. 341; *Lucas v. Lottery Com'rs*, 11 Gill & Johns. (Md.) 506; *Charleston v. Ahrens*, 4 Strob. (S. Car.) 241; *Kip v. Paterson*, 26 N. J. L. 298; *Portland v. O'Neill*, 1 Oreg. 218; *Bennett v. Birmingham*, 31 Pa. St. 15; *Commonwealth v. Stodder*, 2 Cush. (Mass.) 562; *Day v. Green*, 4 Cush. (Mass.) 433; *Dunham v. Rochester*, 5 Cow. (N. Y.) 462; *Lawrenceburg v. Wuest*, 16 Ind. 337; *Cheny v. Shelbyville*, 18 Ind. 84; *Leavenworth v. Booth* (construing words "license tax"), 15 Kan. 627; *Welch v. Hotchkiss* (building license fee of fifty cents sustained), 39 Conn. 140; *post*, § 727, note.

The *police power* extends merely to the regulation of those matters that are confided by the legislature to the municipal corporation for that purpose,

this character, however, do not always have exactly the same meaning, and the intention of the legislature in using them must often be gathered from the whole charter and the general legislation of the State respecting the subject matter.

§ 662 (358). **Same Subject; Regulation of Occupations.** — In harmony with the foregoing principles, it has been held that, under authority "*to license and regulate*" draymen, &c., a municipal corporation may, by ordinance, require a license to be first taken out, and charge a reasonable sum for issuing the same and keeping the necessary record, but *cannot, by virtue of this authority, without more, levy a tax upon the occupation itself*; and, under the power to

including the power to exact reasonable fees, not for the purpose of revenue, but only as incidental to the power of regulation. The *power of taxation* is exerted in order to compel citizens and property owners to contribute to the support of the municipal government. *Per Pitney, J.*, in *Fielders v. North Jersey St. R. Co.*, 68 N. J. L. 343, 357, citing text.

Power "*to regulate the sale of meat*," &c., held to authorize a city to require that a license shall be obtained for the selling of meat, &c. *Kinsley v. Chicago*, 124 Ill. 359.

Distinction between *taxation* and *police regulation* well stated by *Depue, J.*, in *State v. Hoboken*, 33 N. J. L. 280; *Commonwealth v. Markham*, 7 Bush (Ky.), 486; *State v. Cassidy*, 22 Minn. 312; *post*, § 1408; see also *Kip v. Patterson*, 26 N. J. L. 298; *New York v. Second Avenue R. Co.*, 32 N. Y. 261; 33 N. Y. 42, distinguished and questioned in *Frankford & P. P. R. Co. v. Philadelphia*, 58 Pa. St. 119; *Johnson v. Philadelphia*, 60 Pa. St. 445; *Essex Freeholders v. Barber*, 18 N. J. L. 64. Difference between tax and a license to exercise particular callings upon making pecuniary compensation for the privilege. *People v. Thurber*, 13 Ill. 554; *Mount Carmel v. Wabash Co.*, 50 Ill. 69; *Kniper v. Louisville*, 7 Bush (Ky.), 599. *Smith v. Madison*, 7 Ind. 86, so far as it holds that authority "*to suppress and restrain*" bowling saloons confers the power to license and *tax* them, cannot, as it seems to us, be sustained. *Columbia v. Beasley*, 1 Humph. (Tenn.) 240, holds that power in a charter *to regulate and restrain* tippling-houses did not confer the power to *tax* them. The word "*restrain*"

(*Emporia v. Volmer*, 12 Kan. 622, 630), held not to be synonymous with the word "*prohibit*" or "*suppress*." Approving text. *Frank, In re*, 52 Cal. 606; *Hudson v. Hoboken*, 41 N. J. L. 71. A power "*to regulate*" victualling houses held to include the power to *license* them. *St. Johnsbury v. Thompson*, 59 Vt. 300.

One who sells his own goods at public auction, as well as one who sells another's, is an "*auctioneer*," allowing the common council of any municipality to require a license, &c. *Goshen v. Kern*, 63 Ind. 468. The power thus conferred on a common council is in the nature of a police regulation. *Ib.*

The provision of the *constitution of Alabama*, which declares that the general assembly shall not have power to authorize a municipal corporation to pass any laws inconsistent with the general laws of the State, does not limit the grant of police powers to such corporation, nor inhibit a grant of the power to prohibit the sale of spirituous liquors, though the general statutes only provide for licensing and regulating the traffic. *Ex parte Cowert*, 92 Ala. 94.

The difference between "*regulation*" and "*prohibition*" of an occupation is discussed in *Butte v. Paltrovich*, 30 Mont. 18, which holds that an ordinance fixing the *hours of closing of pawnshops* is not a prohibition of the business, but a regulation of it, is not unreasonable, and does not deny to those affected the equal protection of the law. *Horse-races* in inclosed grounds are within the meaning of a statute giving power to license and regulate "*theatrical and other exhibitions, shows, and amusements*." *Webber v. Chicago*, 148 Ill. 313.

regulate, it may make proper police regulations as to the *mode* in which the employment shall be exercised.¹

¹ *Cincinnati v. Bryson*, 15 Ohio, 625. See also *St. Paul v. Dow*, 37 Minn. 20, 22, citing text. As to correctness of application of the principle of law to the facts, *quare*. Consult, in connection with the above case, *Mays v. Cincinnati*, 1 Ohio St. 268; with which compare *Cincinnati v. Buckingham*, 10 Ohio, 257; and see cases cited *supra*, § 661; *Mays v. Cincinnati*, *supra*, cited by *Cornell, J.*, in *St. Paul v. Tredeger*, 25 Minn. 248; *The Laundry License Case*, 22 Fed. Rep. 701; *Marmet v. State*, 45 Ohio St. 63; *Fort Smith v. Ayers*, 43 Ark. 82; *Russellville v. White*, 41 Ark. 485. An act to regulate and license the keeping of dogs was regarded as an exercise of the police, and not the taxing power of the State, and not to be within the constitutional provision requiring uniformity of taxation. *Carter v. Dow*, 16 Wis. 298; *Tenney v. Lenz*, *ib.* 566. In the case last cited, *Paine, J.*, observes: "We cannot assent to the position that, if the sum required for a license exceeds the expense of issuing it, the act transcends the licensing power, and imposes a tax. By such a theory the police power would be shorn of all efficiency. . . . We have no doubt, therefore, that the legislature may, in regulating any matter that is a proper subject of the police power, impose such sums for licenses as will operate as partial restrictions upon the business, or upon the keeping of the particular kinds of property regulated." See also *Fire Department v. Helfenstein*, 16 Wis. 136. Special constitutional provisions in reference to taxation have been held to have no reference to license taxes. *Leavenworth v. Booth*, 15 Kan. 627, 635, 636; *Anderson v. Kerns Drain Co.*, 14 Ind. 199; *Bright v. McCullough*, 27 Ind. 223, 232; *People v. Coleman*, 4 Cal. 46.

The law recognizes property in dogs, and a city ordinance requiring the owner of such property to obtain a license to keep the same, and subjecting him to arrest, fine, and imprisonment for not procuring such license, is invalid. *Washington v. Meigs*, 1 McArthur, 53; *Harrington v. Miles*, 11 Kan. 80. See, on this general subject, *State v. Cymis*, 26 Ohio St. 400; *Ward v. State*, 48 Ala. 161; *post*, § 724; *ante*, § 301.

The legislature may, for police pur-

poses, prescribe the limits of municipal bodies, enlarging or contracting them at pleasure, and give them power to pass ordinances to *prevent nuisances beyond their boundaries*. Thus a packing house which has been licensed by the town where it is located, but within one mile of the corporate limits of a city, does not exempt the same from an ordinance of that city requiring it to be licensed by that municipality. The person using the establishment is liable to be charged a license by both the town and city. *Chicago Packing Co. v. Chicago*, 88 Ill. 221. See Index, *Boundaries; Charter*.

In *Ash v. People*, 11 Mich. 347, it appeared that, by its charter, authority was given to a city to erect, establish, and regulate markets and market-places, and to license and regulate butchers and shop-keepers at any other place in the city, for the sale of meats, &c., and to authorize the mayor to grant such licenses and to prescribe the sum of money to be paid into the treasury of the city therefor. An ordinance prohibiting the keeping of meat-shops outside of the public markets without a license, and requiring the payment of a license fee of five dollars, was sustained, although the amount exceeded the expense of making and registering the license. The court denied that the fee demanded was a tax, and regarded it as but a reasonable compensation for the additional expense of municipal supervision over the business at the place licensed. Approved and followed in *Buffalo v. Hill*, 79 N. Y. App. Div. 402.

A *ferry license fee* of fifty dollars was held not to be a tax, within the meaning of the term, as used in the Constitution of Michigan and the charter of the city of Detroit. *Chilvers v. People*, 11 Mich. 43; *ante*, § 276. "The power to license and regulate carries with it the right to require the payment of a [reasonable] sum in consideration of the license." *Per Wright, J.*, in *State v. Herod*, 29 Iowa, 123. Whenever a municipal corporation is authorized to make by-laws relative to a given subject, and to require of those who desire to do any act or transact any business pertaining thereto to obtain a license therefor, the reasonable cost of granting such licenses may be properly charged to the

§ 663 (359). **Same Subject.** — So authority to a city to adopt rules and orders “for the *due regulation* of omnibuses, stages, &c.,” was held not to authorize the adoption of an ordinance *requiring the payment of a tax or duty on each carriage licensed*, varying from one to twenty dollars, according to the different kinds of carriages, and the stands occupied. This was regarded as a direct tax upon the vehicle used, or its owner, and not necessary to secure the objects of the above grant of power to the city.¹ So where, under an act authorizing the trustees of a village corporation to make ordinances “in relation to hucksters, and for the good government of the village,” it was held that an ordinance was unauthorized which required

persons procuring them, although the power to do so is not expressly given in the charter. *Welch v. Hotchkiss*, 39 Conn. 140. Under a power to “license, tax, regulate, suppress, and prohibit hawkers, peddlers, pawnbrokers,” &c., a city may grant licenses imposing such conditions and burdens as it sees fit. *Lauder v. Chicago*, 111 Ill. 291. In *Illinois* the legislature is not restricted to immoral or injurious occupations in authorizing a city to impose license fees, nor is a power to suppress any business necessary in order to warrant the exercise of a power to license. *Braun v. Chicago*, 110 Ill. 186, 187; *post*, § 727, note, 1408.

¹ *Commonwealth v. Stodder*, 2 Cush. (Mass.) 562, 572; distinguished from *Boston v. Schaffer*, 9 Pick. (Mass.) 415, as to licenses for theatrical exhibitions. Power to the city council of Charleston to make, *inter alia*, “such ordinances respecting streets, carriages, wagons, carts, drays, &c., as to them shall seem expedient and necessary,” was held to authorize an ordinance requiring all persons who drive for hire any cart, dray, wagon, or omnibus, within the city, to take out a license, and to require the vehicle to be numbered, or on failure to do so to pay a fine. *Charleston v. Pepper*, 1 Rich. (S. Car.) Law, 364. A street-sprinkling cart is a “public vehicle” on which a license tax is properly imposed. *St. Louis v. Woodruff*, 4 Mo. App. 169. A similar ordinance, imposing annual charge on each car of a street-railway company, was sustained as a police regulation. *Frankford & Phila. P. R. Co. v. Philadelphia*, 58 Pa. St. 119; *s. p.* *Johnson v. Philadelphia*, 60 Pa. St. 445; *Allerton v. Chicago*, 6 Fed. Rep. 555.

A municipal corporation may, under

its ordinary powers of local government, pass ordinances requiring a street-railway company incorporated by legislature, and having its rails down and in use through the streets under legislative sanction, to make its tracks conform to the grade, to keep in repair the space between the rails, and to remove snow and the like. But it has no power to require such a company *so organized* to take out a license and pay license fee as a means of taxation, unless power is given to resort to licenses and license fees for revenue purposes. A provision in the charter, granting power “to license and regulate,” does not authorize the exaction of license fees for revenue purposes. Power to license when specially given in a charter is nevertheless a police power. The exaction of license fees for revenue purposes is the exercise of the power of taxation. The distinction between the power to license as a police regulation and the same power as a revenue measure is of the utmost importance. If granted with a view to revenue, the amount of tax, if not limited by charter, is in the discretion and judgment of the authorities; if given as a police power, it must be exercised as a means of regulation only, and cannot be used as a source of revenue. *North Hudson R. Co. v. Hoboken*, 41 N. J. L. 71; *New York v. Second Avenue R. Co.*, 32 N. Y. 261. Power to license, tax, and regulate horse railroads, hackney carriages, &c., does not extend to taxation of *private vehicles* used by a merchant or manufacturer. *St. Louis v. Grove*, 46 Mo. 574. Nor does power to license, tax, and regulate authorize the grant of an *exclusive* right to run omnibuses within the limits of the city. *Logan v. Pyne*, 43 Iowa, 524; *Snyder v. North Law-*

that hucksters should, before exercising their employment, take a license, and be taxed a sum varying from five to thirty dollars.¹

§ 664 (360). **Same Subject.** — On the other hand, the power to “license, regulate, and restrain amusements,” it was admitted or taken for granted, would authorize an ordinance taxing, or requiring exhibitors to pay a specific sum for the privilege, this being considered as a means of regulating and restraining them.² So a grant of power to a city or town to license exhibitions “on such terms and conditions as to it may seem just and reasonable,” authorizes it to exact *money* for the license; it is not confined to regulating time and place, establishing police regulations, &c.³

§ 665. **Scope of Power to regulate.** — An authority which is frequently, if not generally, conferred upon municipal corporations, is the power to *regulate occupations, businesses, and other matters* within the city. This power is sometimes conferred without the use of any other or qualifying words, but it is also frequently conferred in the form of authority to regulate, restrain, and license or other terms of similar import. Whether the power be conferred simply as power “to regulate,” or the power to regulate be granted in conjunction with other powers not importing an absolute prohibition, it may be laid down as a general rule, subject to some exceptions,

rence (hackney coach, what is), 8 Kan. 82.

¹ Dunham v. Rochester, 5 Cow. (N. Y.) 462, 466. See further, Index, *Markets*.

Under a charter authorizing the licensing of wagons, &c., and requiring owners and keepers of wagons, &c., *using them in the city*, to take out a license, all hucksters, gardeners, &c., who are not residents and taxpayers of other towns, may be compelled to take out a license. *Frommer v. Richmond*, 31 Gratt. 646. A city has no right to require that persons owning vehicles for hire within its limits and who have paid their city licenses shall obtain from the city, at a certain fixed and exorbitant price, the plates which an ordinance of the city has prescribed for the convenient identification of the vehicles. Such an exaction is another license in disguise, and therefore unconstitutional. *Walker v. New Orleans*, 31 La. An. 828.

Power to regulate hawkers, peddlers, &c., gives the corporation authority to

impose such reasonable conditions and limitations as it sees fit. *People v. Sawyer*, 106 Mich. 423, citing text. Where a charter empowered a city to impose a license tax on vehicles for hire and a license tax on occupations, it was held that the city might impose a license tax on vehicles used in particular occupations. *St. Louis v. Weitzel*, 130 Mo. 600.

² *Hodges v. Nashville*, 2 Humph. (Tenn.) 61. See also *Carter v. Dow*, 16 Wis. 298; *Tenney v. Lenz*, *Id.* 566. Speaking of this subject, Mr. Justice *Cooley* expresses it as his opinion that where the right to impose license fees to operate as a restriction upon the business or thing licensed can be fairly deduced from the taxing power conferred upon the corporation, it should be done, rather than to derive the right solely from the power to regulate. Const. Lim. 202, note.

³ *Boston v. Schaffer*, 9 Pick. (Mass.) 415; distinguished from *Commonwealth v. Stodder*, 2 Cush. (Mass.) 562, 572.

that the power to regulate does not authorize the absolute prohibition of the subject matter upon which the authority is to be exercised; much depends upon the nature of such subject matter as to the scope of the power.¹ In the exercise of the power to regulate, a city may

¹ *Ex parte Reynolds*, 87 Ala. 138; *Ex parte Anniston*, 90 Ala. 516; *Ex parte Sikes*, 102 Ala. 173; *Mernaugh v. Orlando*, 41 Fla. 433; *Sweet v. Wabash*, 1 Ind. 7; *Minden v. Silverstein*, 36 A. An. 912, 914; *State v. Mott*, 61 Id. 297, 309; *State v. Clarke*, 54 Mo. 7; *McConvill v. Jersey City*, 39 N. J. 38; *Thousand Island Park Assoc. v. Tucker*, 173 N. Y. 203; *Peace v. McDoo*, 110 N. Y. App. Div. 13; *Bronson v. Oberlin*, 41 Ohio St. 476; *Andrews v. State*, 3 Heisk. (Tenn.) 165, 81; *Ex parte Robinson*, 30 Tex. App. 93; *Ex parte Patterson*, 42 Tex. Crim. Rep. 256, 260; *Toronto v. Virgo*, App. Cas. [1896] 88; *infra*, §§ 666, 667. Authority to regulate a lawful trade or business or other non-injurious subject matter implies the continued existence of the thing to be regulated. *State v. Clarke*, 54 Mo. 17. This power implies that the subject matter is lawful, but that certain restrictions may be necessary to protect the public welfare. *Anderson v. Wellington*, 40 Kan. 173, 180. Where the business or matter to be regulated is one which is or has become dangerous to health or safety or injurious to public morals, the power to regulate may, we think, include the power to prohibit where the municipal council reasonably deems the public welfare so requires. Following out the principle that the power to regulate does not imply power to prohibit, it has been held that the titles of statutes which are expressed as intended "to regulate" only do not cover a prohibition of the matter regulated and that these statutes are unconstitutional for failure to express the subject matter in the title. See *Miller v. Jones*, 80 Ala. 39; *Morgan v. State*, 81 Ala. 72; *Yahn v. Merritt*, 117 Ala. 485; *Cantril v. Sainer*, 59 Iowa, 26; *People v. Gadway*, 31 Mich. 285; *Matter of Hauck*, 70 Mich. 396. See also *Ex parte Cowert*, 32 Ala. 94; Index, *Constitutional Provisions; Title*.

In *Miller v. Jones*, 80 Ala. 89, 96, *Clopton, J.*, who delivered the opinion of the court said: "Regulate and prohibit have different and distinct meanings, whether understood in their ordinary and common signification, or as

defined by the courts in construing statutes. Power granted to a municipal corporation to grant licenses to retailers of liquors and to regulate them does not confer power to prohibit, either directly, or by a prohibitory charge for a license. *Marion v. Chandler*, 6 Ala. 899; *Ex parte Burnett*, 30 Ala. 461. In *Joseph v. Randolph*, 71 Ala. 499, it is said: 'A constitutional right, though subject to regulation, cannot be impaired or destroyed, under the device or guise of being regulated.' To regulate the sale of liquor implies, *ex vi termini* that the business may be engaged in or carried on, subject to established rules or methods. Prohibition is to prevent the business being engaged in or carried on, entirely or partially. The two purposes are incongruous." An ordinance enacted under the power to regulate merely is invalid, if *the substantial effect is to prohibit*, although on its face it may purport only to regulate. *Ex parte Patterson*, 42 Tex. Crim. Rep. 256.

Light is thrown upon the scope, meaning, and legal effect of the word "regulate" by the numerous decisions of the United States Supreme Court construing the constitutional power of Congress "to regulate" interstate and foreign commerce to which the reader is referred, including the Lottery Cases.

In *Chicago v. Netcher*, 183 Ill. 104, authority was conferred upon the city by statute "to regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables, and all other provisions and to provide for the place and manner of selling the same." Under this authority the city adopted an ordinance prohibiting the sale of these articles in any store where dry-goods, clothing, jewelry, and drugs were sold. The court held that the ordinance was invalid as an exercise of the power to regulate. It construed the ordinance as directed against department stores, and intended to prohibit the sale of meats and provisions in department stores, and as such regarded it as an improper exercise of the police power, the prohibition being made without any reason existing for an exercise of the police power in that respect.

The grant of authority to muni-

exercise all reasonable forms of restraint over the thing regulated so long as it stops short of actual prohibition. To regulate is to govern by or subject to certain rules or restrictions. It implies a power of restriction and restraint certainly within reasonable limits as to the manner of conducting a specified business,¹ and also as to the building or erection in or upon which the business is to be conducted.² By virtue of the power to regulate it has been held that the city council may by ordinance prohibit the carrying on of a business within certain specified portions of the city.³ By virtue of a similar

principal corporations is frequently expressed by the words "to regulate and restrain." Sometimes either term is used alone. With reference to the relative meaning of these terms, *Walker, J.*, said, in *Chicago Packing & Provision Co. v. Chicago*, 88 Ill. 221, 226: "The word 'restrain' is not more comprehensive than 'regulate.' The former term is usually employed to signify to hold back, to curb, to hold in, to check, to prevent, to hinder, and to that extent it may mean to govern. But the power to regulate is surely as comprehensive as to restrain, and would seem to embrace the power to employ more and different means. It, no doubt, embraces the power to restrain by the same methods of restraint, and if a license may be required as a means of restraint, we have no hesitation in saying that it may be as a means of regulation." See *infra*, § 666.

¹ *Cronin v. People*, 82 N. Y. 318, 321, cited *infra*; *Rochester v. West*, 164 N. Y. 510, 513.

² *Cronin v. People*, 82 N. Y. 318, 321; *Rochester v. West*, 164 N. Y. 510, 513.

³ *Buffalo v. Webster*, 10 Wend. 100.

In *Cronin v. People*, 82 N. Y. 318, the authority conferred upon the city by its charter was "to regulate the erection, use, and continuance of slaughter houses within the city." An ordinance was adopted which forbade slaughter houses within certain prescribed limits specifically named. It was urged that this ordinance was prohibitory in its nature; that the authority conferred did not authorize prohibition, and that the authority to regulate could not be construed to permit a total prohibition in particular areas or localities. It was held that the ordinance was a valid exercise of the power granted. *Finch, J.*, in overruling the

contention of the defendant, said: "The use of the word 'regulate' in the statute is not confined merely to the manner in which the business of slaughtering animals is carried on. To regulate implies a power of regulation and restraint, and is applied in the charter not merely to the 'use' of slaughter houses which would relate to the manner of conducting the business, but also to their 'erection' on the one hand and their 'continuance' on the other; so that their erection in the first instance and then the mode and manner of their use after they are built, and necessarily their continuance, are placed under the regulating power of the municipal authority. It would be a very narrow and technical construction to say that the power to regulate the erection of a slaughterhouse is exhausted in prescribing the form of material of its erection, and has no reference to its locality. And the construction wholly falls when applied to the 'continuance' of such a structure and the business carried on within it. How is it possible to regulate its continuance except by limiting and restricting that continuance, which again can only be done by prohibiting its continued existence. It is the plain purpose of the statute to give to the common council the right to fix and determine the limits and localities within which new slaughterhouses may be erected and the areas from which they shall be excluded; to direct and control the mode and manner of using those so erected and those already existing as they may deem the health and cleanliness of the city require; and to prohibit their continuance whenever and wherever they become sources of danger to the health or comfort of the community."

Other decisions have applied a similar construction to the power to

power to regulate, it has been held that it is within the authority of the common council reasonably to limit the manner in which an act may be done by prohibiting one or more methods.¹ By the weight of

regulate, and show that the term "regulate" has no fixed and unvarying meaning, and that it may under circumstances include the power of partial or total prohibition where such conclusion is not inconsistent with the charter or statute and rests upon reasonable grounds. Thus, it has been held that the power "to regulate and manage markets" authorizes the adoption of an ordinance prohibiting the sale of merchandise at stores, stalls, and places in the city outside of the market house. *Ex parte Byrd*, 84 Ala. 17. The power to "regulate" livery stables authorizes the designation of the places where they may thereafter be erected and the prohibition of their erection at other places. *State v. Beattie*, 16 Mo. App. 131. Under the power to regulate the sale of meats, &c., the city council has authority to prescribe by ordinance the times and places of sale and to prohibit the sale of them elsewhere. *Jacksonville v. Ledwith*, 26 Fla. 163. In *People v. Pratt*, 129 N. Y. 58, 72, where the authority conferred upon a city was "to regulate the burial of the dead," *Earl, J.*, delivering the opinion of the court, said: "Under the power to regulate, the common council could prohibit the burial of the dead within the city limits." This dictum *per se* is contrary to many cases above cited, and was not called for by the question before the court, and is to be taken in connection with the nature of the case and its special facts, and the decision of the court in the case is, we think, unquestionably sound. By virtue of the power conferred upon it, the city adopted an ordinance prohibiting the burial of the dead within the city limits except certain cemeteries specifically named. There was therefore no absolute prohibition, and in any event the question before the court was merely one whether land which could not be used for a cemetery by reason of the prohibitory terms of the ordinance was exempt from taxation as a cemetery.

In *People v. Cregier*, 138 Ill. 401, it was held that the power "to regulate and prohibit" may be exercised by a prohibition within specified limits. See also *Gorrell v. Newport*, 1 Tenn.

Ch. App. 120. Similarly in *Dennehy v. Chicago*, 120 Ill. 627, it was held that under a power "to license, regulate, and prohibit" sales of intoxicating liquor, the prohibition need not be total.

¹ Under the power to govern, manage, and direct the public parks, the city council has authority to prohibit by ordinance the use of bicycles therein. *Matter of Wright*, 29 Hun (N. Y.), 357.

Under the power to regulate the running of railroad cars the city council may prohibit their propulsion by steam. *Buffalo & N. F. R. Co. v. Buffalo*, 5 Hill (N. Y.), 209. Under the power to regulate saloons, the city council may ordain that they shall be closed on Sunday. *Richards v. Bayonne*, 61 N. J. L. 496. See also *Paul v. Gloucester*, 50 N. J. L. 585, 590; *Butte v. Paltrovich*, 30 Mont. 18; *post*, § 672. The power to regulate the city streets has been held to include the power to control them, — the control being a necessary incident of regulation. *Chicago Dock Co. v. Garrity*, 115 Ill. 155. The power to regulate the use of the streets of a city implies the power to prohibit the use of them under certain circumstances. *Attorney-General v. Boston*, 142 Mass. 200, 203. Power to regulate streets was construed to include the power to widen, alter, and extend them so as to provide for the public convenience and the mutual connection of the whole. *United States v. Harris*, 1 Sumn. 21. By virtue of the power to regulate the use of the streets, a city may impose on a telegraph company a charge in the nature of rental for the exclusive use of the parts of the city streets occupied by its telegraph poles. *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, s. c. on rehearing, 149 U. S. 465, 470, rev'g 39 Fed. Rep. 59, s. c. on re-trial, 63 Fed. Rep. 68; *Western Union Tel. Co. v. New Hope*, 187 U. S. 419; *Chester City v. Tel. Co.*, 154 Pa. St. 464; *Taylor Borough v. Tel. Co.*, 202 Pa. St. 584; *Atlantic & P. Tel. Co. v. Philadelphia*, 190 U. S. 160; *Postal Telegraph Cable Co. v. New Hope*, 192 U. S. 55. See also *Ft. Smith v. Hunt*, 72 Ark. 556; *McWethy v. Aurora El. L. Co.*, 202 Ill.

authority, although the decisions are not uniform, another form of regulation which may be prescribed by virtue of the power to regulate is the power to *require a license* to follow particular trades or occupations *with an accompanying prohibition* in the event of failure to procure the license.¹ The implied authority to license which flows from authority to regulate confers authority on the city council to *require the licensee to pay a reasonable license fee*, but it cannot, under the guise of a license or a license fee or by virtue of its power to regulate, impose a tax upon the occupation.²

218, 225; *State v. Murphy*, 134 Mo. 548. But compare *Wisconsin Tel. Co. v. Milwaukee*, 126 Wis. 1; 104 N. W. 1009, where it was held that power to regulate and control the city streets does not confer power to exact a license fee from a telephone company which has constructed and is maintaining its lines therein.

¹ *Laundry License Case*, 22 Fed. Rep. 701; *Russellville v. White*, 41 Ark. 485; *Ft. Smith v. Ayers*, 43 Ark. 82; *Fayetteville v. Carter*, 52 Ark. 301; *Fort Smith v. Hunt*, 72 Ark. 556; *Ex parte Mount*, 66 Cal. 448; *Chicago Packing & Provision Co. v. Chicago*, 88 Ill. 221; *Kinsley v. Chicago*, 124 Ill. 359; *Chicago v. Collins*, 175 Ill. 445, 454; *Cairo v. Coleman*, 53 Ill. App. 680, 687; *Vinson v. Monticello*, 118 Ind. 103; *Commonwealth v. Brooks*, 109 Mass. 355; *Commonwealth v. Plaisted*, 148 Mass. 375, 382; *Commonwealth v. Stodder*, 2 Cush. (Mass.) 562, 573; *State v. Clarke*, 54 Mo. 17; *Charleston v. Pepper*, 1 Rich. Law (S. Car.), 364; *St. Johnsbury v. Thompson*, 59 Vt. 300. *Cases contra*: *Duckwall v. New Albany*, 25 Ind. 283 (power to regulate ferries); *Burlington v. Bumgardner*, 42 Iowa, 673; *Keokuk v. Dressell*, 47 Iowa, 597; *Dunham v. Rochester*, 5 Cow. (N. Y.) 462; *Ex parte Garza*, 28 Tex. App. 381. When a city council has, by virtue of its power to regulate, adopted an ordinance requiring a trade or occupation to be licensed, its power to regulate authorizes the council to *refuse a license* in its discretion. *Perry v. Salt Lake City*, 7 Utah, 143. See also *People v. Brooklyn Board of Excise*, 16 N. Y. Supp. 798. Under power "to make all regulations" necessary or expedient for the health or the suppression of disease a city may *require dealers in meats* to take out licenses. *Kinsley v. Chicago*, 124 Ill.

359. Under the power to pass police regulations for the protection of the *public health* the city council may *prohibit the sale of cigarettes near school houses* and require a license to sell them at other places. *Gundling v. Chicago*, 176 Ill. 340, *aff'd* 177 U. S. 183.

² *Laundry License Case*, 22 Fed. Rep. 701; *Sunset Tel. & Tel. Co. v. Medford*, 115 Fed. Rep. 202; *Fayetteville v. Carter*, 52 Ark. 301; *Atkins v. Phillips*, 26 Fla. 281; *Morton v. Macon*, 111 Ga. 162; *Chicago v. Collins*, 175 Ill. 445; *Burlington v. Putnam Ins. Co.*, 31 Iowa, 102; *Ottumwa v. Zekind*, 95 Iowa, 622, 626; *Commonwealth v. Stodder*, 2 Cush. (Mass.) 562, 572; *Freeholders of Essex v. Barber*, 18 N. J. L. 64; *North Hudson R. Co. v. Hoboken*, 41 N. J. L. 71, 78; *Muhlenbrinck v. Long Branch Com'rs*, 42 N. J. L. 364; *Cincinnati v. Bryson*, 15 Ohio, 625. As to the distinction between the *power to license* and the *power to tax*, see *post*, §§ 661, 662, 663, 664. In *Atlantic & P. Tel. Co. v. Philadelphia*, 190 U. S. 160, 164, a case involving the validity of an ordinance of the city of Philadelphia, imposing a license fee upon telegraph poles in the city streets, *Brewer, J.*, said with reference to the limitations upon the right to charge a license fee: "It does not follow from this that a municipality is not subject to any restraint in the amount of the charge which it so exacts. True it is often said that a license tax is in its nature arbitrary; that it is not necessarily graduated by the value of the property invested in the business licensed or its profitableness. But such observations are pertinent only in case the license is resorted to for the purposes of revenue. When it is authorized only in support of police supervision, the expense of such super-

§ 666. **Scope of Power to regulate Occupations.** — It may be taken as firmly established that the States and municipalities under legislative sanction possess the power, because the States have never surrendered it, to prescribe such regulations as may be reasonably necessary and appropriate for *the protection of the public health and comfort*.¹ And for that purpose a State has the power in some cases *to prohibit*, and in other cases *to regulate, trades and occupations*. Such occupations as are inherently dangerous and annoying to the community, or pertain to the public service, or are affected by a public use, are in the nature of privileges instead of rights. Some of them may be prohibited altogether, some within certain territorial limits, and others beyond a limited number, under the police power of the State, which arises from and rests upon the community right of self-protection and self-preservation. There are other occupations that may not be prohibited at all, and over which the power of the State, either through the legislature, or through legislative power delegated to municipal corporations, is confined to regulations for the general safety and welfare of the community.² But there is a

vision determines the amount of the charge, and if it were possible to prove in advance the exact cost that would be the limit of the tax. In the nature of things that, however, is ordinarily impossible, and so the municipality is at liberty to make the charge large enough to cover any reasonable anticipated expenses. It is authorized to fix such charge in advance, and need not wait until the end of the period for which the license is granted. It may not act arbitrarily or unreasonably, but the risk may rightfully be cast upon the licensee, and the charge cannot be avoided because it subsequently appears that it was somewhat in excess of the actual expense of the supervision, nor can the licensee then recover the difference between the amount of the license and such cost."

¹ California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 318. See generally on the subject of this section, Index, *Police Power and Regulations*.

² People v. Department of Health, 117 N. Y. App. Div. 856, 863, 864. See *supra*, § 665; *infra*, § 667. In *People v. Biesecker*, 169 N. Y. 53, aff'g 58 N. Y. App. Div. 391, a case which involved the validity of a statute prohibiting the use of preservatives in dairy products, the court, after referring to the statutes relating to adulteration

and after pointing out the fact that preservatives may in themselves be harmless, and referring to the extent to which people have been engaged in the work of preserving food from decay, said: "There is doubtless, in the prosecution of these industries, danger of adulteration and of the use of processes injurious to public health. The regulation of these subjects for the protection of the public health and prevention of impositions on consumers is within the power of the legislature, and the propriety of its exercise cannot be questioned. But while it may regulate, the legislature may not destroy the industry, and that is not a valid regulation which in dealing with the means of preserving food makes the preservation of food itself an unlawful act. Ingredients and processes may be prohibited as unwholesome or causing deception, but not solely because they preserve."

In *People v. Warden of City Prison*, 157 N. Y. 116, it was held that a statutory enactment prohibiting as a crime the sale of tickets for passage on vessels or railroad trains by any person except common carriers, and their specially authorized agents, transcended the police power, and was unconstitutional in so far as it undertook to prohibit citizens of the State from engaging in the business of brokerage in passage

limit to the power of regulation. If a regulation, enacted by competent authority avowedly for the protection of the public safety, health, and welfare, has a real and substantial relation to these objects, the courts will not strike it down upon grounds merely of public policy or expediency.¹ If the regulation does not have any real or substantial relation to these objects, and violates rights secured by the fundamental law and interferes with the enjoyment of individual rights beyond the necessities of the case, *such regulation exceeds the legislative authority* of the State and cannot be sustained.² And it

tickets. In this case the statute was treated as a mere prohibition, and it was pointed out that it made no attempt to exclude persons of bad character from the business, and that the public authorities were not given the right to determine by examination or otherwise the character of the person to be engaged in it, and it was therefore not to be regarded as a statute intended to regulate the business.

¹ In *People v. Biesecker*, 169 N. Y. 53, aff'g 58 N. Y. App. Div. 391, *Cullen, J.*, who delivered the opinion of the court holding that a *statute prohibiting the sale of dairy products containing a preservative to be void*, after citing the cases summarized the effect of the decisions thus: "From these cases the following propositions may be deduced: 1. That the legislature cannot forbid or wholly prevent the sale of a wholesome article of food. 2. That legislation intended and reasonably adapted to prevent an article being manufactured in imitation or semblance of a well-known article in common use and thus imposing upon consumers or purchasers is valid. 3. That in the interest of public health the legislature may declare articles of food not complying with a specified standard unwholesome and forbid their sale." In *People v. Zimmerman*, 102 N. Y. App. Div. 103, it was held that a *statute requiring that trading stamps be redeemed in money is unconstitutional*. In disposing of the case, *Spring, J.*, said: "It is not a novel expedient for the legislature to interfere with trade. The pretext for this kind of legislation is that the public health and public morals will be conserved thereby. If the pretext is founded in reason, the law will be upheld, for the preservation of the public health calls into requisition the police power of the State; and if fairly within the elastic scope of that power, the courts

are earnest to join with the legislature to give validity to any enactment which promotes the welfare of the public. If, however, the legislation is for the preference of one class of tradesmen above another, or is designed to destroy or hamper one kind of business because its successful prosecution has resulted to the detriment of others in competition, the attempt has invariably been opposed by the courts on the ground that the legislation is in contravention of the fundamental law."

² *Ritchie v. People*, 155 Ill. 98. The power of the legislature to *regulate the hours of labor and manner of payment* and otherwise interfere with the contract relations between employer and employee is discussed, *ante*, § 118, *Mandatory Legislation as to Hours of Labor, Wages and Union Labor in Municipal Works*.

In *Matter of Jacobs*, 98 N. Y. 98, it was held that a *statute prohibiting the manufacture of cigars or preparation of tobacco in any form in any tenement house*, although ostensibly passed for the purpose of improving the public health, had no real or substantial relation to that subject and was unconstitutional and in excess of the police powers of the State. *Earl, J.*, said: "Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient, and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health, and

has been said that certain trades and occupations are so innocuous and innocent that they cannot be made the subject of regulation,

thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health. It matters not that the legislature may, in the title to the act, or in its body, declare that it is intended for the improvement of the public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared and enforce the supreme law."

In *People v. Marx*, 99 N. Y. 377, a statute prohibiting the *manufacture or sale* as an article of food of *any substitute for butter or cheese* produced from pure unadulterated milk or cream was held to be unconstitutional because the terms of the prohibition were not limited to unwholesome or simulated substitutes. But it is to be observed that statutes tending to prevent fraud by placing restrictions upon the sale of simulated substances have been sustained as a constitutional and valid exercise of the police power. *McAllister v. State*, 72 Md. 390; *Plumley v. Massachusetts*, 155 U. S. 461, aff'g 156 Mass. 236; *Butler v. Chambers*, 36 Minn. 69; *State v. Horgan*, 55 Minn. 183; *State v. Addington*, 77 Mo. 110; *State v. Marshall*, 64 N. H. 549; *Waterbury v. Newton*, 50 N. J. L. 534; *People v. Arensberg*, 105 N. Y. 123; *People v. Kibler*, 106 N. Y. 321; *People v. Girard* 145 N. Y. 105; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238; *Powell v. Commonwealth*, 114 Pa. St. 265. In *Lochner v. New York*, 198 U. S. 45, 58, 59, rev'g 177 N. Y. 145, the Supreme Court of the United States held that a statute of the State of New York *limiting the hours of labor in bakeries to sixty hours per week and ten hours per day* was not a proper exercise of the police power and unconstitutional. Mr. Justice Peckham said: "There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker. . . . We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature

to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recommend the exercise of that or of any other trade as a remedy for ill health. Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the government. It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's, or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family. In our large cities there are many buildings into which the sun penetrates for but a short time in each day, and these buildings are occupied by people carrying on the business of bankers, brokers, lawyers, real estate, and many other kinds of business, aided by many clerks, messengers, and other employees. Upon the assumption of the validity of this act under review,

either by the State or by a municipal corporation acting under delegated authority.¹ But this statement must always be taken

it is not possible to say that an act, prohibiting lawyers, or bank clerks, or others, from contracting to labor for their employers more than eight hours a day, would be invalid. It might be said that it is unhealthy to work more than that number of hours in an apartment lighted by artificial light during the working hours of the day; that the occupation of the bank clerk, the lawyer's clerk, the real estate, or the broker's clerk in such offices is therefore unhealthy, and the legislature in its paternal wisdom must, therefore, have the right to legislate on the subject of and to limit the hours for such labor, and if it exercises that power and its validity be questioned, it is sufficient to say, it has reference to the public health; it has reference to the health of the employees condemned to labor day after day in buildings where the sun never shines; it is a health law, and therefore it is valid, and cannot be questioned by the courts. . . . Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddling interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employee's, if the hours of labor are not curtailed."

¹ Statutory enactments forbidding the giving of any gift, prize, premium, or award to the purchaser of goods, or the giving of any trading stamp or other device entitling a purchaser to receive an article from a person or corporation other than the vendor, have generally been held to interfere with private business and to impose unlawful restrictions under the guise of the police power, when the restrictions have no real or substantial relation to the public health, morals, or safety. *Ex parte McKenna*, 126 Cal. 429; *Long v. State*, 74 Md. 565; *Commonwealth v. Sisson*, 178 Mass. 578; *State v. Ramseyer*, 73 N. H. 31; *People v. Gilson*, 109 N. Y. 389; *People v. Dycker*, 72 N. Y. App.

Div. 308; *State v. Dalton*, 22 R. I. 77; *Young's Case*, 101 Va. 853; *State v. Dodge*, 76 Vt. 197. For similar reasons, an ordinance forbidding the giving of any trading stamp or other device entitling a purchaser to receive an article from a person or corporation other than the vendor has been held to be invalid. *Denver v. Frueauff*, 39 Colo. 20; 88 Pac. Rep. 389. As to the power to tax persons issuing trading stamps to their customers as persons engaged in the business of furnishing and issuing such stamps, see *Hewin v. Atlanta*, 121 Ga. 723.

In *People v. Biesecker*, 169 N. Y. 53, aff'g 58 App. Div. 391, it was held that a simple prohibition of the sale of any butter or dairy product containing a preservative did not make the introduction of a foreign substance into them, however deleterious, an adulteration, nor an adulteration illegal, except where the substance was introduced for the purpose of preserving them, and could not be regarded as intended to prevent fraud or imposition on buyers or consumers or as a legislative enactment in the interest of public health; and that it was unconstitutional and void because it forbade the sale of articles of food although they were not rendered unwholesome by the use of the preservative.

The trade of horseshoeing does not in itself bear such relation to the public health and comfort and the safety of society as to bring it within the exercise of the police power in any ordinary respect, for example as by requiring the registration of persons engaged in the business. *Bessette v. People*, 193 Ill. 334; *People v. Beattie*, 96 N. Y. App. Div. 383; *In re Aubry*, 36 Wash. 308. A city was vested with power "to regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables, and all other provisions, and to provide for place and manner of selling the same." Assuming to act under this power, it adopted an ordinance prohibiting the sale of meats and provisions in any store where dry goods, clothing, jewelry, and drugs were sold. It appears from the opinion of the court that this ordinance was directed against department stores. It was held that the ordinance was not a regulation, but a mere prohibition, and invalid because it was enacted without

subject to the general rule that even these trades and occupations are subject to such regulations in the exercise of the police power as may be properly directed against the individuals composing the community at large. In other cases, regulations directed against special features of certain trades, but having no real and substantial relation to, or necessity for, the protection of the public safety and welfare, have been declared to be invalid, although the trades themselves might be regarded as properly requiring regulation in other respects in the public interest.¹

§ 667 (361). **Right must be plainly conferred.** — Even the *right to license must be plainly conferred* or it will not be held to exist. Thus, power to make “by-laws *relative to* hucksters, grocers, and victualling shops” does not authorize the corporation to exact a *license* from persons carrying on such business. Nor does the general power to pass prudential by-laws, not inconsistent with the laws of the State, confer the authority to demand a license.² If the

any necessity for protecting the public welfare. *Chicago v. Netcher*, 183 Ill. 104; s. c. cited more fully *supra*, § 665.

¹ An ordinance which requires all bread sold by licensed bakers to be made in loaves weighing not less than one and one-half pounds is an unlawful restraint of trade, not justified by any necessity for the protection of the public welfare, and is invalid. *Buffalo v. Collins Baking Co.*, 39 N. Y. App. Div. 432.

An ordinance prohibiting any person from bringing into the town the carcass of any animal for burial, cremation, or making into fertilizer, was held to be an unlawful restraint of trade. The ordinance did not prohibit the making of fertilizer within the city limits, nor did it prohibit the transportation through the town of the carcass of animals for other purposes. It therefore did not tend to suppress any nuisance, and it was held that it had no relation to the public health, safety, or morals. *Fulton v. Norteman*, 60 W. Va. 562; 55 S. E. Rep. 658. An ordinance which prohibits the bringing into any town or sale therein of *second-hand clothing* without producing satisfactory proof to the mayor that it did not come from a locality where contagion or infection prevailed, was held to be an unreasonable restraint of trade in the absence of an epidemic or other circumstances

justifying the enforcement of the ordinance. *Kosciusko v. Slomberg*, 68 Miss. 469. See also *Greensboro v. Ehrenreich*, 80 Ala. 579; *State v. Taft*, 118 N. Car. 1190. An ordinance which prohibits the covering of fruit with colored material, tending to conceal the true color of the fruit or the quality thereof, was held to be unreasonable, there being no necessity for provision for the purpose of preventing fraud. *Frost v. Chicago*, 178 Ill. 250. The State may, in the exercise of its power to protect the public health, provide that no person shall practice medicine after conviction of a felony. *Hawker v. New York*, 170 U. S. 189.

² *Dunham v. Rochester*, 5 Cowen (N. Y.), 462; *Commonwealth v. Stodder*, 2 Cush. (Mass.) 562; *Mays v. Cincinnati*, 1 Ohio St. 268; *Gale v. Kalamazoo* (market-house contract), 23 Mich. 344; *St. Paul v. Tredeger*, 25 Minn. 248; *St. Paul v. Stoltz*, 33 Minn. 233 (ordinance requiring license to peddlers held void). By-laws requiring a license, which may be so heavy as to amount to a prohibition, were justly considered to be in restraint of trade, which the general law favors, and in this case were adjudged void, “both for want of jurisdiction” in the corporation to pass them, and for want of “conformity to the general law.” 1 Ohio St. 268. Where the charter gave the corporation the power “to

charter or statute enumerates the occupations or businesses which may be regulated and licensed, the enumeration, if on the whole such appears to be the legislative intent, is exclusive, and the municipality has no power to license or regulate occupations or businesses not embraced in the enumeration.¹

§ 668 (362). **Monopolies Invalid.**—The power to license and regulate a lawful and necessary business will not give the corporation the power to make contracts which *create or tend to create a monopoly*.²

license bakers, and to prohibit sales of bread except by those licensed," the court doubted whether under this, aside from the taxing power of the corporation, an ordinance could be supported which required twenty dollars to be paid by the baker for a license, although it admitted that the corporation could require a fee for issuing and registering the license. *Mobile v. Yuille*, 3 Ala. 137. Statutory conditions precedent must be complied with to make a license valid; and licenses are generally considered personal, ceasing with the life of the license, and not transferable without consent. *Munsell v. Temple* (grocery license), 8 Ill. 96; *Lewis v. United States*, *Morris* (Iowa), 199; *Lombard v. Cheaver* (ferry license), *Ib.* 473; *Brunetti v. New Orleans*, 9 La. 430. As to power to *revoke* licenses, *Towns v. Tallahassee*, 11 Fla. 130. "Junk shops," defined by *O'Neill, C. J.*, "to be a place where odds and ends are purchased or sold," and cities are often empowered to exact a license from keepers thereof. *Charleston v. Goldsmith*, 12 Rich. (S. Car.) Law, 470. "Shows" defined: *McKee v. Anderson Town Council*, *Rice* (S. Car.) Law, 24. *Licensed auctioneer* held not liable to the payment of a pawnbroker's license, under a city ordinance. *Hunt v. Philadelphia*, 35 Pa. St. 277.

¹ *Cairo v. Bross*, 101 Ill. 475; *Kiel v. Chicago*, 176 Ill. 137, 140; *Holder v. Galena*, 19 Ill. App. 409; *Keim v. Chicago*, 46 Ill. App. 445.

² *Chicago v. Rumpff*, 45 Ill. 90. In this case, under a power granted to the city, in its charter, *to regulate and license the slaughtering of animals* within the corporate limits, the common council passed an ordinance whereby a particular building was designated for the slaughtering of all

animals intended for sale or consumption in the city, the owners of which were granted the *exclusive right*, for a specified period, to have all such animals slaughtered at their establishment, they to be paid a specific sum for the privilege by all persons exercising it, and to have the option of accepting such proposition, but which was not to take effect until they executed a certain bond therein required; and it was held that this action of the corporate authorities could not be regarded as regulating or licensing the business, but was simply a conditional proposition, which, if accepted, would constitute a contract. It was also held that this contract tended to create a monopoly, and was therefore void. And the opinion was expressed that, under the charter, authority was conferred simply to pass ordinances to locate and construct, and to regulate, license, restrain, abate, or prohibit slaughtering establishments within the prescribed limits; and to that end the corporate authorities may so regulate the business as to prohibit its exercise, except in a particular place; but the spot so designated must be open to the enjoyment of all persons alike, upon the same terms and conditions. A monopoly cannot be *implied*, but must rest upon express grant. *Tuckahoe Canal Co. v. Railroad Co.*, 11 Leigh (Va.), 42, *per Tucker*, President. A city charter granting the city the right to "exercise and enjoy all the rights, immunities, powers, and privileges appertaining to a municipal corporation," and to "license, tax, and regulate hackney carriages, omnibuses," &c., does not authorize the city authorities to grant to one person the *sole and exclusive right to run omnibuses* in the city. *Logan v. Pyne*, 43 Iowa, 524; *Gale v. Kalamazoo*, 23 Mich. 344,

§ 669 (363). *Intoxicating Liquors.* — The authority of municipalities to license, tax, restrain, or prohibit the *traffic in or sale of intoxicating liquors* is so differently conferred, and so largely influenced by the general legislation and policy of the State on the subject, that the decisions relating to it are mostly of local application. Sometimes the State laws are manifestly intended to repeal or modify prior special charter provisions, which gave the control of

in which the opinion of *Cooley, J.*, will be found to be highly instructive.

Monopolies are odious to the law. A monopoly exists when the sale of any merchandise or commodity is restrained to one or to a certain number (11 Co. 86); and it has three inseparable consequents, — the increase of the price, the badness of the wares, the impoverishment of others. *Ib.*

Statute of Monopolies: By statute, 21 Jac. I. ch. iii., all monopolies and all commissions, grants, licenses, &c., to any person, &c., for any sale, buying, selling, making, working, using of a thing, &c., are void. And any one grieved, &c., may have an action on the statute, and recover treble damages and double costs. So monopolies are contrary to Magna Charta. 2 Inst. 63. By statute, 38 Edw. III, a merchant may freely deal in all manner of merchandise. The statute of 21 Jac. II. does not extend to letters-patent for inventions, &c. The first part of this section is simply a declaration of the common law. Whenever a by-law seeks to alter a well-settled and fundamental principle of the common law, or to establish a rule interfering with the rights of individuals or the public, the power to do so must come from plain and direct legislative enactment. *Ante*, §§ 589, 594, 596, 597. *Post*, § 677, as to power to preserve the Public Health, Safety, and Convenience.

Legal restraints in the form of reasonable regulations may, however, be imposed upon the few for the benefit of the many. It is sometimes difficult to determine when a by-law is in restraint of trade, and when it is a mere regulation of trade. The former is illegal, the latter legal. *The following have been held to be bad, as in restraint of trade:* That no member should sell the barrel of any hand-gun, &c., ready proved, to any person of the trade not a member in London, or within four miles thereof. *Gunmakers, &c. v. Fell, Willes*, 384. No member should strike

his stamp or mark on the barrel of any person not a member of the company, &c. *Ib.* That every person not being already free of the city, occupying, using, or exercising, or who shall occupy, use, or exercise the art, trade, or mystery of a butcher within the said city or its liberties, shall take upon himself the freedom of the Company of Butchers, and that if any person or persons (except such as are already free, &c.) shall use the trade of a butcher, not being free of this company, he shall pay, &c. *Harrison v. Godman*, 1 Burr. 12. So as "to persons using the occupation of music and dancing." *Robinson v. Grosccourt*, 5 Mod. 104. That no person should erect any booth, for the purpose of any show or public entertainment, in any public place within the borough, without license from the mayor, which license should not be given at or for any other time than during the annual fairs, if three inhabitant householders, residing within 100 yards of the place intended to be used, should have previously memorialized the mayor to withhold such license, &c. *Elwood v. Bulloch*, 6 Q. B. 383. So where it was provided that those only to whom licenses were granted should have slaughter-houses within the city. *Nash v. McCracken, In re*, 33 Upper Can. Q. B. 181. Or that none but three persons appointed by the city should sweep for hire or gain any chimney or flue in the city. *Queen v. Johnson*, 38 Upper Can. Q. B., 549. Prohibiting the use of canals on Sundays. *Calder and Hebble Navigation Co. v. Pilling*, 14 M. & W. 76. Prohibiting licensed tavern-keepers from having a light in their bars. *Regina v. Belmont*, 35 Upper Can. Q. B. 298; *Biggar's Mun. Manual* (Canada, 1900), 342. *Criminal conspiracies in restraint of trade fully discussed.* 3 Stephen, *Hist. Criminal Law*, chap. xxx. pp. 202-227.

Power of the legislature to grant or authorize the granting of monopolies,

the matter to the local authorities;¹ and at other times incorporated places have, by the course of legislation, been excepted from the general operation of the State laws, and have been allowed to license, regulate, or prohibit the traffic as they deemed best.²

§ 670 (364). **Effect of General Laws respecting the Liquor Trade.**

— Where there are general laws of the State respecting the sale of intoxicating liquors, a public corporation, by virtue of a general power “to make all *by-laws* that may be necessary to preserve the peace, good order, and internal police” therein, is not authorized to pass an ordinance requiring a corporate license and punishing persons who sell such liquors without being thus licensed.³

or exclusive privileges, as affected by the 13th and 14th amendment to the Federal Constitution, see *Slaughterhouse Cases*, 16 Wall. 36; *Barthet v. New Orleans*, 24 Fed. Rep. 563; *post*, chap. xxv., as to gas companies; *post*, § 704, note. An ordinance granting to a *water company the exclusive right to furnish water* to the inhabitants held to be void as creating a monopoly. *Brenham v. Brenham Water Co.*, 67 Tex. 542. See *post*, chapter on Public Utilities; Index. *Monopolies*.

¹ *State v. Harris*, 10 Iowa, 441; *Burlington v. Kellar*, 18 Iowa, 59; *Hammond v. Haines*, 25 Md. 541. The adoption of a *general law* regulating the sale of liquors does not estop the State from granting power to municipal corporations to further regulate the traffic by requiring licenses of retail dealers. *Wolf v. Lansing*, 53 Mich. 367.

² *Perdue v. Ellis*, 18 Ga. 586; *Clintonville v. Keeting*, 4 Denio (N. Y.), 341; *Phillips v. Tecumseh*, 5 Neb. 305. Construction of charters in connection with State laws on the subject. *Aiken v. Harbers*, 6 Rich. (S. Car.) Law, 96; *Ib.* 404; *State v. Estabrook*, 6 Ala. 653; *West v. Greenville*, 39 Ala. 69; *Adams v. Albany*, 29 Ga. 56; *Chastain v. Calhoun Town Council*, 29 Ga. 333; *Cuthbert v. Conley*, 32 Ga. 211; *State v. Garlock*, 14 Iowa, 444; *Harris v. Intendant of Livingston, &c.*, 28 Ala. 577; *Robinson v. Franklin*, 1 Humph. (Tenn.) 156; *Pekin v. Smelzel*, 21 Ill. 464; *State v. Plunkett*, 3 Harr. (N. J.) 5; both held consistent and able to stand together. *Byers v. Olney*, 16 Ill. 35; *Page v. State*, 11 Ala. 849; *Benefield v. Hines*, 13 La. An. 420; *Louisville v.*

McKean, 18 B. Mon. (Ky.) 9; *Deitz v. Central*, 1 Colo. 323; *Burekholter v. McConnellsville*, 20 Ohio St. 308; *Baldwin Co. Ordinary v. Liquor Dealers*, 42 Ga. 325; *State v. Sherman*, 20 Mo. 265. A *general law* authorizing towns to require licenses of persons selling liquor held to be constitutional. *Moundsville v. Fountain*, 27 W. Va. 182. In *Kansas*, the power to license or authorize the sale of intoxicating liquors was held not vested in the cities, but is conferred upon the probate judges. *Kansas v. Topeka*, 31 Kan. 452. See also *State v. Topeka*, 30 Kan. 653.

³ *Commonwealth v. Turner*, 1 Cush. (Mass.) 493; *Loeb v. Attica*, 82 Ind. 175; and see notes to § 669, *ante*; *post*, § 753. The limitations on such a general power to make *by-laws*, discussed by *Shaw*, C. J. As to text, see *Commonwealth v. Dow*, 10 Met. (Mass.) 382. General welfare clause does not authorize a municipal corporation to pass an ordinance prohibiting the retail of intoxicating liquors, when this is repugnant to the State laws on the subject. *Burnett, In re*, 30 Ala. 461. But under a different state of general legislation, see *State v. Clark*, 28 N. H. 176; *Heisembrittle v. City of Charleston*, 2 McMullan (S. Car.), 233; *State v. Ferguson*, 33 N. H. 424; distinguished from and commenting on the above cases. *State v. Freeman*, 38 N. H. 426, approving and following *State v. Clark*, 28 N. H. 176; *Megowan v. Commonwealth*, 2 Met. (Ky.) 3. Where there is no legislation authorizing township officers incorporated under general laws of the State to regulate and license the sale of intoxicating liquors, or to exact a fee for such license, there is no power

§ 671 (365). **Power to license Sale of Liquor under the General Welfare Clause.** — In the absence, however, of controlling general legislation, power to a city to pass “in general every other by-law or regulation that shall appear to the city council requisite and neces-

in the board of trustees either to pass an ordinance requiring or to grant a license for this purpose. A provision limiting the amount that may be charged for liquor licenses by cities and towns does not give the power. They have just such powers as the law has conferred upon the board, and none other. *Walter v. Columbia City*, 61 Ind. 24; *Cowley v. Rushville*, 60 Ind. 327; *McFee v. Greenfield*, 62 Ind. 21.

Ordinance ultra vires. License to sell liquors at retail. Subsequent ordinance restricting sale invalid. A. obtained a license to sell liquors; subsequently an ordinance was passed prohibiting the sale of liquor during the continuance of divine service at any time thereafter to be held by any denomination of Christian people within the corporate limits, providing that the prohibition should cover the entire appointed time for divine worship from its commencement to its final close, and on all protracted occasions covering intermissions by day and by night. Held invalid, as the element of time was not fixed by the corporate will, but left to a casual and incidental control, dependent upon the will and pleasure of the various denominations of Christian people, and ignoring all others. *Gilham v. Wells*, 64 Ga. 192.

In *West Virginia*, there are constitutional provisions conferring upon county courts authority over licenses for the sale of intoxicating liquors, but notwithstanding these provisions, the legislature may give municipal corporations exclusive jurisdiction thereof. *Wilson v. Ross*, 40 W. Va. 278; *Ward v. Taylor County Court*, 51 W. Va. 102; *State v. Harden*, 62 W. Va. 313; 58 S. E. Rep. 715.

In *Kansas*, where there is a *State prohibitory law*, it has been held that the legislature may authorize cities to provide by ordinance for the prohibition of the sale of intoxicating liquors contrary to the law, the suppression of common nuisances, and the seizure and destruction of all intoxicating liquors and other property used in maintaining a common nuisance, but it seems that the owner of

property seized pursuant to such ordinance is entitled to a jury trial before his property can be forfeited and destroyed. *Stahl v. Lee*, 71 Kan. 511. In *Kansas*, where a prohibitory law is in force, an ordinance which is a transcript of the State law providing that all places where people are permitted to resort for the purpose of drinking intoxicating liquors are common nuisances, is within the power of the city. *Topeka v. Raynor*, 61 Kan. 10. The State may confer, and by delegating the power to pass police ordinances, &c., has conferred, upon municipalities the right to punish pursuant to ordinance illegal sales of intoxicating liquors or the keeping of any place for conducting such within their limits, notwithstanding that the general laws of the State cover the same subject. *In re Jahn*, 55 Kan. 694, citing *Emporia v. Volmer*, 12 Kan. 622; *Salina v. Seitz*, 16 Kan. 143; *State v. Young*, 17 Kan. 414; *Franklin v. Westfall*, 27 Kan. 614; *Topeka v. Myers*, 34 Kan. 500; *Junction City v. Keffe*, 40 Kan. 275, 279, 280.

A statute authorized the sale of native wines without license. It was held that an ordinance adopted by a city by virtue of the power to license, tax, regulate, or suppress the sale of intoxicating liquors which prohibited the sale of native wines except on the premises where the grapes were grown, was contrary to the provisions of the statute and void. *Morrilton v. Comes*, 75 Ark. 458. A city was vested with power to regulate, license, and tax the sale of intoxicating liquors. The statute authorized the granting of licenses on the petition of two-thirds of the owners of the property in the block where the proposed saloon was situated. An ordinance was adopted which required the petition of two-thirds of the qualified voters of the whole city. It was held that the statutory provision with reference to the sufficiency of the petition limited the power of the city, and that the requirements of the city ordinance were *ultra vires*. *People v. McCammon*, 111 Mo. App. 626.

sary for the security, welfare, and convenience of the city, or for preserving the peace, order, and good government within the same," was held to authorize an ordinance (and the same is constitutional) to prevent shopkeepers, unless licensed by the city, from keeping spirituous liquors in their shops or in any adjacent room.¹

A corporation whose charter contained the general welfare clause, and also specific power "to license persons to retail spirituous liquors, and to prohibit persons from selling without such license," and was, it seems, silent as to the amount which might be demanded for a license, was adjudged competent to enact an ordinance demanding \$500 as a fee for a retail license.²

Power by charter to a city "to tax, or entirely suppress, all petty groceries," was held, in connection with other provisions of the charter expressly authorizing certain other subjects to be licensed, not to confer upon the corporation the power to grant licenses for retailing vinous liquors, and to demand a sum of money therefor.³

¹ *Heisembrittle v. City Council*, 2 McMullan (S. Car.) Law, 233. Followed and affirmed. *Charleston v. Ahrens*, 4 Strob. (S. Car.) Law, 241. See *Charleston v. Wentworth Baptist Church* (giving preamble to charter in question), *Ib.* 306, 308. A town had exclusive authority over the sale of liquors therein, and it was held that power to "regulate, restrain, and suppress shops and places for the sale of ardent spirits by retail" amounted to an authority to forbid the sale; for if there is a sale it must be made in some shop or place. *Clintonville v. Keeting*, 4 Denio (N. Y.), 341; *Thomas v. Mt. Vernon*, 9 Ohio, 290. Requiring a license tax from the owner of a saloon situated three miles from the settled portions of a city, though within its limits, held unlawful on the ground that the benefits of the parties should be reciprocal, and in this case the saloon owner received no benefits whatever from the city government. *Salt Lake City v. Wagner*, 2 Utah, 400. Construction of charter provisions holding that the sale of intoxicating liquors might be declared a nuisance by the municipal authorities. *Block v. Jacksonville*, 35 Ill. 301; *Goddard v. Same*, 15 Ill. 588; *Byers v. Olney*, 16 Ill. 35; *Pekin v. Smelzel*, 21 Ill. 464.

² *Perdue v. Ellis*, 18 Ga. 586. But see *Burnett*, *In re*, 30 Ala. 461, and compare that with *Marion v. Chandler*, 6 Ala. 899. See also *St. Louis v. Smith*, 2 Mo. 113, where there was

charter power to "restrain and prohibit tippling-houses," and the corporation was held entitled to impose a license fee. Power to "tax" and "restrain" sale of liquor includes power to grant licenses. *Mt. Carmel v. Wabash County*, 50 Ill. 69; *Schweitzer v. Liberty*, 82 Mo. 309; *Portland v. Schmidt*, 13 Oreg. 17. Where authority was conferred upon a corporation to suppress and prohibit the sale of intoxicating drinks, as well as to license the same, an ordinance which imposes a penalty for selling such drinks without license, which penalty exceeds that fixed by the general law of the Territory is reasonable. *Deitz v. Central*, 1 Colo. 323.

There should be no arbitrary discrimination in granting such licenses. *Zanone v. Mound City*, 103 Ill. 552. If the power to fix the fee is granted to the municipal corporation, its discretion in fixing it cannot be reviewed by the courts. *Wolf v. Lansing*, 53 Mich. 367. Courts will not presume, as matter of law, that the amount of a license tax upon selling liquor is unreasonable, oppressive, or prohibitory. *In re Guerrero*, 69 Cal. 88; *Ex parte McNally*, 73 Cal. 632. An ordinance may provide for the payment of liquor license fees at the rate fixed or to be fixed by an amendment to the city charter voted or to be voted on by the people. *Seattle v. Clark*, 28 Wash. 717.

³ *Leonard v. Canton*, 35 Miss. 189. Power "to prohibit tippling-houses"

§ 672 (400). **Regulation of Saloons, &c., under General Welfare Clause.** — Under a general power to pass “any other by-laws for the well-being of the city,” its council may, by ordinance, prohibit saloons, restaurants, and other places of public entertainment, to be *kept open after ten o'clock at night*. The objections that such a by-law was unreasonable, and deprived the citizen of the constitutional right of “acquiring property,” were not considered to be well taken. It regulates, but does not deprive, the party of his rights.¹ Under similar powers, an ordinance confining the carrying on of the laundry business to a certain portion of a city is a police regulation and reasonable.²

§ 673. **Intoxicating Liquors; Power to prohibit Sale.** — The business of dealing in and selling intoxicating liquors does not come within the category of those useful and harmless trades which the individual has the right to pursue at will. The sale of such liquors has been, at all times, by the courts of every State, considered as the proper subject of legislative regulation. There is *no inherent right in a citizen to engage in the business of selling intoxicating*

does not authorize an ordinance prohibiting sales of beer by brewers. *Strauss v. Pontiac*, 40 Ill. 301. Prohibition in ordinance to sell liquors without license held not to apply to sales by manufacturers, but to retail dealers. *St. Paul v. Troyer*, 3 Minn. 291.

Under a law requiring a majority of citizens to petition for a license to the city council, a license granted upon a petition signed by a less number is void and affords no protection. *Eureka v. Davis*, 21 Kan. 578; and the mayor is not bound to sign any license so ordered. *Welsford v. Weidlein*, 23 Kan. 601; *s. p. State v. Young*, 17 Kan. 414; *Hartford Fire Ins. Co. v. State*, 9 Kan. 210; *Eureka v. Davis*, 21 Kan. 578; *Wabaunsee Co. v. Muhlenbacker*, 18 Kan. 129; *Bouldin v. Baltimore*, 15 Md. 18. Cannot compel its issue by *mandamus*. *State v. Stevens*, 23 Kan. 456. Where there is no law governing the amount, it is a question of expediency, of which the city authorities are the sole judge. *Goldsmith v. New Orleans*, 31 La. 646.

¹ *State v. Freeman*, 38 N. H. 426 (following and approving on this point, *State v. Clark*, 28 N. H. 176); *Morris v. Rome City Council*, 10 Ga. 532; *Hudson v. Geary*, 4 R. I. 485. “It is an unavoidable consequence of

city ordinances, that they in some degree interfere with the unlimited exercise of private rights.” *Per Bell, J.*, in *State v. Freeman*, 38 N. H. 426; *State v. Welch*, 36 Conn. 215. In further support of text, *Platteville v. Bell*, 43 Wis. 488; *Staates v. Washington*, 45 N. J. L. 318; *Staates v. Washington*, 44 N. J. L. 605.

Under the *general welfare clause*, a city may adopt an ordinance prohibiting the possession of intoxicating liquors for purposes of illegal sale. *Sawyer v. Blakely*, 2 Ga. App. 159; *Bagwell v. Lawrenceville*, 94 Ga. 654; *Reese v. Newnan*, 120 Ga. 198; *Tucker v. Moultrie*, 122 Ga. 160. But under that clause the city cannot prohibit the transportation or delivery within the city of intoxicating liquors lawfully purchased elsewhere. *Southern Express Co. v. Rose Co.*, 124 Ga. 581. Nor can it forbid the sale of wines which are permitted by statute to be sold. *Duren v. Stephens*, 126 Ga. 496. By virtue of the general welfare clause a city may enact ordinances for the punishment of open and notorious drunkenness. *Fairmont v. Meyer*, 83 Minn. 456.

² *Matter of Hang Kie*, 69 Cal. 149. See Index, *Laundry*.

liquors by retail; it is not a privilege of a citizen of the State, or of a citizen of the United States. As a business attended with danger to the community, it may be entirely prohibited by the State, or be permitted under such conditions as will limit to the utmost its evils.¹

The power of the legislature in this respect *may be delegated to municipal corporations*. The delegated power may include the power to prohibit. Thus, under delegated power to *restrain, prohibit, and suppress* the sale of intoxicating liquors, a city may adopt a prohibitory ordinance.² But authority conferred in these terms leaves the nature and extent to which the power conferred shall be exercised in the discretion of the city. This authority does not limit the municipality to absolute prohibition. By virtue of the power to *restrain*, the city may exercise control by way of partial prohibition, or by license under conditions.³ Whatever may be the case where the power conferred is simply regulative in its nature, it has been held that under a power to prohibit, license, and regulate, the *city may at any time repeal* the original licensing ordinance, and thereby revoke a license for a specified term before the expiration of that term.⁴

¹ *Mugler v. Kansas*, 123 U. S. 623; *Crowley v. Christensen*, 137 U. S. 86, 91; *Giozza v. Tiernan*, 148 U. S. 657; *Holden v. Hardy*, 169 U. S. 366, 393; *Cronin v. Adams*, 192 U. S. 108, 114; *Ex parte Christensen*, 85 Cal. 208; *Foster v. Police Com'rs*, 102 Cal. 483; *Robison v. Haug*, 71 Mich. 38; *Sherlock v. Stuart*, 96 Mich. 193, 196; *Paul v. Washington*, 134 N. Car. 363; *Sandys v. Williams*, 46 Oreg. 327; *Mt. Carmel v. Wabash Co.*, 50 Ill. 69; *Schwuchow v. Chicago*, 68 Ill. 444, 448; *Territory v. Robertson*, 19 Okla. 149; 92 Pac. Rep. 144. See also *St. Louis v. Smith*, 2 Mo. 113; *Clintonville v. Keeting*, 4 Denio (N. Y.), 341.

Under statutory authority to license, regulate, or prohibit, an ordinance imposing a *partial prohibition* is authorized. *Dennehy v. Chicago*, 120 Ill. 627. In *Gunnarssohn v. Sterling*, 92 Ill. 569, the statutory authority of the municipality was to license, prohibit, or regulate, but the court used language to the effect that the power to prohibit authorizes any partial prohibition.

A municipal ordinance imposing a license upon the sale of liquor without prohibiting it does not abridge the right of a citizen to pursue a lawful employment, within the meaning of the *Fourteenth Amendment* to the Constitution of the United States. *In re Bickerstaff*, 70 Cal. 35.

² *Emporia v. Volmer*, 12 Kan. 622. An ordinance making the delivery of intoxicating liquor by a carrier to the consignee a sale of such liquor is void. *Carthage v. Munsell*, 203 Ill. 474. Title to intoxicating liquor to be shipped C.O.D. passes to the consignee on delivery to the express company, and the express agent at the point of destination is not guilty of violating an ordinance against the sale of liquor by delivery of the consignment and collecting therefor. *Carthage v. Duvall*, 202 Ill. 234; *Carthage v. Munsell*, 203 Ill. 474, aff'g 105 Ill. 119.

³ *Emporia v. Volmer*, 12 Kan. 622;

⁴ *Carbondale v. Wade*, 106 Ill. App. 654. "Licenses to sell liquors are not contracts between the State and the person licensed, giving the latter vested rights, and partaking of the nature of contracts, but are merely temporary permits to do what otherwise would be an offence, issued in the exercise of police powers, and subject to the direction of government, which may revoke them as it deems fit." *Per Day, C. J.*, in *Columbus v. Cutcomp*, 61 Iowa, 672, citing *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; *Calder v. Kurby*, 5 Gray (Mass.), 597; *Commonwealth v. Brennan*, 103 Mass. 70. Under charter authority to suppress, regulate, license, and restrain, the municipality may, by ordinance, impose a condition

§ 674. **Intoxicating Liquors; Power to regulate.** — But the power conferred upon cities *is usually regulative and not prohibitive* in its nature, and is usually embraced in the terms, “to regulate, restrain, license, or tax” the business, or in some one or more of these or similar terms importing regulation rather than prohibition. Under a power which is plainly regulative only, total or absolute prohibition is not authorized, either expressly or in fact as a result of the exaction of prohibitive conditions.¹ A power to regulate, in whatever terms granted, includes the power of reasonable, partial, or qualified prohibition.² Under a regulative power, the city may,

subjecting all licenses issued to revocation on violation of any of the provisions of the ordinance. Schwuchow v. Chicago, 68 Ill. 444, 449.

¹ Steffy v. Monroe City, 135 Ind. 466; Champer v. Greencastle, 138 Ind. 339; State v. McCammon, 111 Mo. App. 626; Rossell v. Garon, 50 N. J. L. 358; Portland v. Schmidt, 13 Oreg. 17, 22; Bennett v. Pulaski (Tenn. Ch. App.), 52 S. W. Rep. 913; Provo v. Shurtliff, 4 Utah, 15.

Special provision of charter construed not to give power to *prohibit absolutely* the sale of liquor in the town. Hill v. Decatur, 22 Ga. 203. In State v. McCammon, 111 Mo. App. 626, a city, having authority to regulate, license, and tax, adopted an ordinance requiring, among other things, the petition of two-thirds of the qualified voters of the city as a condition of obtaining a license. The court held the condition to be prohibitive in its effect, and the ordinance to be invalid, for that, as well as for other reasons. When the power is conferred to license, the city has no authority to prohibit absolutely the sale of beer by the quart. Rossell v. Garon, 50 N. J. L. 358.

Where the city had authority “to regulate, control, tax, license, or prevent” the sale of intoxicating liquors, it was held that, if the council *elected to license* the business, the *restrictions imposed must be reasonable* in their nature in relation to the exercise of the power to license. Paul v. Washington, 134 N. Car. 363.

² Newbern v. McCann, 105 Tenn. 159, 164; Provo v. Shurtliff, 4 Utah, 15. Power to license, regulate, and control *places* where intoxicating liquors are sold confers authority to license and regulate the *sale* of such liquors. Houck v. Ashland, 40 Oreg. 117. See also Woods v. Prineville, 19 Oreg. 108.

An ordinance which prohibits the sale of intoxicating liquors in quantities less than five gallons is a valid and reasonable exercise of the power to regulate, license, or prohibit. Gunnarssohn v. Sterling, 92 Ill. 569.

When the city has power to license, regulate, or restrain the sale of intoxicating liquors, it may adopt an ordinance *prohibiting druggists* from selling them for other than medicinal purposes. Provo v. Shurtliff, 4 Utah, 15.

Where a city is authorized to license the sale of intoxicating liquors, and has also general authority conferred upon it to pass ordinances for promoting the peace and good order of the city, an ordinance may be adopted *which forbids the sale of intoxicating liquors in unlicensed places.* Hershoff v. Beverly, 45 N. J. L. 288; Staats v. Washington, 45 N. J. L. 318.

By virtue of the power to license and regulate a city may *classify vendors* of intoxicating liquors as wholesale and retail dealers or by the quantity sold, and may impose different license fees upon each class. Dennehy v. Chicago, 120 Ill. 627; Strauss v. Galesburg, 203 Ill. 234. Ordinance prohibiting the sale of intoxicating liquors without a license held to include and apply to *wholesale traffic.* Cofer v. Commonwealth (Ky.), 87 S. W. Rep. 264. See also Miller v. Ammon, 145 U. S. 421. But the ordinance must embrace and have the same application to all persons in the same class. An ordinance requiring a license for the sale of liquors at retail held to be *void for discrimination* between different persons in the same business. Monmouth v. Popel, 183 Ill. 634; Cairo v. Feuchter, 159 Ill. 155.

Where a city is given power by charter to license places for the sale of fermented as distinguished from spirit-

by ordinance, prescribe the portions of the city within which the business may be carried on, and may prohibit it in other portions.¹ The city may adopt an ordinance specifying the hours of business and requiring the closing of saloons during other hours,² or prohibit the transaction of all business on Sunday,³ and as an incident of its

uous liquors, and has also power to pass ordinances for the peace, good order, and prosperity of the city, and there is no general law restricting the sale of fermented liquors, the city has power to forbid by ordinance the sale of fermented liquors and may punish the sale thereof without license. *Stokes v. Schlacter*, 66 N. J. L. 247.

Under a power "to declare what shall be a nuisance and to abate the same, and to impose fines upon parties who may create, continue, or suffer nuisances to exist," a city may adopt an ordinance declaring that *places where hop ale is sold are nuisances*, hop ale containing some alcohol, and, it being doubtful whether the keeping of it is or is not a nuisance, its action is decisive of the question. *Laugel v. Bushnell*, 197 Ill. 20, aff'g 96 Ill. App. 618. A power "to license saloons, taverns, and eating houses" held, under the legislation applicable to the question, not to authorize licensing the sale of liquors. *Mount Pleasant v. Vansice*, 43 Mich. 361.

In *Illinois*, it has been held that the exercise of the power to require licenses to sell intoxicating liquors is legislative in its nature and *must be exercised by ordinance*. A resolution is not sufficient. *People v. Crotty*, 93 Ill. 180; *People v. Cregier*, 138 Ill. 401; *People v. Mount*, 186 Ill. 560, aff'g 87 Ill. App. 194.

¹ *Valverde v. Shattuck*, 19 Colo. 104; *People v. Cregier*, 138 Ill. 401; *Strauss v. Galesburg*, 203 Ill. 234; *Shea v. Muncie*, 148 Ind. 14, 24; *Rowland v. Greencastle*, 157 Ind. 591; *Sherlock v. Stuart*, 96 Mich. 193; *People v. Blom*, 120 Mich. 45; *Johnson v. Bessemer*, 143 Mich. 313; *In re Wilson*, 32 Minn. 145; *Territory v. Robertson*, 19 Okla. 149; 92 Pac. Rep. 144.

When, by statute, express authority is conferred on a city to prohibit the sale of liquors within the "residence portion" and to confine the sale to the "business portion," an ordinance confining the sale to the "business portion" and prohibiting it within the "residence portion" is not void as too indefi-

nite, although it does not set forth the boundaries of the "business" and "residence" portions respectively. *Shea v. Muncie*, 148 Ind. 14.

² *State v. Calloway*, 11 Idaho, 719; *Schwuchow v. Chicago*, 68 Ill. 444; *Davis v. Fasig*, 128 Ind. 271; *Tarkio v. Cook*, 120 Mo. 1; *Ex parte Wolf*, 14 Neb. 24; *Staates v. Washington*, 44 N. J. L. 605; *Paul v. Washington*, 134 N. Car. 363; *Smith v. Knoxville*, 3 Head (Tenn.), 245; *Maxwell v. Jonesboro*, 11 Heisk. (Tenn.) 257; *Bennett v. Pulaski*, (Tenn. Ch. App.), 52 S. W. Rep. 913.

³ *State v. Calloway*, 11 Idaho, 719; *Newbern v. McCann*, 105 Tenn. 159; *Nashville v. Linck*, 12 Lea (Tenn.), 499; *Gabel v. Houston*, 29 Tex. 335.

Under the power to license, regulate, and restrain, a city may by ordinance prohibit the sale of liquors on *particular days* or at *particular places*, although it cannot prohibit generally. *Portland v. Schmidt*, 13 Oreg. 17, 22.

Under "full power to pass such ordinances as the city council shall deem expedient for the government of the city, not contrary to the constitution of the State or the United States," a city may prohibit within its limits the sale of liquor on Sunday. *Megowan v. Commonwealth*, 2 Met. (Ky.) 3; *State v. Welch*, 36 Conn. 215; *Lovilia v. Cobb*, 126 Iowa, 557. In *Shreveport v. Levy*, 26 La. An. 671, an ordinance forbidding the sale of goods on Sunday, but excepting those persons keeping their places closed on Saturday, was held to be unconstitutional as giving to Jews a privilege denied to others.

Prohibiting by ordinance the sale of liquor on Sunday is not a violation of the constitutional provision forbidding the establishment of any religion by law. *Minden v. Silverstein*, 36 La. An. 912. Where a city had power to license, regulate, and restrain, it was held that an ordinance providing that persons "who shall sell, give away, furnish or cause to be furnished or delivered" on Sundays any intoxicating liquor was invalid so far as it sought to prevent the delivery of liquors on Sunday. The

power to regulate, and of an ordinance closing saloons at specified times, it has been held that the city may direct that all persons, other than the proprietor and his servants, shall be excluded when the saloon is closed.¹ Under the power to regulate it has also been held that the municipality may by ordinance prohibit the use of booths and stalls in saloons,² may require that all drinking shall be done at the counter,³ may prohibit the maintenance of restaurants, eating rooms, and lunch rooms connected with barrooms,⁴ may prohibit all music, singing, and dancing in saloons,⁵ may also prohibit the keeping of billiard and pool tables, gambling tables, ten-pin alleys, etc.,⁶ and may further prohibit the use of side doors for the sale or delivery of liquors.⁷

A divergence of opinion appears to have arisen as to the validity of ordinances *requiring the removal* from the windows and doors of saloons *of all screens, &c.*, obstructing the view during business hours of the interior and the business transacted therein. In Indiana, it has been held that such an ordinance is prohibitive and not merely regulative and cannot be enacted under authority to "license, regulate, or restrain."⁸ But in another case a provision prohibiting screens and curtains during business hours was sustained as a valid and reasonable exercise of the power to regulate.⁹

It is within the power of the legislature to expressly confer upon a

delivery might be by a person who had no beneficial interest in the property which might belong to the person to whom it was delivered. *Norris v. Oakham*, 138 Ala. 411.

¹ *State v. Calloway*, 11 Idaho, 719; *Davis v. Fasig*, 128 Ind. 271; *Paul v. Washington*, 134 N. Car. 363. In *Davis v. Fasig*, 128 Ind. 271, the court held that an ordinance directing the closing of saloons and requiring the ejection of all persons therefrom at the closing hour, the locking of the premises, keeping them locked and closed, and the exclusion of all persons while closed, was valid. But a contrary view was adopted in *Bennett v. Pulaski* (Tenn. Ch. App.), 52 S. W. Rep. 913.

² *State v. Barge*, 82 Minn. 256; *Sandys v. Williams*, 46 Oreg. 327.

³ *Paul v. Washington*, 134 N. Car. 363. Where a city was authorized to license, tax, regulate, or suppress the sale of intoxicating liquors, it was held that it had power to adopt an ordinance forbidding the *keeping of chairs or seats* on the premises except for the use of the proprietor or his bartenders. *Pate v. Jonesboro*, 75 Ark. 276.

⁴ *St. Anthony v. Brandon*, 10 Idaho, 205; *Paul v. Washington*, 134 N. Car. 363.

⁵ *St. Anthony v. Brandon*, 10 Idaho, 205.

⁶ *Paul v. Washington*, 134 N. Car. 363.

⁷ *Paul v. Washington*, 134 N. Car. 363.

⁸ *Steffy v. Monroe City*, 135 Ind. 466; *Champer v. Greencastle*, 138 Ind. 339. But in the same State it has also been held that such an ordinance is valid when limited in effect to the hours during which saloons are required to be closed. *Decker v. Sargeant*, 125 Ind. 404. *Statutory requirement* for the removal of screens, &c., during closed hours held to be constitutional. *Robison v. Haug*, 71 Mich. 38; *People v. White*, 127 Mich. 428. But in *Bennett v. Pulaski* (Tenn. Ch. App.), 52 S. W. Rep. 913, an ordinance prohibiting screens, curtains, &c., during hours when closed, was held to be prohibitive in its effect and unauthorized.

⁹ *Paul v. Washington*, 134 N. Car. 363.

municipality the power to prohibit under penalty the sale of liquor in any saloon into which any female person shall be permitted to enter, to *prohibit the presence of females in saloons*, and to prohibit the *employment of females as waitresses* and attendants; and an ordinance enacted pursuant to such express statutory authority is valid,¹ and it has been held that an ordinance prohibiting the employment of females to wait in saloons and barrooms may be adopted under the power to regulate.²

§ 675. **Intoxicating Liquors: Qualifications of Dealers.** — It is within the power of the legislature to enact *that only reputable persons* shall be allowed in the business of retailing intoxicating liquors, and the legislature may authorize municipalities to determine the question of fitness.³ The legislature may also confer upon municipalities the right to determine the places where saloons shall be kept, and to determine that question upon each application.⁴ By virtue of the power to license, tax, and regulate the business, a city may require a bond with sureties in a reasonable amount, conditioned that the licensee will conduct the liquor business in a legal manner.⁵ Under the power to license, tax, regulate, and restrain barrooms and drinking shops, a city is authorized to adopt an ordinance to provide the

¹ *Adams v. Cronin*, 29 Colo. 488; *aff'd sub. nom. Cronin v. Adams*, 192 U. S. 108; *Walker v. People*, 5 Colo. App. 37; *Denver v. Domedian*, 15 Colo. App. 36. Statute prohibiting the employment of females to wait in saloons, &c., held to be constitutional. *State v. Reynolds*, 14 Mont. 383.

² *Bergman v. Cleveland*, 40 Ohio St. 651.

In *California*, the constitution confers direct authority upon municipal and public corporations to make all such local police, sanitary, and other regulations as are not in conflict with the general laws. It has been held that this authority permits the enactment of an ordinance prohibiting the sale of intoxicating liquors in any place where *females are employed* to attend as waitresses. *Ex parte Hayes*, 98 Cal. 555. See also *Foster v. Police Com'rs*, 102 Cal. 483. Under this authority, also, the ordinance may provide that no license shall be issued to any person who has in the past employed females as waitresses. *Foster v. Police Com'rs*, 102 Cal. 483. In *Gasteneau v. Commonwealth*, 108 Ky. 473, it was held that an ordinance which makes it unlawful for any female to go in or out of a building

where there is a saloon or "to frequent, loaf, or stand around such building within fifty feet thereof," under a penalty on the saloon keeper, is an unreasonable interference with personal liberty and is void. Ordinance prohibiting saloon keepers from permitting *infants or females* to drink in saloons or to be or remain therein more than five minutes, held to be valid and reasonable. *Commonwealth v. Price*, 123 Ky. 163; 94 S. W. Rep. 32. No question was raised as to the sufficiency of the statutory authority of the municipality to adopt this ordinance.

³ *Sherlock v. Stuart*, 96 Mich. 193, 198; *Wells v. Torrey*, 144 Mich. 689. But when the statute prescribes the qualifications of the persons who may be licensed, the city cannot by ordinance prescribe additional qualifications under its power to restrain, license, &c. *Territory v. Robertson*, 19 Okla. 149; 92 Pac. Rep. 144.

⁴ *Sherlock v. Stuart*, 96 Mich. 193, 198; *O'Halloran v. Jackson*, 107 Mich. 138, 140.

⁵ *Paducah v. Jones*, 126 Ky. 809; 104 S. W. Rep. 971; *People v. Blom*, 120 Mich. 45.

terms and conditions on which licenses shall be granted, the amount of tax to be imposed, and the mode of collecting it, and to establish reasonable rules and regulations to be observed in conducting the business.¹ Under the power to impose conditions upon the issuance of the license, the city may require as a condition of the granting of the license the consent or certificate of character of neighbors, residents, voters, or property owners.² The authority to require the consent of the voters, property owners, or residents, is an incident to the power vested in the municipality to prohibit the sale of intoxicating liquors, or to regulate the same and to attach such conditions as it deems expedient, and is not invalid as a delegation to the voters, residents, or property owners of the power to license.³

§ 676. **Intoxicating Liquors; License Fees.** — The *power to license* is an exercise of the police power, and includes the power to exact *reasonable fees*, not for the purpose of taxation or revenue, but as incidental to the power of regulation.⁴ But, as pointed out above, the business of selling intoxication liquors at retail is one which no person has an inherent right to follow and which may be prohibited or regulated at the pleasure of the legislature. The nature and extent of the regulation are necessarily within the discretion of the legislature or of the municipality under statutory authority conferred upon it. It has been held that a fee exacted as a condition of issuing a license to sell liquors is not necessarily, in view of the nature of the business, a tax, and is none the less a license because it may yield a revenue in excess of the expenses of what may be regarded as the reasonable expense of regulation.⁵ When a license fee is exacted under the power to regulate, the courts regard the amount of the fee as largely within the discretion of the licensing authority and will not, as a general rule, hold it to be exorbitant or unreasonable unless possibly in very exceptional cases.⁶

¹ *Portland v. Schmidt*, 13 Oreg. 17, 22.

² *In re Bickerstaff*, 70 Cal. 35 (certificate of moral character signed by five persons); *Ex parte Christensen*, 85 Cal. 208; *Whitten v. Covington*, 43 Ga. 421 (written recommendation by four of nearest neighbors); *Martens v. People*, 186 Ill. 314 (petition of property owners in block); *Harrison v. People*, 195 Ill. 466 (petition of property owners in block); *People v. Blom*, 120 Mich. 45 (certificate of good character by six reputable citizens).

³ *Swift v. People*, 162 Ill. 534.

⁴ *Fielders v. North Jersey St. R. Co.*, 68 N. J. L. 343, 357.

⁵ *Schmidt v. Indianapolis*, 168 Ind. 631; 80 N. E. Rep. 632.

⁶ Where the city has authority "to restrain, license, and regulate saloons," it may adopt an ordinance requiring a license and a license fee of \$500. Such ordinance is, *in view of the nature of the business*, a police regulation and not a tax or revenue measure. *Wells v. Torrey*, 144 Mich. 689. Under the power to license, tax, regulate, and restrain, a license fee or tax of \$500 per annum is not unreasonable and

§ 677 (369). **Health Ordinances.**— Our municipal corporations are usually invested *with express power to preserve the health and safety of the inhabitants*. This is, indeed, one of the chief purposes of local government, and reasonable by-laws in relation thereto have always been sustained in England as within the incidental authority of corporations to ordain.¹ In determining the validity of ordinances adopted to promote the health and comfort of the inhabitants it may be taken as firmly established that the State possesses, and therefore municipal corporations under legislative sanction may exercise, the power to prescribe such regulations as may be reasonably necessary and appropriate for the protection of public health and comfort, and that no person has an absolute right to be at all times and in all circumstances wholly freed from restraint; but persons and property are subject to all reasonable kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State, the public as represented by its constituted authorities taking

will not be deemed prohibitive. *Portland v. Schmidt*, 13 Oreg. 17, 25.

In *Missouri*, cities of the fourth class were authorized to regulate and license the sale of intoxicating liquors. It was held that a license fee of \$1000 was not unreasonable and oppressive. *Ex parte Hinkle*, 104 Mo. App. 104.

A license fee of \$1000 exacted from brewers and brewers' agents held not to be excessive. *Schmidt v. Indianapolis*, 168 Ind. 631; 80 N. E. Rep. 632. But a license fee of \$500 applied to places where *intoxicating drinks are not sold* is excessive for this purpose and unreasonable, and an ordinance exacting it in the case of places of public entertainment where only non-intoxicating liquors are sold is void. *Kenaston v. Riker*, 146 Mich. 163.

When the statute requires that a license fee shall be paid in advance and *fixes the minimum fee*, an ordinance which provides for the issuing of licenses on complying with certain requirements "and paying for such license at a rate that may be from time to time established per annum," does not comply with the statute and is invalid for failure to fix the fee. *People v. Mount*, 186 Ill. 560, aff'g 87 Ill. App. 194. When authority is conferred "to fix the amount, terms, and manner of issuing and revoking licenses," the amount of the fee *can only be fixed by ordinance*. *People v. Mount*, 186 Ill. 560, aff'g 87 Ill. App. 194. Although the statute authoriz-

ing the issuing of licenses provides that the license shall not extend beyond the municipal year, the license fee need not be fixed by the council yearly. *People v. Mount*, 186 Ill. 560, aff'g 87 Ill. App. 194. *Liquor license fee* held not a *tax*, in the constitutional sense of the term, compelling uniformity of taxation. *East St. Louis v. Wehrung*, 46 Ill. 392. A license tax has been held not to be a penalty but a debt, so far as relates to the application of the statute of limitations. *San Luis Obispo v. Hendricks*, 71 Cal. 242.

The payment of a license tax upon the sale of liquor *imposed by a city* does not exempt the person who pays it from liability to pay a similar tax imposed by the county. *In re Lawrence*, 69 Cal. 608. A State law providing for the assessment of a specified tax on liquor dealers, the money raised to be devoted to towns and cities in which the business was carried on, was held to be a tax and not a licensing of the sale, and not to be unconstitutional because unjust or unequal, nor because the municipality had no voice in the levy. *Youngblood v. Sexton*, 32 Mich. 406. Liquor license fee held to be a *tax* and not a *police regulation* where imposed by the same ordinance as licenses for revenue. *Sheriff v. Daigle*, 107 La. 510.

¹ Text approved, *Mayor of Monroe v. Gerspach*, 33 La. An. 1011.

care always that no regulation, although adopted for those ends, shall violate rights secured by the fundamental law nor interfere with the enjoyment of individual rights beyond the necessities of the case. It is equally well settled that if a regulation, enacted by competent public authority avowedly for the protection of the public health, has a real, substantial relation to that object, the courts will not strike it down upon grounds merely of public policy or expediency.¹

§ 678. **Removal and Disposal of Garbage and Refuse Matter.** — The *removal and disposal of garbage*, offal, and other refuse matter is recognized as a proper subject for the exercise of the power of a municipality to pass ordinances to promote the public health, comfort, and safety.² The natural scope of an ordinance on this subject is confined to *discarded and rejected matter*, *i. e.*, to such as is no longer of value to the owner for ordinary purposes of domestic consumption.³ If the matter in question has not been rejected or

¹ *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 318; *Gardner v. Michigan*, 199 U. S. 325; *Dobbins v. Los Angeles*, 195 U. S. 223, 235. See also *Atlantic City v. Abbott*, 73 N. J. L. 281; *Commonwealth v. Cutter*, 156 Mass. 52; *Walker v. Jameson*, 140 Ind. 591. Under authority to pass such ordinances as the council "may consider fit and proper to remove nuisances or causes of disease," &c., it was held that the city of Savannah might prohibit the growing of rice within the corporate limits, as being injurious to the health of the city, and that such an ordinance was valid as a police regulation. *Green v. Savannah*, 6 Ga. 1.

² *In re Zhizhuzza*, 147 Cal. 328; *Ouray v. Corson*, 14 Colo. App. 345; *Boehm v. Baltimore*, 61 Md. 259; *Nicoulin v. Lowery*, 49 N. J. L. 391. Under statutory authority to prevent or abate nuisances, a municipality may contract for the erection of a *crematory* for destroying garbage, dead animals, offal, and refuse matter. *Kilvington v. Superior*, 83 Wis. 222.

³ *In State v. Orr*, 68 Conn. 101, 109, 112, a municipal ordinance defined "garbage and offal" as such "refuse matter as accumulates in the preparation of food for the table." In considering the validity of the ordinance which also licensed a single contractor for its removal and prohibited any person from removing it without a

license, *Baldwin, J.*, said: "Construing this ordinance with the strictness properly applicable to municipal legislation of a penal nature, the term 'refuse matter' can only extend to matter which is in fact noisome, or which has been refused and rejected by the owner as worthless. Meat trimmings, potato parings, specked apples, and many other things of a like character, might be thrown aside in preparing table dishes, and yet properly utilized afterwards for other purposes."

In *Grand Rapids v. De Vries*, 123 Mich. 570, 580, the ordinance defined garbage and offal to include every accumulation of animal, fruit, or vegetable matter, liquid or otherwise, that attends the preparation, use, cooking, dealing in, or storing of meat, fish, fowl, fruit, or vegetables, and provided for its disposal in a specified manner. In defining the scope of the ordinance, *Long, J.*, said: "The ordinance does not attempt to regulate in any manner whatever the disposition of wholesome substances by the householder. It is aimed only at refuse; that is, discarded worthless matter, — matter unfit for food. The householder has perfect liberty, under the ordinance to consume, or to sell or give away, all the leavings of his table or kitchen that are fit for food; but he is not suffered by the ordinance to have around his premises, in open buckets, pans, pails, or heaps, that which is

abandoned as worthless and is not offensive in any way to the public health, it does not come within the natural scope of such an ordinance.¹ *Garbage matter and refuse* are regarded by the decisions as inherently of such a nature as to be either actual or potential nuisances.² By reason of the inherent nature of the substance, it is

known as 'refuse.' Matter of this character he is required to care for by depositing the same in water-tight vessels or tanks, and dispose of it in such a way that will not endanger the public health."

The term "refuse" in a statute or ordinance providing for the removal and disposition of garbage, offal, and refuse, includes ashes. *Haley v. Boston*, 191 Mass. 291; *Gay v. Cadby*, L. R. 2 C. P. Div. 391. But compare *St. Martins v. Gordon*, L. R. 1 Q. B. 61. See also *State v. Howard*, 72 Me. 459.

¹ In *State v. Orr*, 68 Conn. 101, 112, where the ordinance applied to such "refuse matter as accumulates in the preparation of food for the table" and the defendant was charged with removing such matter without a license as required by the ordinance, *Baldwin, J.*, said: "The ordinance does not extend to everything that is separated and thrown aside in the preparation of food for the table. Whatever of this description is not abandoned as worthless, remains property which, so long as it does not constitute a nuisance, may be sold or otherwise disposed of at the will of the owner. If the evidence had shown both that the contents of the defendant's cart, while they had been rejected for table use, were not offensive, and that they were in his possession as the agent or vendee of the original owners, he might have been entitled to a verdict, for he could not then have been engaged in the business for which a license was required." But in *Dupont v. District of Columbia*, 20 App. D. C. 477, 489, it was said that when good food matter is mingled with garbage, it becomes subject to public control in the same manner as garbage properly so-called, notwithstanding that in some instances the owners might be able to dispose of it in its unredacted state as either animal food or manure.

² In *People v. Gardner*, 136 Mich. 693, the court, after referring to its earlier decisions, said that it was plainly

implied therein "that the common council in the exercise of the police power had the right to treat as a nuisance all such refuse as is unfit for human food." The court may well take judicial notice that table refuse when dumped into receptacles for that purpose will speedily ferment and emit noisome odors calculated to affect the public health." This language is quoted with approval by the Supreme Court of the United States in disposing of the same case. See *Gardner v. Michigan*, 199 U. S. 325, 331. In *Grand Rapids v. De Vries*, 123 Mich. 570, 579, *Long, J.*, said, "The ordinary and accepted meaning of the words 'garbage' and 'offal' is such refuse matters that in and of themselves are nuisances."

In *Dupont v. District of Columbia*, 20 App. D. C. 477, 488, *Shepard, J.*, said: "Garbage is necessarily composed largely of matter noisome even before its deposit in the receptacles provided for it, and other matter mingled with it must necessarily partake of its offensive character. Moreover, it is a thing of almost hourly accumulation in every occupied house of a large city, and is therefore a constant menace to the health and comfort of thousands of people. These conditions amply justify the application of a different rule as regards its collection, removal, and final disposition." To bring garbage within the police power of the State or municipality, it is not necessary that at the time of removal and transportation it should be in fact a nuisance and detrimental to the public health. *State v. Orr*, 68 Conn. 101. The collection and removal of garbage is a business which, as usually carried on, is in its nature dangerous to the public health. *State v. Orr*, 68 Conn. 101, 110. It has been declared that the gathering and disposing of garbage is not a trade or business, but is a public duty to be discharged by the city in such manner as to promote the public health. *Grand Rapids v. De Vries*, 123 Mich. 570. In removing ashes and other refuse from dwelling houses, a city acts in the exercise of

therefore not a valid objection to an ordinance requiring disposal in a specified manner that garbage has some value for purposes of disposal, and that the effect of the ordinance is to deprive the owner or householder of such value. That the owner suffers some loss by destruction or removal without compensation is justified by the fact that the loss is occasioned through the exercise of the police power of the State, and the loss sustained by the individual is presumed to be compensated in the common benefit secured to the public.¹

Founded upon the foregoing considerations, it is therefore within the power of the city not only to impose reasonable restrictions and regulations upon the manner of removing garbage,² but also, if it sees fit, to assume the exclusive control of the subject, and to provide that garbage and refuse matter shall only be removed by the officers of the city, or by a contractor hired by the city, or by some single individual to whom an exclusive license is granted for the purpose. An exclusive right so created is not open to the objection that it is a monopoly.³

a public or governmental function, and not in a private or commercial capacity. *Haley v. Boston*, 191 Mass. 291.

¹ *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306; *Gardner v. Michigan*, 199 U. S. 325, aff'g 136 Mich. 693; *Dupont v. District of Columbia*, 20 App. D. C. 477; *In re Zhishuzza*, 147 Cal. 328. The ordinance may properly require the property owner to pay the cost of removal. *Walker v. Jameson*, 140 Ind. 591; *In re Zhishuzza*, 147 Cal. 328. Purchaser of garbage of certain hotels for a valuable consideration held to be properly convicted of violating ordinance regulating the removal and disposal of garbage. *Dupont v. District of Columbia*, 20 App. D. C. 477. See also *State v. Orr*, 68 Conn. 101.

² The State, or a municipality under legislative authority, may license the business of removing garbage, and may refuse permits or licenses in its discretion, and a person who is refused a license has no right to complain; it may by ordinance contract with a single person for removal or with several persons to remove from different portions of the city; it may contract as to a part of the city or as to certain buildings in a part of the city, and may leave the remainder open to persons obtaining a permit, or it may require a license of all persons engaged in the

business. *State v. Orr*, 68 Conn. 101, 110. Ordinance prohibiting the hauling of garbage without a license and requiring license plates to be attached to vehicles held valid. *St. Louis v. Weitzel*, 130 Mo. 600. Ordinance requiring wagons used in the transportation of refuse matter to have the word "garbage" in plain letters held reasonable. *Dupont v. District of Columbia*, 20 App. D. C. 477. Requirement of ordinance that garbage be collected and removed in water-tight tanks and wagons covered on top to prevent odors escaping is reasonable. *People v. Gordon*, 81 Mich. 306; *Grand Rapids v. De Vries*, 123 Mich. 570.

³ *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, aff'g 126 Fed. Rep. 299; *Gardner v. Michigan*, 199 U. S. 325, aff'g 136 Mich. 693; *Dupont v. District of Columbia*, 20 App. D. C. 477; *Ouray v. Corson*, 14 Colo. App. 345; *State v. Orr*, 68 Conn. 101, 110; *Walker v. Jameson*, 140 Ind. 591; *State v. Payssan*, 47 La. An. 1029; *Grand Rapids v. De Vries*, 123 Mich. 570; *Smiley v. MacDonald*, 42 Neb. 5; *Atlantic City v. Abbott*, 73 N. J. L. 281. The only decision which has been found in opposition to the principles stated in the text is *In re Lowe*, 54 Kan. 757, where an ordinance which appointed a city scavenger and conferred upon him the exclusive power and duty to remove all

An ordinance of a city prohibiting, under a penalty, any person, *not duly licensed therefor* by the city authorities, from "removing or

night soil, dead animals, clean privy vaults and cesspools, &c., was held invalid as attempting to confer a monopoly of a lawful calling and as in restraint of trade.

In the important case of the California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, aff'g 126 Fed. Rep. 29; 94 Fed. Rep. 693, the constitution ordained that: "Any county, city, town, or township may make and enforce within its limits all such local police, sanitary, and other regulations as are not in conflict with general laws." The statute provided that: "The board of supervisors of the city and county of San Francisco shall have power, by regulation or order, . . . to authorize and direct the summary abatement of nuisances; to make all regulations which may be necessary or expedient for the preservation of the public health and the prevention of contagious diseases; to provide, by regulation, for the prevention and summary removal of all nuisances and obstructions in the streets, alleys, highways, and public grounds of said city and county."

Ordinances of the city of San Francisco prohibited the depositing and dumping of house refuse, ashes, cinders, offal, putrid vegetables, &c., on lots in the city, and directed that all such matter should be delivered at the crematory of the Sanitary Reduction Works, and there, at the expense of the person so conveying the same, be cremated and destroyed, or so treated as to effect a complete combustion of all gases and odors. Any violation of the ordinances was declared to be a misdemeanor punishable by fine or imprisonment or both. The action was brought by the Sanitary Reduction Works against a rival concern, certain scavengers in the city, and householders to restrain the defendants from removing from the city or depositing at any place other than the works of the plaintiff any of the garbage or other materials specified in the ordinances. It was held that the plaintiff was entitled to an injunction as prayed for. *The validity of the ordinances was attacked* for lack of power to enact them; that they granted an *exclusive* privilege to the Sanitary Reduction Works, and also on the ground that they *deprived*

householders of San Francisco of *property* of value by transferring it to the Sanitary Reduction Works without requiring compensation to be made.

The court held that the defendant rival corporation and the defendants who were not householders, could not raise any question of deprivation of property. If the householders do not complain, but acquiesce in the ordinances, other persons cannot assert that their property is taken without compensation. The court declared further that, so far as the householders were concerned, the court could not say that the mode adopted for the suppression of the evils was arbitrary and did not have a real, substantial relation to the protection of the public health, and held that, inasmuch as the ordinance was enacted under the police power, the property owners were not entitled to compensation for the property destroyed. Mr. Justice Harlan said: "The defendants insist that the requirement that the substances mentioned should be delivered at the plaintiff's works for cremation or destruction, at the expense of the person, company, or corporation conveying the same, was a taking of private property for public use without compensation. We cannot assent to this view. It is the duty, primarily, of a person on whose premises are garbage and refuse material to see to it, by proper diligence, that no nuisance arises therefrom which endangers the public health. The householder may be compelled to submit even to an inspection of his premises at his own expense, and forbidden to keep them or allow them to be kept in such condition as to create disease. He may, therefore, have been required, at his own expense, to make, from time to time, such disposition of obnoxious substances originating on premises occupied by him as would be necessary in order to guard the public health. If the householder himself removed them from his premises, it must have been at his own expense; and the scavenger who took to the crematory the material from the premises of origin, under some arrangement with the householder, was, in effect, the representative, in that matter, of the householder, and was performing a duty resting upon

carrying through any of the streets of the city any house-dirt, refuse, offal, or filth," is not improperly in restraint of trade, and is reason-

the householder. So that, if the requirement that the person conveying the material should pay a given price for having it cremated or destroyed, in effect, put some expense on the householder, that gave him no ground for complaint; for it was his duty to see to the removal of garbage and house refuse having its origin on his premises. Still less has the licensed scavenger a right to complain; for his right to convey garbage and refuse through the public streets, in covered wagons, was derived from the public, and he was subject to such regulations as the constituted authorities, in their exercise of the police power, might adopt. The whole arrangement may be fairly regarded as one in the interest and for the convenience of the householder. He gets his proportionate benefit of any revenue derived by the city, and at the same time shares the protection given to him by the community. Nor did the destruction of garbage and refuse, at an approved crematory, amount, in itself, and under the circumstances disclosed, to a taking of private property for public use without compensation, even if some of the substances destroyed at the crematory had a value for certain purposes. The authorities were not bound, prior to the removal of such substances from the premises on which they were found, to separate those that were confessedly worthless from those which might be utilized. The garbage and refuse matter were all together, on the same premises, and as a whole or in the mass they constituted a nuisance which the public could abate or require to be abated, and to the continuance of which the community was not bound to submit. And when the obnoxious garbage and refuse were removed from the place of their origin and put in covered wagons to be carried away, the municipal authorities might well have doubted whether the substances that were *per se* dangerous or worthless would be separated from such as could be utilized and whether the former would be deposited by the scavenger at some place that would not endanger the public health. They might well have thought that the safety of the community could not be assured unless the entire mass of garbage and refuse, constituting the

nuisance, from which the danger came, was carried to a crematory where it could be promptly destroyed by fire, and thus minimize the danger to the public health. Be all this as it may, the cremation and destruction of garbage and house refuse, under the authority of the municipal authorities, proceeding upon reasonable grounds, and at a place designated by law, as a means for the protection of the public health, cannot be properly regarded, within the meaning of the Constitution, as a taking of private property for public use, without compensation, simply because such garbage and house refuse may have had, at the time of its destruction, some element of value for certain purposes. With the knowledge of the householder, the scavenger receives the garbage and refuse matter, that which, if separated, might have value being mingled with that which is, in itself, noxious and worthless. The entire mass goes into the same covered wagon, and the authorities are not bound, before its destruction at the crematory, to cause the good to be separated from the bad, but could require, as the ordinances in question did, that the substances be promptly conveyed to the designated crematory and destroyed. Such a disposition of the contents cannot be regarded as a taking of private property for public use without compensation."

Under the above constitutional and statutory provisions, it was also held that the board of supervisors might confer an *exclusive contract right for fifty years* to collect and remove garbage from the city of San Francisco, the court among other things saying: "The defendants criticise the ordinances because they give the *exclusive privileges* in question *for a period of fifty years*. But whether the period during which such privileges might be exercised should be long or short was a matter in the wise discretion of the board and determinable wholly upon grounds of public policy. It may be that grants by public authority of privileges to be exercised for the benefit or in behalf of the public ought never to be for long periods. But it suffices to say that no such consideration can control the action of the judiciary." As to power of municipality to make ex-

able and valid. Such a by-law is *not in the nature of a monopoly*, but is founded upon a wise regard for the public health. It was contended that the city could regulate the number and kind of horses and carts to be employed by strangers or unlicensed persons, as well as they could those of licensed persons; but *practically* it was considered that the main object of the city could be better accomplished by employing men over whom they have entire control, night and day, who are at hand, and able from habit to do the work in the best way and at the proper time.¹

clusive contracts or grants, see chapters on Contracts and Public Utilities.

Power conferred upon a city to remove or provide for the removal of garbage, &c., *confers authority to fix the price for removal and to impose the cost of removal on the householder*. A charge for that purpose is not an assessment. *Walker v. Jameson*, 140 Ind. 591.

¹ *Vandine, In re*, 6 Pick. (Mass.) 187; commented on in *Commonwealth v. Stodder*, 2 Cush. (Mass.) 562, 575, 576; *State v. Orr*, 68 Conn. 101; *ante*, § 668, note. In *Zylstra v. Charleston*, 1 Bay (S. Car.), 382, Mr. Justice *Waties* (one of the most accomplished of early American judges), speaking of an ordinance prohibiting the making of soap or candles contrary to the mode prescribed and within the limits of the city, says: "I am willing to admit that the by-law itself is a valid one. If it restrained an *inoffensive* trade it would not be so; but it is made to restrain one that is both offensive and dangerous. It is, therefore, calculated to guard the comfort and safety of the citizens; and the benefit of a by-law is, generally, the touchstone of its validity." The courts will not interfere with the legitimate exercise by municipal bodies of their police powers by which the peace, health, comfort, and general welfare are secured or promoted. *Weil v. Ricord*, 24 N. J. Eq. 169; *Boehm v. Baltimore*, 61 Md. 259.

"The proper control of the time and mode of cleansing such receptacles for refuse matter [sinks, cesspools, &c.], and removal of their contents, is not only a legitimate subject of municipal concern, but is imperatively demanded by a just regard for the comfort and health of the citizen." Legislation for the protection of the public health and for establishing boards of health "ought not to be regarded as detracting from the general powers of municipal governments, un-

less that legislative intent clearly appears." *Knapp, J.*, in *Nicoulin v. Lowery*, 49 N. J. L. 391. A city may, when authorized by statute, require by ordinance that *all privy vaults be abandoned* and that connection be made with the public sewers. *Harrington v. Providence*, 20 R. I. 233.

A power to "exclude from certain limits or to regulate all occupations, houses, &c., . . . which are against good morals, . . . or dangerous to the public safety," includes the power to confine the *keeping of more than two cows* within prescribed limits. *Re Linehan*, 72 Cal. 114.

Power to a city council to compel the *owners and occupants of slaughter-houses to cleanse and abate* them, whenever necessary for the health of the inhabitants, was considered not to authorize an ordinance entirely prohibiting the slaughtering of animals within certain limits of the city. *Wreford v. People*, 14 Mich. 41; see Metropolitan Board of Health *v. Heister*, 37 N. Y. 661; *Shrader, In re*, 33 Cal. 279. In *Cronin v. People*, 82 N. Y. 318, it appeared that by the charter of the city of Albany the common council was authorized by ordinance "*to regulate the erection, use, and continuance of slaughter-houses*." It was held that the power to "regulate," as thus used, gave the council the right to determine and fix the limits and localities within which new *slaughter-houses* may be erected, and from which they may be excluded, and also to prohibit their *continuance* whenever and wherever they endanger the health and comfort of the community, of which the common council was to judge for itself, and its judgment was implied from the ordinance, and need not be recited.

Powers with respect to *privies*. *Gregory v. New York*, 40 N. Y. 273. Powers under legislative authority with respect to *swill milk*. *Johnson v. Simon-*

§ 679. **Removal and Disposal of Carcasses of Animals.** — The weight of authority seems to have differentiated the removal and disposal of carcasses of animals from the removal and disposal of garbage and refuse matter. A dead animal is not *per se* a nuisance, and is not necessarily dangerous to the public health.¹ The carcass of a dead animal, from whatever cause the death may have ensued, has some value to the property owner, and of this property he cannot be deprived without due compensation. Hence, under statutory authority, while a city may require the removal of a dead animal beyond the city limits within a reasonable time and to a specified reasonable distance, and in default thereof may deal with the carcass as a nuisance and take it and make such disposition as may be necessary for the public health,² these or similar regulations appear to mark the limit of legislative and municipal authority. To justify the seizure and removal of a carcass by virtue of police power, it must be shown that the dead animals are, or will become in some way, dangerous or deleterious to the public health.³ Therefore all ordinances and regulations which result in depriving the owner of his property in the dead animal without compensation, whether it be by prohibiting him from removing the carcass, by requiring him to pay a public contractor for its removal, or by making it unlawful for any person other than the public contractor to remove and dispose of the carcasses, are in excess of the legislative power, and unconstitutional and void.⁴

ton, 43 Cal. 342. Power to regulate the sale of milk from vehicles by requiring a license sustained. *People v. Mulholland*, 82 N. Y. 324. Ordinance providing for cleanliness and reasonable inspection of wash-houses or laundries and reasonable fee for inspection, valid. *New Orleans v. Hop Lee*, 104 La. 601; *New Orleans v. Kee*, 107 La. 762.

¹ *Underwood v. Green*, 42 N. Y. 140; *River Rendering Co. v. Behr*, 77 Mo. 91; *Richmond v. Caruthers*, 103 Va. 774.

² *Campbell v. District of Columbia*, 19 App. D. C. 131; *Schoen v. Atlanta*, 97 Ga. 697. Ordinance so construed as to give owner opportunity to remove carcass. *Alpers v. Brown*, 60 Cal. 447.

³ *Underwood v. Green*, 42 N. Y. 140.

⁴ *Campbell v. District of Columbia*, 19 App. D. C. 131; *Schoen v. Atlanta*, 97 Ga. 697; *Knauer v. Louisville*, 20 Ky. Law Rep. 193; 45 S. W. Rep. 510; *State v. Morris*, 47 La. Ann. 1660; *River Rendering Co. v. Behr*, 77 Mo. 91,

rev'g 7 Mo. App. 345; *Underwood v. Green*, 42 N. Y. 140; *Bauer v. Casey*, 26 Ohio Cir. Ct. R. 598; 16 Ohio Cir. Dec. 598; *Richmond v. Caruthers*, 103 Va. 774. But see to the contrary, *Alpers v. San Francisco*, 32 Fed. Rep. 503; *National Fertilizer Co. v. Lambert*, 48 Fed. Rep. 458; *Louisville v. Wible*, 84 Ky. 290; *State v. Fisher*, 52 Mo. 174. To justify a seizure of dead hogs by a city contractor under an ordinance directing that "all dead animals . . . be forthwith removed and disposed of by removal beyond the limits of the city or otherwise, so as most effectually to secure the public health," it must be shown that the dead animals were or would become in some way dangerous or deleterious to the public health. *Underwood v. Green*, 42 N. Y. 140. In this case, certain hogs belonging to plaintiff were suffocated on the railroad cars, and were seized by the city contractor. In an action against the city contractor for damages for conversion, the court held that the defend-

§ 680 (370). **Quarantine Regulations.** — Authority by charter to pass ordinances respecting the harbors and wharves, and “every other by-law necessary for the security, welfare, and convenience of the city,” gives to the city council power to pass a health ordinance requiring *boats coming from infected places* to anchor before landing and to submit to an examination, provided such ordinance be not repugnant to the general law of the State. And it was further held that a general law of the State, prohibiting “any person coming into the State from an infected place, and in violation of quarantine regulations,” was not repugnant to, and did not render the ordinance invalid.¹

ant could not justify the taking of the hogs under the city ordinance above mentioned, as there was no evidence that they were dangerous or offensive in any way to the public health, or that the owner had abandoned them or was unwilling to take proper care of them. *Earl, C. J.*, said: “A dead hog is not *per se* a nuisance, even though it died of suffocation, and is not necessarily dangerous to public health. The owner may still put it to a useful and innocent purpose. This ordinance, so far as it relates to ‘dead animals,’ cannot be literally construed, because, if it should be, the city inspector might with impunity remove dead animals provided for food. The connection in which the terms are used and the object of the ordinance render it quite manifest that only such ‘dead animals’ were meant as were nuisances, or dangerous or deleterious to the public health. The objects mentioned in the ordinance were required to be disposed of ‘so as most effectually to secure the public health’; and it seems to follow that it is only when the public health is in some way endangered, or likely to be, that the removal is authorized or that the inspector has jurisdiction.” In *Campbell v. District of Columbia*, 19 App. D. C. 131, the ordinance required the transportation of dead animals in closed vessels or vehicles to a place designated by the health officer, where they were required to be disposed of under his direction. It was held that the ordinance was invalid, and the court declared that the death of a domestic animal does not terminate the owner’s property in it; and while he may be required to dispose of the carcass so that it will not become a nuisance, the municipal authorities cannot arbitrarily deprive him of his property by giving it to another.

An ordinance declared it to be un-

lawful to bring into town any carcass for burial, cremation, or manufacture into fertilizer of any kind, or for any person to bury, cremate, or manufacture into fertilizer any such carcass. It did not prohibit the bringing into the town of carcasses for other purposes, nor did it make it unlawful to manufacture fertilizer from such materials. It was held that the ordinance was discriminative, but the court seems to have been of the opinion that, but for the discriminative features of the ordinance, it would have been a lawful exercise of the police powers for the protection of the public health. *Fulton v. Norteman*, 60 W. Va. 562; 55 S. E. Rep. 658.

¹ *Dubois v. Augusta, Dudley (Ga.)*, 30; *ante*, § 304, as to quarantine and health powers of municipalities. Under statutes making it the duty of the health commissioner of a city to take measures for the preservation of the public from impending pestilence, and to “guard against the introduction of contagious and infectious diseases,” and to “require the isolation of all persons . . . infected with or exposed to such disease,” the fact must exist that the persons are infected with the contagious disease, or have been exposed to it, to justify isolation. Persons engaged in moving furniture and other articles in a locality in which small-pox is prevalent cannot be isolated merely because they are so engaged, when there is no evidence that they have been actually exposed to infection, and the fact that they have refused to submit to vaccination does not justify the isolation. *Matter of Smith*, 146 N. Y. 68.

Quarantine ordinances of a municipal corporation, passed by virtue of a grant of power from the State, whereby passenger vessels are required to remain in quarantine for a specified period, are not repugnant to the commerce clause

§ 681 (371). **Hospitals.**— Authority to the corporation of New Orleans “to pass such by-laws as they shall deem necessary to maintain the cleanliness and salubrity of the city,” was considered in view of its extensive nature, certain provisions of the civil code, and the liability of the city to epidemics, as conferring power upon the city council to *prohibit the erection and maintenance of private hospitals*; the court admitting that the same question had been decided otherwise by tribunals governed by the common-law jurisprudence.¹

of the Federal Constitution. *St. Louis v. McCoy*, 18 Mo. 238; s. p. *St. Louis v. Boffinger*, 19 Mo. 13; *Metcalf v. St. Louis*, 1st Mo. 103. In modern usage, *quarantine* is not confined to vessels having on board the plague, but extends to vessels having on board other contagious diseases. *Per Tenney*, C. J., *Mitchell v. Rockland*, 41 Me. 363; s. c. again, 45 Me. 496; *ante*, § 304. Under the rule that municipal corporations having power to abate nuisances cannot absolutely prohibit a lawful business, it has been held that an ordinance prohibiting the importation into a town of second-hand clothing or furniture for sale is void. *State v. Taft*, 118 N. Car. 1190. Similarly in *Kosciusko v. Slomberg*, 68 Miss. 469, an ordinance which made it unlawful to bring second-hand clothing into town without first having produced satisfactory proof that it did not come from a district or location in which contagion or infection prevailed, was held to be unlawful and void in the absence of an epidemic or other circumstances creating an apparent necessity for the requirement for the preservation of the public health. See also *Greensboro v. Ehrenreich*, 80 Ala. 579.

¹ *Milne v. Davidson*, 5 Martin, 409.

A power to “erect and establish . . . pest-houses and hospitals” does not authorize a city to enact an ordinance to regulate and license *private* hospitals; nor does a general power to make by-laws “necessary to carry out the objects of the corporation.” *Bessonies v. Indianapolis*, 71 Ind. 189.

As to *city* hospitals, see *Vionet v. Municipality*, 4 La. An. 42; *Bozant v. Campbell*, 9 Rob. (La.) 411; *Charleston City Council v. Boyd*, 1 Const. Rep. (S. Car.) 352; *Tucker v. Virginia City*, 4 Nev. 20. City may, under 39 Eliz., chap. v., found hospitals for the poor. *Newcastle-on-Tyne v. Attorney-General*, 12 Clark & Fin. 402. Where a city has power to “*establish*” a hospital,

the purchase, according to existing law, of a farm and the buildings thereon specially for the purpose is an “*establishing*” of the hospital. *Richmond v. Henrico County*, 83 Va. 204.

Boards of health. An ordinance creating and giving to the board of health “general supervision over the health of the city,” and “all necessary power to carry the ordinance into effect,” was considered to include the power to rent a building for a temporary hospital to protect the city from an apprehended visitation of the cholera, and to make the corporation liable for the rent, although it did not become necessary to use the house. *Aull v. Lexington*, 18 Mo. 401. **Power of board of health.** *Frend v. Dennett*, 4 C. B. (N. S.) 576; *Barton v. New Orleans*, 16 La. An. 317; *Hutton v. Camden*, 39 N. J. L. 122; *Nicoulin v. Lowery*, 49 N. J. L. 391; *Ferguson v. Selma*, 43 Ala. 398; *Tugman v. Chicago*, 78 Ill. 405; *Belcher v. Farrar*, 8 Allen (Mass.), 325; *Hazen v. Strong*, 2 Vt. 427; *Salisbury v. Powe*, 6 Jones Law (N. Car.), 134; *Wilkinson v. Albany*, 28 N. H. 9. The powers of a board of health held to be advisory and executive, not legislative, and a resolution of the board that a specified tannery was a nuisance was unauthorized and void. *State v. Trenton*, 36 N. J. L. 283. Such a board held not to have the power to absolutely prohibit carrying on a lawful business not necessarily a nuisance. *Weil v. Ricord*, 24 N. J. Eq. 169. Regularly the *orders* of a board of health directing the abatement of a nuisance should be *in writing*. Such orders may be proved by the minutes of the board, by the written orders themselves, or by being recited in the proceedings of the corporation of which the board of health are members. How far *parol evidence* may be received of such orders, when it appears that no record or written evidence ever existed, is not free from doubt. *Meeker v. Van*

§ 682 (372). **Cemeteries and Burials.** — The public health, comfort, and convenience are concerned in *the proper regulation of burials*; and the evils resulting from its neglect are especially to be apprehended in the crowded populations of cities. Power to regulate this matter may properly be conferred upon municipal corporations. And such power will be held to be given by authority to make police regulations or to pass by-laws respecting the health, good government, and welfare of the place.¹ It has also been held to be within the power of the legislature to prohibit future interments within the limits of a city and that the legislature may delegate this power to the municipality.² Power to a city corporation, after

Rensselaer, 15 Wend. (N. Y.) 397, where parol evidence of this kind was held inadmissible by the Supreme Court. But see, in Court of Errors, *Van Wormer v. Albany*, 18 Wend. (N. Y.) 169, affirming s. c. 15 Wend. 262. See also *People v. Adams*, 9 Wend. (N. Y.) 333; 6 Wend. (N. Y.) 651; *ante*, chap. xiv.; *Health Department v. Knoll*, 70 N. Y. 530. Orders of board of health must stand the test of reasonableness. *Wilson v. Alabama G. S. R. Co.*, 77 Miss. 714.

¹ *Bogert v. Indianapolis*, 13 Ind. 134, *per Perkins, J.*; *Mayor, &c. of New York v. Slack*, 3 Wheel. Cr. Cas. 237; *Brick Presbyterian Church v. New York*, 5 Cow. (N. Y.) 538; *ante*, § 302, note; *Coates v. Same*, 7 Cow. (N. Y.) 585; *Austin v. Murray*, 16 Pick. (Mass.) 126; *Commonwealth v. Fahey*, 5 Cush. (Mass.) 408; *New Orleans v. St. Louis Church*, 11 La. An. 244, distinguished from *Brick Presbyterian Church v. New York*, *supra*; *Commonwealth v. Goodrich*, 13 Allen (Mass.), 546; *Graves v. Bloomington*, 17 Ill. App. 476, quoting text; *ante*, §§ 301, 302. The power of disinterment may be delegated by the legislature to municipalities. *Kincaid's Appeal*, 66 Pa. St. 411. "Morgue" is a place where bodies are taken for identification, a dead-house, and not an undertaking establishment. A restriction or condition prohibiting the establishment of morgues upon real estate does not affect or prohibit the undertaking business. *Koebler v. Pennewell*, 75 Ohio St. 278. Under legislative authority a city may prohibit burials without a permit from the board of health. *Meyers v. Duddenhauser*, 122 Ky. 866; 93 S. W. Rep. 43. It has been held that the legislature may attach as a condition to the establish-

ment of a cemetery a requirement that the consent of the adjoining owners be first obtained; *Henry v. Trustees*, 48 Ohio St. 671; or the consent of the municipal corporation. *Woodlawn Cemetery v. Everett*, 118 Mass. 354. A statute which prohibits disinterment without a license for which a fee must be paid is valid. *In re Wong Yung Quy*, 6 Sawy. 442.

² *Carpenter v. Yeadon*, 151 Fed. Rep. 879; *Odd Fellows Cemetery Assoc. v. San Francisco*, 140 Cal. 226; *Concordia Cemetery Assoc. v. Minnesota & N. W. R. Co.*, 121 Ill. 199, 212; *Sohier v. Trinity Church*, 109 Mass. 1, 22; *Page v. Symonds*, 63 N. H. 17; *People v. Pratt*, 129 N. Y. 68; *Brick Presbyterian Church v. Mayor, &c. of New York*, 5 Cowen (N. Y.), 538; *Coates v. Mayor, &c. of New York*, 7 Cowen (N. Y.), 585; *Went v. Methodist Protestant Church*, 80 Hun (N. Y.), 266, *aff'd* 150 N. Y. 577; *Humphrey v. Front St. Methodist Church*, 109 N. Car. 132; *Portland v. Terwilliger*, 16 Oreg. 465; *Kincaid's Appeal*, 66 Pa. St. 411, 423; *Craig v. First Presbyterian Church*, 88 Pa. St. 42. Statutory authority to make regulations to secure the general health of the inhabitants and prevent and remove nuisances is sufficient to authorize the prohibition of burials and the discontinuance of graveyards in populous districts of cities. *Campbell v. Kansas City*, 102 Mo. 326, 350. In *People v. Pratt*, 129 N. Y. 68, it is said that under statutory power to make ordinances "to regulate the burial of the dead" the city council may forbid burials in cemeteries within the city limits although the title thereto was acquired for cemetery purposes at a time when no prohibition existed. But *quare*, Does the power to "regu-

enumerating various objects, "in general to pass every other by-law that to it shall seem requisite and necessary for the security, welfare, and convenience of the city," &c., was, by the Court of Appeals of South Carolina, considered to give authority to regulate the burial of the dead, and particularly to prevent the establishment of new burial grounds within the limits of the city, and, in the opinion of the court, also to regulate the time of burial, the manner of interment so as to prevent noxious effluvia, and to prohibit interments in the private gardens, yards, and by-places of the city.¹ But as every by-law must be reasonable, an arbitrary or unnecessary or oppressive restraint upon the right of burying the dead is invalid.² Hence it has been held that the power to order the discontinuance of interments within the limits of the municipality or to prohibit the establishment of cemeteries therein must be exercised upon reasonable grounds, and that prohibitions affecting cemeteries in parts of the city or other municipality in sparsely populated sections distant from any inhabitants or public thoroughfares are unreasonable and void.³

late" authorize prohibition? An ordinance defining the places for burial purposes within the city, restricting the right to three designated cemeteries, is not void where it is not shown that the provision is inadequate. *Austin v. Cemetery Assoc.* 87 Tex. 330.

¹ *Charleston v. Wentworth Baptist Church*, 4 Strob. (S. Car.) Law, 306, 309, *per Frost, J.*; *s. p. Bogert v. Indianapolis*, 13 Ind. 134, *per Perkins, J.*; *New Orleans v. St. Louis Church*, 11 La. An. 244; distinguished from 5 Cowen, 538, *supra*; *Musgrove v. St. Louis Catholic Church*, 10 La. An. 431.

² *Austin v. Murray*, 16 Pick. (Mass.) 121; *Coates v. Mayor, &c. of New York*, 7 Cow. (N. Y.) 585; *Commonwealth v. Fahey*, 5 Cush. (Mass.) 408.

The law of burials, in some of its relations to property and municipal rights, was ably considered by the Hon. Samuel B. Ruggles, referee, in the matter of the opening of *Beekman Street*, in New York City, whose report, establishing the following principles, was confirmed by the Supreme-Court: 1. In this country, corpses and their burials are not matters of ecclesiastical cognizance. 2. That the right to bury a corpse and preserve its remains is a legal right, belonging, in the absence of testamentary disposition, exclusively to the next of kin, and includes the right to select and change the place of

sepulture at pleasure. 3. If place of burial is taken for public use, the next of kin may claim indemnity for expense of removing and suitably re-interring their remains. *Beekman Street, In re*, 4 Bradf. (N. Y.) 503, 532; *Bogert v. Indianapolis*, 13 Ind. 134, *per Perkins, J.* Many cases relating to the law of cemeteries are collected in Mr. Thompson's note to *Louisville v. Nevin*, 10 Am. Rep. 78, 79; *s. c.* 10 Bush (Ky.), 549. See also *Brick Presbyterian Church, In re*, 3 Edw. Ch. (N. Y.) 155. Laying streets and highways through cemeteries. *Cemetery Assoc. v. New Haven*, 43 Conn. 234, and note and cases cited; *First Evangelical Church v. Walsh*, 57 Ill. 363. Local assessments for improvements of adjoining streets. *Louisville v. Nevin*, 10 Bush (Ky.), 549. See on this point, *post*, § 1401.

³ *Hume v. Laurel Hill Cemetery*, 142 Fed. Rep. 552; *Ex parte Wygant*, 39 Oreg. 429. An ordinance arbitrarily prohibiting burials within an entire county embracing large tracts of unoccupied land remote from human habitation where the public health and safety would not be endangered, held to be unreasonable and void. *Hume v. Laurel Hill Cemetery*, 142 Fed. Rep. 552. But compare *Odd Fellows Cemetery Assoc. v. San Francisco*, 140 Cal. 226. An ordinance prohibiting a cemetery without license in an entire county

§ 683 (373). **Same Subject.** — Where the burden to support a public cemetery is required to be borne by all the citizens, an ordinance throwing that burden upon a particular class is unreasonable and void.¹ Cemeteries in cities *are not per se nuisances*, but special circumstances may make them so. It is not, however, sufficient that they affect the market value of property in the vicinity.² A city corporation had power, by charter, "to establish cemeteries or burial places within or without the city." It was held that this would authorize the city to establish cemeteries of its own, and regulate them; but that it did not empower the council to subject to the control of the city sexton cemeteries other than those belonging to the city, or to pass an ordinance prohibiting lot owners in private cemeteries, though within the city limits, from entering to bury without the permission of the city sexton, to be obtained only by paying him the price of digging a grave.³ Certain statutes of New York, authorizing incorporated rural cemetery associations to condemn lands for cemetery purposes, where no right on the part of the public to buy lots or bury their dead there, or to fix the price of lots, is secured, were held to be unconstitutional, on the ground that the use was private and not public.⁴

§ 684 (374). **Nuisances, and of the Power to prevent and abate.** — It is to secure and promote the public health, safety, and convenience that municipal corporations are so generally and so liberally

but not affecting existing cemeteries was held to be unreasonable and void both because applying to localities and situations where cemeteries might be maintained without endangering the public health, and because it operated in a discriminative manner to the prejudice of new and to the advantage of old cemeteries. *Los Angeles v. Hollywood Cemetery Assoc.*, 124 Cal. 344. In *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191, a cemetery corporation was chartered under a statute. The legislature passed a law fixing the boundaries of the cemetery and prohibiting the corporation from using any of its lands outside of its then enclosure for the burial of the dead without regard to the manner in which the franchise conferred upon it should be exercised. This statutory enactment was held to be unconstitutional and void. This decision is distinguished in *Concordia Cemetery Assoc. v. Minnesota & N. W. R. Co.*, 121 Ill. 199, 212, on the ground that it was shown that the lands af-

ected by the statute were situated at a distance from the populous part of the city and in a sparsely settled section.

¹ *Beroujohn v. Mobile*, 27 Ala. 58.

² *Kingsbury v. Flowers*, 65 Ala. 479; *Los Angeles v. Hollywood Cemetery Assoc.*, 124 Cal. 344, 347; *Lake View v. Letz*, 44 Ill. 81; *Lake View v. Rose Hill Cemetery*, 70 Ill. 191; *Musgrove v. St. Louis Catholic Church*, 10 La. An. 431; *New Orleans v. St. Louis Church*, 11 La. An. 244; *Monk v. Packard*, 71 Me. 309; *Henry v. Trustees*, 48 Ohio St. 671; *Ex parte Wygant*, 39 Oreg. 429, approving text. Index, *Cemeteries*. The business of conducting a cemetery is not an avocation presumably having an injurious tendency. *Los Angeles v. Hollywood Cemetery Assoc.*, 124 Cal. 344, 347.

³ *Bogert v. Indianapolis*, 13 Ind. 134.

⁴ *Deansville Cemetery Assoc., Inc. v. Deansville*, 66 N. Y. 569; overruling *a. c. 5 Hun*, 482.

endowed with *power to prevent and abate nuisances*. This authority and its summary exercise may be constitutionally conferred on the incorporated place, and it authorizes its council to act against that which comes within the legal notion of a nuisance; but such power, conferred in general terms, cannot be taken to authorize the extra-judicial condemnation and destruction of that as a nuisance which, in its nature, situation, or use, is not such.¹ Speaking upon this

¹ *Cuba v. Mississippi Cotton Oil Co.*, 150 Ala. 259; 43 So. Rep. 706, quoting text; *McKibbin v. Fort Smith*, 35 Ark. 352; *Ward v. Little Rock*, 41 Ark. 526; *Denver v. Mullen*, 7 Colo. 245; *Western & A. R. Co. v. Atlanta*, 113 Ga. 537, 546, quoting text; *Roberts v. Ogle*, 30 Ill. 459; *Lake View v. Letz*, 44 Ill. 81; *Des Plaines v. Poyer*, 123 Ill. 348, citing text; *Baumgartner v. Hasty*, 100 Ind. 575; *First Natl. Bank v. Sarils*, 129 Ind. 201, 207; *Evansville v. Miller*, 146 Ind. 613, citing text; *Walker v. Towle*, 156 Ind. 639, 642; *State v. Indianapolis Union R. Co.*, 160 Ind. 45, 59, quoting text; *Everett v. Council Bluffs*, 46 Iowa, 66; *Monroe v. Gerspach*, 33 La. An. 1011; *Opelousas v. Norman*, 51 La. An. 736; *De Blanc v. New Iberia*, 106 La. 680, 682, citing text; *Salem v. Eastern R. Co.*, 98 Mass. 431; *Dingley v. Boston*, 100 Mass. 544; *Wreford v. People*, 14 Mich. 41; *St. Paul v. Gilfillan*, 36 Minn. 298; *Pieri v. Shieldsboro*, 42 Miss. 493; *St. Louis v. Heitzberg Packing Co.*, 141 Mo. 375, quoting text; *State v. Jersey City*, 29 N. J. L. 170; *Avis v. Vineland*, 56 N. J. L. 474; *People v. Yonkers Board of Health*, 140 N. Y. 1, 9, quoting text; *Van Dyke v. Cincinnati*, 1 Disney (Ohio), 532; *Crosby v. Warren*, 1 Rich. (S. Car.) 385; *Pye v. Peterson*, 45 Tex. 312; *Ex parte Robinson*, 30 Tex. App. 493. See Index, *Nuisances*.

The legislature may invest a municipal corporation with *power to abate nuisances summarily*, without requiring resort to legal proceedings (*Baumgartner v. Hasty*, 100 Ind. 575), or by a trial by jury. *King v. Davenport*, 98 Ill. 305. That which is authorized by legislative authority cannot be declared a nuisance by a city corporation. Cases *supra*. The power to abate nuisances is a portion of police authority necessarily vested in the corporation of all populous towns. *Kennedy v. Phelps*, 10 La. An. 227, *per Buchanan, J.* A city cannot create a nuisance upon private property, as, in this case, by

diverting a stream, and *compel* its owner to abate it. *Hannibal v. Richards*, 82 Mo. 330.

Nuisances are of two kinds, — public or common nuisances, which affect people generally, and private nuisances, which may be defined as anything done to the hurt of the lands, tenements, or hereditaments of another. Russell on Crimes, 4th ed., 435. A public nuisance can only be abated by a public prosecution, or by a party whose damages are special, and different from those sustained by the public generally. *Clay Co. School District v. Neil*, 36 Kan. 617; *Billard v. Erhart*, 35 Kan. 611; *Blanc v. Murray*, 36 La. An. 162. See also *Moore v. Langdon*, 2 Mackey, 127. A public nuisance is not made legal by having been maintained for twenty years. *Commonwealth v. Upton*, 6 Gray (Mass.), 473; *New Salem v. Eagle Mill Co.*, 138 Mass. 8. The erection of a building in a public street to be used as a market, and as a pound for confining swine, would be both a public and a private nuisance, and may be enjoined at the suit of any one threatened with injury thereby. *Lutterloh v. Cedar Keys*, 15 Fla. 306. But see *Henkel v. Detroit*, 49 Mich. 249; Index, *Injunction*. That which affects only three or four persons is a private and not a public nuisance. *King v. Lloyd*, 4 Esp. 200. The term "nuisance" is well understood, and means literally annoyance, — anything that worketh hurt. *King v. White*, 1 Burr. 333; *King v. Davey*, 5 Esp. 217; *Burdett v. Swenson*, 17 Tex. 489.

Offensive Trades and Occupations. It is not necessary, to constitute a nuisance, to show that the smell, &c., produced should be unwholesome. It is enough if it renders the enjoyment of life and property uncomfortable. *Per Lord Mansfield*, in *King v. White*, 1 Burr. 337; *King v. Neill*, 2 C. & P. 485; *St. Helen's Chemical Co. v. Corporation of St. Helen's*, L. R. 1 Ex. Div. 196. "If there be smells offensive to the senses, that is enough, as the neigh-

subject in a *very important* case, where a city, under authority to prevent and restrain encroachments on rivers running through it, com-

borhood has a right to fresh and pure air." *Per Abbott, C. J., King v. Neill*, 2 C. & P. 485. "The only question therefore is, Is the business (slaughter-house), as carried on by the defendant, productive of smells to persons passing along the public highway?" *Ib.* A by-law providing "that no person shall keep a slaughter-house within the city without a special resolution of the council" was held bad, tending to create a monopoly. *Nash v. McCracken, In re*, 33 Upper Can. Q. B. 181. So a by-law imposing a fine upon every person "who shall keep, or suffer to be kept, any swine within the said borough from 1st February to 31st October inclusive, in any year." *Everett v. Grapes*, 3 L. T. N. s. 669. A resolution or license from the corporation held to be no defence to a prosecution for a public nuisance. *King v. Cross*, 2 C. & P. 483. "This certificate is no defence; and even if it were a license from all the magistrates in the county to the defendant to slaughter-houses in this very place, it would not entitle the defendant to continue the business there one hour after it became a public nuisance to the neighborhood. . . . If the defendant's slaughtering-house was so conducted as to be a public nuisance at common law, the parish might at any time have caused it to be removed; and I am clearly of opinion that in this case it was so conducted as to be a nuisance at common law, and that the defendant would not have been and is not entitled to any compensation." It was in this case proved that smells proceeded from the slaughter-house which were a great nuisance to persons passing along the public highway. If a certain noxious trade is already established in a place remote from habitation and public roads, and persons afterwards come and build houses within reach of its noxious effects, or if a public road be made so near to it that the carrying on of the trade becomes a nuisance to the persons using the road, in those cases the party would be entitled to continue his trade, because his trade was legal before the erection of the houses in the one case, and the making of the road in the other. *Per Abbott, C. J., in King v. Cross*, 2 C. & P. 484. But *quare*; and see cases *supra*. But if the man so situated increase the

nuisance by the manner or extent to which he carries on the trade, he is liable to indictment. *King v. Watts, M. & M.* 281; *King v. Neville*, 1 Peake, 92. In countries, however, where great works are carried on, which are the means of developing national wealth, persons must not stand on extreme rights. *Barnford v. Turnley*, 3 B. & S. 62-66; *Tipping v. St. Helen's Smelting Co.*, 4 B. & S. 608; *aff'd* 11 H. L. C. 642; *Gaunt v. Fynney*, L. R. 8 Ch. App. 8; *Harrison v. Good*, L. R. 11 Eq. 338; *Salvin v. North Brancepeth Coal Co.*, L. R. 9 Ch. App. 705; *Ball v. Ray*, L. R. 8 Ch. App. 467; *Broder v. Sallard*, L. R. 2 Ch. Div. 692; *Biggar's Mun. Manual* (Canada, 1900), 755 *et seq.*

But a private individual cannot justify damaging the property of another on the ground that it is a public nuisance, unless it do him a special and particular injury. *Dimes v. Petley*, 15 Q. B. 276; *Arnold v. Holbrook*, L. R. 8 Q. B. 96; *Scarborough v. Scarborough Rural Sanitary Authority*, L. R. 1 Ex. Div. 344; *Price v. Grants*, 118 Pa. St. 402; *Irwin v. Dixon*, 9 How. 10; *Mississippi & M. R. Co. v. Ward*, 2 Black (U. S.), 485; *The Brinton*, 26 U. S. App. 486. A distinction must be drawn between a house which is a nuisance *per se* and one that is only a nuisance by reason of its use or abuse. In the latter case there is no legal right to destroy the property. In several parts of England public slaughter-houses are established, under a provision that "no person shall slaughter any cattle or dress any carcass for sale as food for man in any place within the limits other than a slaughter-house." It was held that the enactment only applied to the slaughtering of beasts intended by the person slaughtering the same for sale for human food. *Elias v. Nightingale*, 8 E. & B. 698; see further, *Anthony v. Brecon Markets Co.*, L. R. 2 Ex. 167; reversed, L. R. 7 Ex. 399. An indictment will lie for a public nuisance, but not for a private nuisance. *King v. Atkins*, 3 Burr. 1706. That which is not of public concern is a mere civil injury. *King v. Storr*, 3 Burr. 1698; *King v. Johnson*, 1 Wils. 325. The non-repair of a private road, even by a public body, is not indictable. *King v. Richards*, 8 T. R. 634; *King v. Traf-*

menced a *summary proceeding to remove a private wharf*, an eminent judge uses this language: "But the mere declaration by the city

ford, 1 B. & Ad. 874. The writ *quod permittat* lay at common law to prostrate a public nuisance (Palmer v. Poultney, 2 Salk. 458), and after judgment on an indictment for a nuisance, a writ of prostration may still be issued. King v. Newdigate, Comb. 10; Houghton's Case, Sir R. T. Boyd, 215; Vin. Abr. "Nuisance," A; *Ib.* "Chemin," Fitz. Nat. Brev. 124; Queen v. Haynes, 7 Ir. L. R. 2. An action on the case will lie for the continuance of a nuisance after recovery for its erection. Rosewell v. Prior, 1 Salk. 460. Though an indictment for a nuisance is in form a criminal, it is in substance a civil proceeding remedial in its object. King v. Sadler, 4 C. & P. 218; Holmes v. Wilson, 10 A. & E. 503; Douglas, *In re*, 3 Q. B. 825; Thompson v. Gibson, 7 M. & W. 456; Queen v. Chorley, 12 Q. B. 515; King v. Russell, 3 E. & B. 942; Queen v. Loughton, 3 Smith, 575; Queen v. Lincombe, 2 Chit. 214. Upon an indictment for a continuing nuisance — such as a wall across a highway — the proper judgment is, that it be abated (King v. Stead, 8 T. R. 142; King v. Yorkshire, 7 T. R. 467), and when the court is satisfied before judgment that a nuisance has been abated, the judgment need not be pronounced. King v. Incedon, 13 East, 164; Queen v. Paget, 3 F. & F. 29. The practice followed is to respite judgment until it be seen whether or not the nuisance is abated, and, if not, to inflict a heavy fine to compel the abatement. There may be an indictment for the continuance of a nuisance (Queen v. Maybury, 4 F. & F. 90), and in such a case the former judgment is conclusive that the *locus in quo* was a highway, and that the erection upon it was a nuisance. This being so, upon proof of the continuance of the nuisance the jury must find the defendant guilty. See further, Regina v. Jackson, 40 Upper Can. Q. B. 290.

As to the right of an adjoining owner to recover damages for a private injury resulting from a public nuisance in a public highway, where there is a direct and particular damage, such as that arising from unreasonable obstruction to the access to his premises from the highway. Fritz v. Hobson, 19 Am. Law Reg. (N. S.) 615, and note; Bushnell v. Robeson, 62 Iowa, 540 (slaughterhouse); Irwin v. Great Southern Tele-

phone Co., 37 La. An. 63; McDonald v. Newark, 42 N. J. Eq. 136.

Ring of bells, blowing of horns, and other *unusual noises*, are treated as nuisances. They may or may not be nuisances according to circumstances. It is in the power, however, of the corporation at any time to treat all such, when in streets and public places, as nuisances, and to prevent them. It is difficult to describe, though easy to imagine, such "an unusual noise" as would be a nuisance. Some examples may, however, be given. The noise of a tinsmith in carrying on his trade, if in a neighborhood where there is a number of offices, and of sufficient volume to prevent the occupants from following their lawful business, will, if it affect a considerable number of inhabitants, be deemed a public nuisance. King v. Lloyd, 4 Esp. 200.

A *circus*, the performances in which were to be carried on for eight weeks near the plaintiff's house, and the performances, which took place every evening, lasted from about half-past seven till half-past ten o'clock. The noise of the music and shouting in the circus could be distinctly heard all over the house, and was so loud that it could be heard above the conversation in the dining-room, though the windows and shutters were closed. This was held to be a nuisance. *Inchbald v. Robinson*, L. R. 4 Ch. App. 388. If a man builds a *rolling-mill* close to inhabited cottages, so that the vibration produced by the hammers cracks the walls of the cottages, and the noise of the mill causes them to become and remain uninhabited, the rolling-mill will be a nuisance. Scott v. Firth, 4 F. & F. 349; s. c. 10 L. T. N. S. 240.

A *shooting ground* near a public highway, where persons come to shoot with rifles at pigeons, targets, &c., may be a nuisance. King v. Moore, 3 B. & Ad. 184. So, by means of powder, working stone quarries near the public streets and dwelling-houses. Queen v. Mutters, 10 Cox, C. C. 6; Biggar's Mun. Manual (Canada, 1900), 659, 772.

A corporation has no more right to license or maintain a nuisance than an individual would have, and for a nuisance maintained upon its property the same liability attaches against a city as to an individual. Haag v. Vander-

council that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country that a municipal corporation, without any general laws either of the city or of the State within which a given structure can be shown to be a nuisance, can, by the mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property in the city, at the uncontrolled will of the temporary local authorities."¹

burgh Co. Com'rs, 60 Ind. 511; Petersburg v. Applegarth, 28 Gratt. (Va.) 321; Brayton v. Fall River, 113 Mass. 218; Franklin Wharf Co. v. Portland, 67 Me. 46; Harper v. Milwaukee, 30 Wis. 365; Hannibal v. Richards, 82 Mo. 330; Wood on Nuisances, § 742. *Infra*, § 685, note. A city was held liable for erecting a pest-house whereby plaintiff's premises became unhealthy and infected with the same disease, and the occupancy rendered unsafe and unpleasant. Niblett v. Nashville, 12 Heisk. (Tenn.) 684. May pass ordinances to prevent as well as to remove nuisances. Gregory v. New York, 40 N. Y. 273. See Wood on Nuisances, §§ 740, 741, and cases cited. A city held to have no power to destroy a dam across a creek within its limits as a nuisance. Clark v. Syracuse, 13 Barb. (N. Y.) 32. *Abatement by individuals and by public officers.* Manhattan Manuf. & Fert. Co. v. Van Keuren, 23 N. J. Eq. 251; Meeker v. Van Rensselaer, 15 Wend. (N. Y.) 397. Destruction of building by mob. Brightman v. Bristol, 65 Me. 426. Under the laws of New York establishing boards of health, while the board of health of a town cannot go outside of its own boundaries to abate a nuisance summarily, it may restrain the violation of its order and enforce abatement, though the cause of the nuisance arises in an adjoining municipality. Gould v. Rochester, 105 N. Y. 46.

¹ Per Miller, J., in Yates v. Milwaukee, 10 Wall. (U. S.) 497. The decision of the Supreme Court of the United States has been followed and approved in the following cases: Cuba v. Mississippi Cotton Oil Co., 150 Ala. 259; 43 So. Rep. 706; Denver v. Mullen, 7 Colo. 345, 357; Ison v. Manley, 76 Ga. 804; Western & A. R. Co. v. Atlanta, 113 Ga. 537, 544; Darst v. People, 62

Ill. 306; Chicago, R. I. & P. R. Co. v. Joliet, 79 Ill. 25, 44; Everett v. Council Bluffs, 46 Iowa, 66; Cole v. Kegler, 64 Iowa, 59; Joyce v. Woods, 78 Ky. 386; New Windsor v. Stockdale, 95 Md. 196, 215; Frostburg v. Wineland, 98 Md. 239, 244; Everett v. Marquette, 53 Mich. 450 (a staircase in a sidewalk is not a nuisance *per se*); St. Paul v. Gilfillan, 36 Minn. 298; Pieri v. Shieldsboro, 42 Minn. 493; Green v. Lake, 60 Miss. 451; Underwood v. Green, 42 N. Y. 140; Grossman v. Oakland, 30 Oreg. 478; McCrowell v. Bristol, 5 Lea (Tenn.) 685; Miller v. Burch, 32 Tex. 209; Pye v. Peterson, 45 Tex. 312.

A person sick, even with contagious disease, in his own house or at a hotel, is not a nuisance. Bbom v. Utica, 2 Barb. (N. Y.) 104.

Works that amount to a private nuisance, causing actual damage to private persons, cannot be justified, under a license from the city council to erect them. But the fact of such license is evidence of great but not conclusive weight in favor of the party erecting and owning the works claimed to be a nuisance. Ryan v. Copes, 11 Rich. Law (S. Car.), 217. Nor is a liberty pole a nuisance *per se*. Allegheny v. Zimmerman, 95 Pa. St. 287; Dargan v. Waddell, 9 Ire. Law (N. Car.), 244; Kirkman v. Handy, 11 Humph. (Tenn.) 406; Coker v. Birge, 10 Ga. 336. A tannery is not, *per se*, a nuisance. State v. Cadwalader, 36 N. J. L. 283. Brick-making: Warstead Health Board v. Hill, 13 C. B. N. s. 479. Powder-house, with large quantities of powder therein, located in a city, is a nuisance. Cheatham v. Shearn, 1 Swan (Tenn.), 213, 216; Dumesnil v. Dupont, 18 B. Mon. (Ky.) 800. The manufacturing and keeping large quantities of gunpowder in towns

§ 685 (375). **General Power over Nuisances.**—Power to municipal corporations to make “by-laws relative to nuisances generally” has been decided to authorize an ordinance prohibiting the keeping,

or closely inhabited places is an indictable offence at common law. *Rex v. Williams*, 1 Russ. 321; *King v. Taylor*, 2 Str. 1167; *Crowder v. Tinkler*, 19 Ves. 617. *Planing mill*: *Rhodes v. Dunbar*, 57 Pa. St. 274; *Duncan v. Hayes*, 22 N. J. Eq. 25. As to gas-works: *Cleveland v. Cit. Gasl. Co.*, 20 N. J. Eq. 203. *Steam flouring mill*: *Gilbert v. Showerman*, 23 Mich. 448. *Stockyards*: *Ib.* 296; *Ashbrook v. Commonwealth*, 1 Bush (Ky.), 139. *Porgy oil factory*: *Brightman v. Bristol*, 65 Me. 426. *Privies*: *Wahle v. Reinbach*, 76 Ill. 322. *Gas companies*: *Cleveland v. Citizens' Gasl. Co.*, 20 N. J. Eq. 203. *Potteries*: *Ross v. Butler*, 19 N. J. Eq. 294. *Glass and broken-ware in public place*. *Ex parte Casinello*, 62 Cal. 538. *Smoke and noxious vapors* caused by burning, under public authority, clothing, bedding, &c., to prevent the spread of contagious diseases, is not an indictable nuisance. *State v. Knoxville*, 12 Lea, 146. *Coasting on a public street held not necessarily a nuisance*. *Burford v. Grand Rapids*, 53 Mich. 98. See *post*, chapter on Streets. A wooden awning over a sidewalk is not a nuisance *per se*. *Hawkins v. Sanders*, 45 Mich. 491; *Brown v. Carrollton*, 122 Mo. App. 276. See Index, *Awning*. Whether a particular lime kiln is a nuisance or not is a mixed question of law and of fact. *State v. Mott*, 61 Md. 297. A market-cart in a street held not a nuisance *per se*. *State v. Edens*, 85 N. Car. 452. A wooden building in a city is not a nuisance *per se*, but may become so by the way in which it is used. *Fields v. Stokley*, 99 Pa. St. 306. *Flouring mill*: Under the power to prevent nuisances and dangerous manufactories, a municipal corporation cannot, on petition of citizens, deal with a flouring mill as a nuisance, unless it is shown by the record to fall within some law or ordinance previously passed. *Lake v. Aberdeen*, 57 Miss. 260. In *Louisiana*, where the civil code (art. 655) provides that works, &c., causing annoyance “shall be regulated by the rules of the police or the customs of the place” where located, an ordinance of a city council ordering a blacksmith shop to be closed as a nuisance is authorized

by law, and may be carried into effect by an injunction, procured by the city in its corporate name, restraining the owner from continuing the shop. *New Orleans v. Lambert*, 14 La. An. 247.

Power of municipal corporations to remove nuisances, and how far their decision as to fact of nuisance is conclusive. *Welch v. Stowell*, 2 Doug. (Mich.) 332; *Kennedy v. Philadelphia Board of Health*, 2 Pa. St. 369; *Commonwealth v. Van Sickle*, Bright. (Pa.) 69; *Green v. Savannah*, 6 Ga. 1; *Roberts v. Ogle*, 30 Ill. 459; *Clark v. Syracuse, &c.*, 13 Barb. (N. Y.) 32; *Saltonstall v. Banker*, 8 Gray (Mass.), 195; *Kennedy v. Phelps*, 10 La. An. 227; *Mayor of Hudson v. Thorne*, 7 Paige (N. Y.), 261; *Salem v. Eastern R. Co.*, 98 Mass. 431; *Chicago v. Laffin*, 49 Ill. 172; *Babcock v. Buffalo*, 56 N. Y. 268; *Darst v. People* (intoxicating liquors), 51 Ill. 286. The power of municipal corporations, with respect to nuisances, is treated in chapter xxii. of Mr. Wood's work on the Law of Nuisances. Instance of refusal by a court of chancery to interfere with the municipal authorities in removing nuisances. *Ferguson v. Selma*, 43 Ala. 398.

Under the English Municipal Corporations Act the council of any borough is empowered to make by-laws for the good rule and government of the borough, and the prevention and suppression of nuisances (*ante*, § 609); and it is held that this power respecting the suppression of nuisances is confined to the suppression and prohibition of acts which, if done, must necessarily and inevitably cause a nuisance, and it does not empower the council to impose penalties for the doing of things which may or may not be a nuisance according to circumstances. Thus, where the town council imposed a fine upon every person who should “keep or suffer to be kept any swine within the borough between the first of May and the first of October,” it was held that the by-law was wholly invalid, as the keeping of a pig did not necessarily create a nuisance. *Addison on Torts*, 34, citing *Everett v. Grapes*, 3 Law T. R. n. s. Q. B. 669; *Wanstead Local Board of Health v. Hill*, 13 C. B. n. s. 479.

in any manner whatsoever, of a *bowling-alley for gain or hire*, such a place being a public nuisance at common law.¹ So under power to pass by-laws to prevent and remove nuisances, an ordinance may be passed inflicting a fine on any person who should exhibit a *stud-horse* in the streets of the corporation.²

¹ *Tanner v. Albion*, 5 Hill (N. Y.), 121; followed, *Updike v. Campbell*, 4 E. D. Smith (N. Y.), 570; *People v. Sergeant*, 8 Cow. (N. Y.) 139, which held that a room kept for the *playing of billiards* was not a public nuisance, though a profit was made of it, commented on and distinguished, and by *Cowen, J.*, doubted, in 5 Hill, *supra*. Whether a *ball alley* could be prohibited under the general authority to pass by-laws relative to good government, &c., was alluded to, but not determined. See *Jackson v. People*, 9 Mich. 111; *Smith v. Madison*, 7 Ind. 86. In *State v. Hall*, 32 N. J. L. 158, it was held that a *ten-pin alley* kept for gain and public use in a town is not, *per se*, a nuisance. The law on the subject is very fully examined in the opinion of *Beasley, C. J.*, and the case of *Tanner v. Albion*, *supra*, reviewed and disapproved. A *bowling-alley* not *per se* a nuisance. *Ex parte Patterson*, 42 Tex. Crim. Rep. 256. Where a city has, by its charter, the power to determine whether *bowling-alleys* should be allowed, and, if so, under what restrictions, an ordinance requiring them to be closed at a certain hour is valid. *State v. Hay*, 29 Me. 457; *State v. Freeman*, 38 N. H. 426; *supra*, § 632, note. Where proceedings in respect to nuisances are instituted by order of the city council, *chancery will not enjoin or interfere*, "unless the municipal corporation have clearly transcended their powers." *Kennedy v. Phelps*, 10 La. An. 227 (building for *curing hides*); s. p. *Milne v. Davidson* (private hospital), 5 Mar. (La.) 409; *Potter v. Menasha*, 30 Wis. 492; *post*, § 727, note.

² *Nolin v. Franklin*, 4 Yerger, 163; *Hoops v. Ipava*, 55 Ill. App. 94; *State v. Iams*, 78 Neb. 678; 111 N. W. Rep. 604. See also *Farrell v. Cook*, 16 Neb. 483. But under power to prevent and abate nuisances, the city cannot prohibit the keeping of a stallion for hire within the city limits. *Ex parte Robinson*, 30 Tex. App. 493. Under power "to prevent and remove nuisances," a corporation may, if a vacant building is so used as to endanger by

fire the property of others, or the health of the community, declare the same a nuisance, and notify owner to abate it, and if he fails, the individual officer of the corporation who abates the nuisance may, on being individually sued, justify the act. *Harvey v. Dewoody*, 18 Ark. 252.

Where a city council has authority under its charter to prevent and remove all nuisances within the city, "such as *all decayed and dilapidated houses and structures* calculated to produce disease of any kind, or unfit for use or habitation," &c., a court of chancery will not interfere to prevent the removal of such nuisance unless it appears that the complainant's right is illegally assailed, or threatened with an irreparable injury, and there is no sufficient remedy at law. *Ferguson v. Selma*, 43 Ala. 398. In this case the court denied an injunction to prevent the removal by the city authorities of two old, dilapidated, substantially valueless houses, on a lot in an improving and flourishing part of the city, which were filthy, and crowded with filthy tenants, and which had also been condemned as a nuisance by the board of health of the city. *Ib.*; *infra*, §§ 687, 727, note. But a city under a charter authorizing the common council "to regulate all wharves on the shore of the Ohio River adjoining said city," cannot by ordinance define the line of high-water mark, and declare the erection of buildings below said line a nuisance, and impose a fine upon persons erecting such buildings on their own lands. *Evansville v. Martin*, 41 Ind. 145. In *Nevada v. Hutchins*, 59 Iowa, 506, it was held that, under a power to *abate* nuisances, an incorporated town is not authorized to pass an ordinance imposing a fine for maintaining a nuisance; but *quære*.

If a sewer is declared to be a *private nuisance to property*, the owner is entitled to an injunction against the city as he would be against a private individual; but a court in granting such injunction will postpone its operation a reasonable time in order to enable the city to take adequate measures to

§ 686 (376). **Suppression of Houses of Ill-fame.** — Power “to suppress *bawdy-houses*” gives the corporation authority, by implication to adopt by ordinance the proper means to accomplish the end; and among the methods which may be adopted is one forbidding the owners of houses from renting or letting the same for this purpose or with knowledge that they are to be thus used.¹ But power to the common council of a city “to make all such by-laws as it may deem expedient for effectually preventing and suppressing houses of ill-fame,” does not authorize the council to decide that a given house is kept for that purpose, nor, if kept for that purpose, does it authorize the council to order it to be demolished; nor if thus demolished, will it justify the officers of the city who did it, in execution of the ordinance and resolution of the council.² Neither

remove the nuisance without unnecessary injury to the public health and interests. *Haskell v. New Bedford*, 108 Mass. 208; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396; *Attorney-General v. Birmingham*, 4 K. & J. 528; *Spokes v. Banbury*, L. R. 1 Eq. 42; *Goldsmid v. Tunbridge*, L. R. 1 Eq. 161; *Attorney-General v. Bradford*, L. R. 2 Eq. 71; *Attorney-General v. Colney*, L. R. 4 Ch. 146; *Breed v. Lynn*, 126 Mass. 367; *supra*, § 684, note.

¹ *Childress v. Nashville*, 3 Sneed (Tenn.), 347; *Shreveport v. Roos*, 35 La. An. 1010. The legislature may confer exclusive power upon a city to prohibit and suppress bawdy-houses; in such case the general State law upon the subject was held to be superseded by an ordinance passed to enforce the power. *Rogers v. People*, 9 Colo. 450 (*quære*); *supra*, § 630; *post*, §§ 718, note, 749–753, and notes. Construction of power “to regulate or suppress bawdy-houses.” *State v. Clarke*, 54 Mo. 17; *State v. De Bar*, 58 Mo. 395; commented on, *ante*, § 235, note; *post*, § 753. Power to make by-laws relative to nuisances gives authority to impose penalties on the keepers of houses of ill-fame, and on persons owning houses used, with their knowledge, for this purpose. *McAlister v. Clark*, 33 Conn. 91. See *Ely v. Niagara Co. Supervisors*, 36 N. Y. 297; *Shafer v. Mumma*, 17 Md. 331; *Wong v. Astoria*, 13 Oreg. 538; *Ogden v. Madison*, 111 Wis. 413. In prosecutions for keeping bawdy-houses, the law, it has been said, so far relaxes the ordinary rule that common reputation as to the character of the defendants, and of the houses which they keep, is ad-

missible. *State v. McDowell*, Dudley (S. Car.) Law, 346. A power to “repress and restrain disorderly houses” held to confer power to make it penal to visit such houses. *State v. Botkin*, 71 Iowa, 87; s. p. *Re Johnson*, 73 Cal. 228. A power to “license, regulate, and suppress” includes power to prevent soliciting for bawdy-house, &c. *Thomas v. Hot Springs*, 34 Ark. 553. Keeping house of ill-fame, what? *Queen v. Rice*, L. R. 1 C. C. 21. Sufficient to charge that the defendant did on, &c., in the city of, &c., keep a common disorderly bawdy-house on a specified street in said city, as a place of resort for both men and women of lewd character. *Queen v. Munro*, 24 Upper Can. Q. B. 44; *Queen v. Levecque*, 30 Upper Can. Q. B. 44; *Queen v. Sraith*, 35 Upper Can. Q. B. 518; *Biggar's Mun. Manual* (Canada, 1900), pp. 631, 632.

An ordinance to prevent the keeping of bawdy-houses held to be clearly within a charter authority to adopt by-laws “for preserving peace, order, and good government.” *State v. Williams*, 11 S. Car. 288. Under authority to adopt ordinances for the government of the corporation and to abate or prevent nuisances, no power is granted to enact that the permitting of prostitution by the owner or occupant of any house therein shall constitute such owner or occupant the keeper of a house of ill fame. *State v. Webber*, 107 N. Car. 962.

² *Welch v. Stowell*, 2 Doug. (Mich.) 332. In *England*, municipal corporations have the power to prevent indecent public exposure of the person and other indecent exhibitions. In order to

does such a power authorize an ordinance making it a misdemeanor for a prostitute to reside or be found within the corporate limits,¹ or to return to a city.²

§ 687 (377). **Nuisances upon Rivers within City Limits.** — A city charged by law with the duty of preventing obstructions of a river within its limits may, by its own act, and without proceeding by indictment, abate or remove anything which obstructs the free and public use of the river, such as a *floating storehouse*, calculated to remain stationary in the water, and which exclusively occupies a portion of the river, such a structure being a public nuisance.³ It is no answer to this right of abatement that room enough is left for the public, or that the structure is beneficial,⁴ or that the party erecting it is the owner of the adjacent lots.⁵

§ 688 (378). **Power to demolish; Indictment.** — But under the power to abate nuisances, property lawfully erected and existing, or a house which is only a nuisance because occupied by a business which is such, *cannot be destroyed or demolished*. The public can proceed by indictment, or the business carried on in the house be suppressed.⁶

render a person liable to an indictment for indecently exposing his person in a public place, it is not necessary that the exposure should be made in a place open to the public. *Queen v. Thallman*, 9 Cox C. C. 388; s. c. 9 L. T. N. s. 425. If the act is done where a great number of persons may be offended by it, and several see it, it is sufficient. *Ib.* If the indictment, however, charge the offence to have been committed *on* a highway, such an indictment will not be sustained by evidence that the offence was committed in a place *near* the highway, though in full view of it. *Queen v. Farrell*, 9 Cox C. C. 446. An indecent exposure in a place of public resort, if actually seen by only one person, no other person being in a position to see it, is not an indictable offence. *Queen v. Webb*, 1 Den. C. C. 338; *Queen v. Watson*, 2 Cox C. C. 376; *Queen v. Farrell*, 9 Cox C. C. 446. A party was indicted for an indecent exposure in an omnibus, several passengers being therein. Held, a public place. *Queen v. Holmes*, 3 C. & K. 360. But a urinal, with boxes or divisions for the convenience of the public, though situated in an open market, was held not to be a public place within the meaning of the allega-

tion. *Queen v. Orchard*, 3 Cox C. C. 248. Keeping a booth in a public place containing an indecent exhibition for hire is an indictable offence. *Regina v. Saunders*, L. R. 1 Q. B. Div. 15; *Biggar's Mun. Manual* (Canada, 1900), pp. 636, 637.

¹ *Buell v. State*, 45 Ark. 336.

² *Paralee v. Camden*, 49 Ark. 165.

³ *Hart v. Albany*, 9 Wend. (N. Y.) 571, a valuable and very carefully considered case, affirming s. c. 3 Paige (N. Y.), Ch. 213; *People v. Vanderbilt*, 28 N. Y. 396. See *Dutton v. Strong*, 1 Black (U. S.), 23. The corporate body may abate or remove the nuisance; but without *express authority* cannot ordain a *forfeiture* of the structure, or seize and *sell it*, or convert the materials to their own use. *Hart v. Albany*, 9 Wend. (N. Y.) 571, 609, *supra*; *Compton v. Waco Bridge Co.*, 62 Tex. 715.

⁴ *Ib.*; *Respublica v. Caldwell*, 1 Dal. 150; *King v. Russell*, 6 East, 427; *King v. Cross*, 3 Camp. 224; *King v. Jones*, 8 Camp. 229.

⁵ *Hart v. Albany*, 9 Wend. (N. Y.) 571, 608; *Strange R.* 1247; 3 Bac. Abr. 686; 1 Hawk. P. C. 363, note 1.

⁶ *Cuba v. Mississippi Cotton Oil Co.*, 150 Ala. 259; 43 So. Rep. 706, quoting

§ 689 (379). **Extent of Authority over Nuisances.**— Finally, it may be remarked that *the extent of municipal authority over nuisances depends, of course, upon the powers conferred in this regard upon the municipality. They may be general or specific, or both. The authority to preserve the health and safety of the inhabitants and their property, as well as the authority to prevent and abate nuisances, is*

ext; Chicago *v.* Union Stockyards Co., 4 Ill. 224, 235, citing text; Bright-
man *v.* Bristol, 65 Me. 426; Welch *v.*
owell, 2 Doug. (Mich.) 332; Allison
Richmond, 51 Mo. App. 133, citing
text; Waggoner *v.* South Gorin, 88
o. App. 25, 34, citing text; Clark *v.*
racuse, 13 Barb. (N. Y.) 32; Lawton
Steele, 119 N. Y. 226, 238; Miller *v.*
urch, 32 Tex. 209. See also Shepard
People, 40 Mich. 487, 492.

A license from a board of health to
arry on a *manufactory of fertilizers*
annot be urged as a defence to an in-
ictment for creating a public nuisance
y the process of manufacturing.
arrett *v.* State, 49 N. J. L. 94.

*When equity will interfere to prevent
nd remove nuisances which affect the
ublic generally.* People *v.* St. Louis, 10
l. 372; Hoole *v.* Attorney-General, 22
la. 190; Attorney-General *v.* Gas
onsumers Co., 19 Eng. Law & Eq. 639;
ldrich *v.* Howard, 7 R. I. 87; Za-
riskie *v.* Jersey City & B. R., 13 N. J.
q. 314; Jersey City & H. H. R. Co. *v.*
udson, *ib.* 420; Attorney-General *v.*
rown, 24 N. J. Eq. 89; Moore *v.* Walla
Valla, 2 Wash. Ter. 184; Metropolitan
ity R. Co. *v.* Chicago, 96 Ill. 620;
Wood on Nuisances, chap. xxv.; Du-
resnil *v.* Dupont, 18 B. Mon. (Ky.)
00. "It is now well settled that, in
ddition to the purely legal remedies,
hich may be resorted to in such cases,
ourts of equity will take jurisdiction of
uch public nuisances, and, in proper
ases, afford relief by *injunction*, espe-
ially where the nuisance threatened or
ommitted is of a nature to be perma-
nent or continuous." Dickinson, J.,
earns County *v.* St. Cloud, M. & A.
l. Co., 36 Minn. 425; Reed *v.* Birming-
am, 92 Ala. 339 (obstruction in street).
fence, or other like obstruction,
rected across a street is a public nu-
iance, and may be such although the
bstruction is created under an ac-
ompanying claim of title to the soil.
Equity will assume jurisdiction to abate
uch a nuisance, by *injunction* to pre-
vent its continuance, where the fact of
is existence is undoubted. Demopolis

v. Webb, 87 Ala. 659. But it cannot be
summarily removed where it does not
in fact impede or obstruct travel. Pauer
v. Albrecht, 72 Wis. 416. See *post*,
§ 727, note; Index, *Injunction*. A *city
council may, by resolution, direct its offi-
cers to proceed against a specified estab-
lishment as a nuisance, and cause the
same to be abated under a general ordi-
nance of the corporation; this is a
different thing from passing an ordi-
nance inflicting a fine upon a particular
person for keeping a nuisance, which
cannot be lawfully done.* Kennedy *v.*
Phelps, 10 La. An. 227. See Common-
wealth *v.* Goodrich, 13 Allen (Mass.),
546; Municipality No. 1 *v.* Blineau, 3
La. An. 688. The power to abate nu-
isances must be reasonably exercised, so
as to do the least practicable injury to
private rights. State *v.* Newark, 38
N. J. L. 264; Wood on Nuisances, §
741. Power to *suppress gambling-
houses* does not, it is apprehended, au-
thorize the corporation to demolish the
houses so used. All common gam-
ing-houses are nuisances in the eye of
the law, being detrimental to the public,
as they promote cheating and other
corrupt practices, and entice numbers
of persons to idleness, whose time might
be otherwise employed for the good of
the community. 1 Hawk. P. C. cap.
32, § 4; Bolsey *v.* Davies, L. R. 1 Q. B.
Div. 84; Brodie & Bowmanville, 3
Upper Can. Q. B. 580. As to *liability
of a city authorized to abate nuisances
for failure to exercise the power.* Kiley
v. Kansas, 69 Mo. 102; Parker *v.* Macon
City, 39 Ga. 725; Biggar's Mun. Man-
ual (Canada, 1900), pp. 633, 634;
Bassett *v.* St. Joseph, 53 Mo. 290;
Cain *v.* Syracuse, 95 N. Y. 83; *post*,
chap. xxxii. Where a municipal cor-
poration does an act, lawful in itself, in
such a manner as to create a nuisance,
it is liable in the same manner that an
individual would be. Judge *v.* Meriden,
38 Conn. 90; Danbury & N. R. Co. *v.*
Norwalk, 37 Conn. 109; Mootry *v.*
Danbury, 45 Conn. 550. More fully,
post, chap. xxxii.

a sufficient foundation for ordinances to suppress and prohibit whatever is intrinsically and inevitably a nuisance.¹ The authority to *declare* what is a nuisance is somewhat broader; but neither this nor the general authority mentioned in the last preceding sentence will justify the declaring of acts, avocations, or structures not injurious to health or property to be nuisances.² Much must necessarily be left to the discretion of the municipal authorities, and their acts will not be judicially interfered with unless they are manifestly unreasonable and oppressive, or unwarrantably invade private rights, or clearly transcend the powers granted to them;³ in which case the contemplated action may be prevented, or the injuries caused be redressed by appropriate suit or proceedings. As there is in such cases a judicial remedy in favor of the citizen, so on principle the right of the corporate authorities to resort at their election to the courts in proper cases, to aid them when the citizen is in the wrong, should, in the author's judgment, be also recognized.⁴ It is not unusual to invest the municipal council with *special authority* in respect of particular avocations, trades, acts, omissions, and structures, with a view to conserve the public health and safety, of which many examples have been given in the notes to this chapter. The terms in which such authority is conferred measure its scope, but in view of the end for which it is given, it is not subjected to a hostile or even a narrow construction.⁵

§ 690. **Scope of Power to abate Nuisances.**— Under statutory authority conferred upon a municipal corporation to *declare* and to *abate* and *remove nuisances*, the acts and things which may be the subject of the exercise of the power have, for some purposes and in some jurisdictions, been divided into three classes. *First*: those which in their nature are nuisances *per se* and are so denounced by the common law or by statute. *Second*: those acts and things, including certain trades and occupations, such as slaughter-houses, livery stables, laundries, soap and glue factories, &c., which in their nature may fairly be regarded as tending to prejudice the public health and comfort, when carried on in populous centres, and

¹ *Ante*, §§ 301, 304, 677 *et seq.*, 684; *post*, § 718, and note.

² *Supra*, § 684 and notes.

³ *Ante*, §§ 242, 243, 589, 590, *et seq.*; *Miller v. Syracuse*, 168 Ind. 230; 80 N. E. Rep. 411, quoting text; *Laugel v. Bushnell*, 197 Ill. 20, aff'g 96 Ill. App. 618; *North Chicago City R. Co. v. Lake View*, 105 Ill. 207; *Harmison v. Lewistown*, 153 Ill. 313.

⁴ *Post*, § 727. note. The principles upon which courts of equity interfere by injunction in the case of nuisances are clearly stated by *Ld. Chancellor Brougham* in *Earl of Ripon v. Hobart*, 3 Mylne & Keen, 169, 179. See also *Flint v. Russell*, 5 Dillon, 151, where the authorities are collated.

⁵ *Post*, § 718, and note.

about which, while impartial minds may differ, yet they may honestly be regarded as noxious and hurtful to the public interests, and as nuisances in fact. *Third*: those which in their nature are not nuisances, but may become so by reason of their locality, surroundings, or the manner in which they may be maintained, managed, conducted, &c.¹

With reference to the *first class*, it has been held that under statutory authority to abate or remove nuisances, the *municipality has the power to abate* as a nuisance anything that falls within the legal notion of a nuisance *per se*, and to do it in a summary manner.²

As to the *second class*, *i. e.*, trades and occupations, which are not nuisances *per se*, but which when conducted in populous districts may fairly be regarded as tending to hurt the health of the citizens

¹ In *Laugel v. Bushnell*, 197 Ill. 20, the court defined the different classes of nuisances as follows: "Nuisances may thus be classified: *first*, those which in their nature are nuisances *per se*, or are so denounced by the common law or by statute; *second*, those which in their nature are not nuisances, but may become so by reason of their locality, surroundings, or the manner in which they may be conducted, managed, &c.; *third*, those which in their nature may be nuisances but as to which there may be honest differences of opinion in impartial minds. The power granted by the statute to the governing bodies of municipal corporations to declare what shall be nuisances and to abate the same, &c., authorizes such bodies to conclusively denounce those things falling within the first and third classes to be nuisances, but as to those things falling within the second class, the power possessed is only to declare such of them to be nuisances as are in fact so." Followed and applied in *Carthage v. Munsell*, 203 Ill. 474, 478.

² *Cuba v. Mississippi Cotton Oil Co.*, 150 Ala. 259; 43 So. Rep. 706; *Denver v. Mullen*, 7 Colo. 245; *Western & A. R. Co. v. Atlanta*, 113 Ga. 537; *Coverdale v. Edwards*, 155 Ind. 374, 383; *De Blanc v. New Iberia*, 106 La. 680, 682; *Brown v. Carrollton*, 122 Mo. App. 276; *Lawton v. Steele*, 119 N. Y. 226; *aff'd* 152 U. S. 133. In *Lawton v. Steele*, 152 U. S. 133, 140, *aff'g* 119 N. Y. 226, where the question involved was the power of a State officer summarily to seize and destroy nets used for fishing in violation of a statutory provision, Mr. Justice *Brown* said: "It

is not easy to draw the line between cases where property illegally used may be destroyed summarily and where judicial proceedings are necessary for its condemnation. If the property were of great value, as, for instance, if it were a vessel employed for smuggling or other illegal purposes, it would be putting a dangerous power in the hands of a custom officer to permit him to sell or destroy it as a public nuisance, and the owner would have good reason to complain of such act, as depriving him of his property without due process of law. But where the property is of trifling value, and its destruction is necessary to effect the object of a certain statute, we think it is within the power of the legislature to order its summary abatement. For instance, if the legislature should prohibit the killing of fish by explosive shells, and should order the cartridges so used to be destroyed, it would seem like belittling the dignity of the judiciary to require such destruction to be preceded by a solemn declaration in a court of justice. The same remark might be made of the cards, chips, and dice of a gambling room. . . . Nor is a person whose property is seized under the act in question without his legal remedy. If in fact his property has been used in violation of the act, he has no just reason to complain; if not, he may replevy his nets from the officer seizing them, or, if they have been destroyed, may have his action for their value. In such cases the burden would be upon the defendant to prove a justification under the statute."

and to be prejudicial to the public interest, a determination by the municipality that they are nuisances, and should be prevented and abated, or prohibited as such, is regarded by the courts as a proper exercise of legislative discretion conferred upon the municipality. Such determination will be accepted by the courts as binding and conclusive in the absence of any evidence of abuse of discretion, or discrimination between lawful trades and occupations.¹

As to the *third class*, i.e., acts and things not in any view of their nature nuisances *per se*, but which may become so by reason of their locality and surroundings or the manner in which they may be kept, managed, or conducted, while they may be abated under the power conferred by statute, the proper construction of the power in respect to such things is, that the city has authority to declare by general

¹ North Chicago City R. Co. v. Lake View, 105 Ill. 207; Harmison v. Lewistown, 153 Ill. 313; Laugel v. Bushnell, 197 Ill. 20, aff'g 96 Ill. App. 618; Hoops v. Ipava, 55 Ill. App. 94; Miller v. Syracuse, 168 Ind. 230; 80 N. E. Rep. 411. The thing or act complained of to become within the power of the corporation to prohibit or abate as a nuisance, must come within the legal notion of a nuisance, or must be of such a nature as necessarily to become such. Opelousas v. Norman, 51 La. An. 736. *Open cattle-yards and pens* within the corporate limits where cattle in numbers are kept for feeding and fattening purposes held to belong to that class of things which must necessarily become nuisances and which may be abated by virtue of the power to prevent and abate nuisances under an ordinance declaring it a nuisance to so keep cattle within the corporate limits. Opelousas v. Norman, 51 La. An. 736. In *Ex parte Lacey*, 108 Cal. 326, it is said that the business of establishing or conducting a *steam shoddy machine or steam carpet-beating machine* may properly be classed with livery stables, laundries, soap and glue factories, &c., a class of business undertakings in the conduct of which police and sanitary regulations are made to a greater or less degree by each city in the country and which may be declared to be nuisances by the city under its power to prevent or abate nuisances. It is not necessary to the exercise of the police power in regulating a business, e. g., *steam carpet-beating machines*, that it shall constitute a nuisance *per se*, but the power to regulate or prohibit conferred upon the municipality includes not only nui-

sances, but extends to everything to be regulated or prohibited for the preservation of the public health or general welfare. To the extent that it is material in creating a valid ordinance passed under the power of the police or sanitary regulation, it must be assumed that questions of fact calling for the exercise of the police power were determined by the municipal authorities, and the correctness of their determination as to matters of fact is not open to inquiry by way of defence to a prosecution for violating an ordinance. *Ex parte Lacey*, 108 Cal. 326.

The police power of a city in *California*, under the *constitutional* authority to make and enforce within its limits all such local police, sanitary, and other regulations as are not in conflict with general laws, is not confined to the regulation or suppression of those things which the law declares to be nuisances in themselves. Whenever a thing or act is of such a nature that it may become a nuisance or may be injurious to the public health if not suppressed or regulated, the legislative body may, in the exercise of its police power, make and enforce ordinances to regulate or prohibit such act or thing, although it may never have been offensive or injurious in the past. *Odd Fellows Cemetery Assoc. v. San Francisco*, 140 Cal. 226, 231. In *State v. Jersey City*, 29 N. J. L. 170, it is said that the power to declare nuisances and provide for their removal does not include the power to denounce the doing of an act which may be a nuisance; it is confined to stationary nuisances, such as can be removed.

ordinance what shall constitute a nuisance; that is to say, the city may by such ordinance define, classify, and enact what things or classes of things, and under what conditions and circumstances, such specified things shall be deemed nuisances.¹

As to the *third class*, it is for the courts to determine whether a nuisance exists in fact, and the city has no power of summary abatement or removal.² In the determination of the question whether a particular act or thing constitutes a nuisance and should be abated, the local authorities, whose duty it is to compel the abatement, act in an administrative and not in a judicial capacity, and are under no obligation to give the person who maintains the alleged nuisance notice or a hearing before making a determination, and may act on their own inspection or knowledge.³ Any such determination is not conclusive, or finally binding on the courts. It is not entitled, in the absence of an express statutory provision to the contrary, to any greater presumption of validity than the presumption of legality which attends the acts of all persons acting in an official capacity.⁴ And any person who, in abating an alleged nuisance, destroys or

¹ *Denver v. Mullen*, 7 Colo. 245; *Evansville v. Miller*, 146 Ind. 613.

Under statutory authority to declare what shall constitute a nuisance an ordinance declaring a *partially burnt building* to be a nuisance irrespective of its actual condition or location is invalid. The court declared the ordinance to be invalid because it had no reference or regard to the condition, character, situation, or surroundings which might tend to render the building unsafe in any manner to the public or a detriment to the health or convenience of the public. *Evansville v. Miller*, 146 Ind. 613. *Public picnics and open-air dances* are not in their nature nuisances, and cannot be so declared by ordinance. If the manner in which they are conducted becomes a nuisance, the ordinance should be directed thereto. *Des Plaines v. Poyer*, 123 Ill. 348. Under power to pass ordinances to prevent and remove nuisances, a city has no right to declare that a *particular structure or business* not condemned by any law or general ordinance is a nuisance and to have the structure removed or the business stopped or interfered with. *Lake v. Aberdeen*, 57 Miss. 260, 263. An ordinance adopted under power to remove nuisances, declaring to be nuisances buildings used for the *storage of cotton seed*, while awaiting shipment, without

regard to the manner in which the business is carried on, is *ultra vires* and void. Such a building is not *per se* a nuisance. *Cuba v. Mississippi Cotton Oil Co.*, 150 Ala. 259; 43 So. Rep. 706.

Storing of *gunpowder* not a nuisance *per se*. *Kinney v. Koopman*, 116 Ala. 310. A ginhouse for *ginning cotton* is not a nuisance *per se*. *Rouse v. Martin*, 75 Ala. 510. *Steam engine* not a nuisance *per se*. *Brightman v. Bristol*, 65 Me. 426, 435.

² *Cuba v. Mississippi Cotton Oil Co.*, 150 Ala. 259; 43 So. Rep. 706; *Denver v. Mullen*, 7 Colo. 245; *Western & A. R. Co. v. Atlanta*, 113 Ga. 537; *Des Plaines v. Poyer*, 123 Ill. 348; *Evansville v. Miller*, 146 Ind. 613; *Brown v. Carrollton*, 122 Mo. App. 276; *Lawton v. Steele*, 119 N. Y. 226; *Pauer v. Albrecht*, 72 Wis. 416.

³ *People v. Yonkers Board of Health*, 140 N. Y. 1; *Yonkers Board of Health v. Copcutt*, 140 N. Y. 12, 20; *People v. Dept. of Health*, 189 N. Y. 187, 194.

⁴ *Salem v. Eastern R. Co.*, 98 Mass. 431; *Miller v. Horton*, 152 Mass. 540; *Hutton v. Camden*, 39 N. J. L. 122; *People v. Yonkers Board of Health*, 140 N. Y. 1, 7; *New York Health Department v. Trinity Church*, 145 N. Y. 32, 48; *People v. Department of Health*, 189 N. Y. 187, 195.

injures private property or interferes with private rights, even if he be a public officer, save when he acts under the judgment or order of a court having jurisdiction, acts at his peril, and will be held liable, unless it is shown when his act is challenged in court that the thing abated was in fact a nuisance.¹

§ 691. **Slaughter-Houses.** — It has been held that *slaughter-houses* belong to the class of occupations which *have a tendency to affect the public health*, and a *determination* by the municipality, under authority to declare and abate nuisances, *that they are nuisances* and shall be prohibited within the city limits, is an exercise of legislative discretion which is regarded as final and binding upon the courts.² When expressly authorized, cities may prohibit the maintenance or operation of slaughter-houses within the corporate limits.³ Under properly delegated authority the city may prohibit the maintenance of slaughter-houses without a license,⁴ or it may prescribe the localities where the business shall be carried on⁵ and it may change the districts designated for the business, but in so doing must act reasonably and not arbitrarily.⁶ Under statutory authority and in the absence of any constitutional restriction, the city may contract that a corporation shall have *the exclusive power of slaughtering* within the corporate limits.⁷ But such contract is

¹ *People v. Yonkers Board of Health*, 140 N. Y. 1; *Delaware L. & W. R. Co. v. Buffalo*, 158 N. Y. 266, 271. In justifying the abatement of an alleged nuisance when challenged in court it would seem to be sufficient to show in regard to the first class mentioned in the text that it was a nuisance *per se* under the common law or by statute; and as to the second class that it was denounced as a nuisance by ordinance, and that the ordinance is valid.

² *Harmiston v. Lewiston*, 153 Ill. 313; *Huesing v. Rock Island*, 128 Ill. 465; *Portland v. Cook*, 48 Oreg. 550.

³ *Ex parte Heilbron*, 65 Cal. 609; *Rund v. Fowler*, 142 Ind. 214; *Beiling v. Evansville*, 144 Ind. 644; *Elkhart v. Lipschitz*, 164 Ind. 671; *Portland v. Meyer*, 32 Oreg. 368; *Spokane v. Robinson*, 6 Wash. 547. Under the power to exclude, the city may prohibit the further use of establishments already in operation. *Portland v. Meyer*, 32 Oreg. 368. But power "to direct the location of slaughter-houses and to regulate the same" does not authorize exclusion from the city

limits. *Elkhart v. Lipschitz*, 164 Ind. 671.

⁴ *Watertown v. Mayo*, 109 Mass. 315; *Cambridge v. Trelegan*, 181 Mass. 565; *St. Paul v. Smith*, 27 Minn. 364; *St. Louis v. Howard*, 119 Mo. 47.

⁵ *Slaughter-House Cases*, 16 Wall. (U. S.) 36. *Ex parte Shrader*, 33 Cal. 279; *Villavaso v. Barthet*, 39 La. An. 247; *St. Louis v. Howard*, 119 Mo. 47; *Cronin v. People*, 82 N. Y. 318, aff'g 20 Hun (N. Y.), 137.

⁶ *Villavaso v. Barthet*, 39 La. An. 247.

⁷ *Slaughter-House Cases*, 16 Wall. (U. S.) 36; Under *statutory authority* the city may prohibit the slaughtering of animals unless buildings are constructed in accordance with the ordinance. The operation of the ordinance is not suspended because there is no such building in the city. *Boyd v. Montgomery*, 117 Ala. 677.

Ordinance granting to the applicants the privilege to *maintain a slaughter-house* within certain limits held *not to create a monopoly* in violation of the provisions of the Louisiana constitution, there being no provision

not beyond the future exercise of the police power when it is necessary to exercise it for the general welfare.¹

§ 692. *Stables.* — *A livery or sale or other stable is not a nuisance per se; it depends upon its location and the manner in which it is built, kept, or used.*² But livery, sale, and other stables have generally

preventing the city from giving a permit for other establishments within the same limits or elsewhere. *Darcantel v. People's S. H. & R. Co.*, 44 La. An. 632.

In *Chicago v. Rumpff*, 45 Ill. 90, power was granted to a city to regulate and license the slaughtering of animals within the corporate limits. The council passed an ordinance whereby a particular building was designated for the slaughtering of all animals intended for sale or consumption in the city, the owners of which were granted an exclusive right for a specified period to have all such animals slaughtered at their establishment, they to be paid a specific sum for the privilege by all persons exercising it. It was held that this ordinance could not be regarded as an exercise of the power to regulate or license the business, and that the contract embodied in the ordinance tended to create a monopoly and was void. The court expressed the opinion that under the charter the city had authority to limit the construction and to regulate, license, restrain, abate, or prohibit slaughtering establishments within the prescribed limits; and to that extent the corporate authorities, whenever necessary for the health of the inhabitants, might so regulate the business as to prohibit its exercise, except at a specified place, but the power conferred was not to be construed to authorize an ordinance entirely prohibiting the slaughtering of animals within said limits of the city.

¹ *Butchers Union Co. v. Crescent City Co.*, 111 U. S. 746. Ordinance granting right to establish and maintain a packing-house on particular premises is a mere license which may be revoked by the city in the exercise of the police power. *Portland v. Cook*, 48 Oreg. 550. The right to operate under such license may be annulled by prohibiting the continuance of existing establishments in a prescribed locality. *Portland v. Cook*, 48 Oreg. 550.

Power to abate or remove slaughter-

houses, and to regulate the location thereof, does not authorize the city to appropriate its funds for the erection and maintenance of a public slaughter-house. *Huesing v. Rock Island*, 128 Ill. 465. But in *Milwaukee v. Gross*, 21 Wis. 241, 243, it is said that power "to direct the location and management of slaughter-houses and markets" gave the common council authority to establish city slaughter-houses, and hence it might contract, pursuant to ordinance, that all animals should be slaughtered at a certain slaughter-house free of charge to all city butchers and prohibit slaughtering elsewhere.

See also as to slaughter-houses, *Barthet v. New Orleans*, 24 Fed. Rep. 563; *Sawyer v. State Board of Health*, 125 Mass. 182; *Wreford v. People*, 14 Mich. 41; *St. Paul v. Smith*, 27 Minn. 364; *St. Paul v. Byrnes*, 38 Minn. 176; *St. Louis v. Kreutz*, 12 Mo. App. 591; *Attorney-General v. Steward*, 20 N. J. Eq. 415; *Portland v. Cook*, 48 Oreg. 550; *McCrowell v. Bristol*, 5 Lea (Tenn.), 685; *State v. Shelbyville*, 4 Sneed (Tenn.), 176; *Hill v. State*, 4 Sneed (Tenn.), 443; *King v. Neill*, 2 C. & P. 485.

² *Flint v. Russell*, 5 Dillon C. C. R. 151; *Phillips v. Denver*, 19 Colo. 179; *Harrison v. Brooks*, 20 Ga. 537; *Rounsaville v. Kohlheim*, 68 Ga. 668; *Shiras v. Olinger*, 50 Iowa, 571; *Metropolitan Savings Bank v. Manion*, 87 Md. 68, 71; *King v. Hammill*, 97 Md. 103, 109; *St. Louis v. Russell*, 116 Mo. 248; *Pickard v. Collins*, 23 Barb. (N. Y.) 444; *Morris v. Brower*, *Anthon's N. P. (N. Y.)* 368; *Dargan v. Waddell*, 9 Ire. (N. Car.) 244; *Rodenhausen v. Craven*, 141 Pa. St. 546; *Aldrich v. Howard*, 7 R. I. 87; s. c. 8 R. I. 246; *Harvey v. Consumer's Ice Co.*, 104 Tenn. 583; *Kirkman v. Handy*, 11 Humph. (Tenn.) 406; *Burdett v. Swenson*, 17 Tex. 489; *Miller v. Burch*, 32 Tex. 209; *Gifford v. Hulett*, 62 Vt. 342.

been recognized as a *proper subject of regulation* by the legislature or by municipal corporations under statutory authority.¹ Under the power to regulate livery and sale stables, a city may confine them to certain prescribed localities.²

§ 693. **Keeping Hogs and Swine.** — It has been said that a pig-sty in a city is a nuisance *per se*³; and again, that the maintenance of a hog-pen or pig-sty in close proximity to a dwelling-house is a nuisance *per se*.⁴ But the better view seems to be that hog-pens and pig-styes are only nuisances when so kept as to cause annoyance to the public or to the occupants of adjoining property.⁵ When so maintained as to constitute a nuisance, an indictment will lie.⁶ The *keeping of hogs and swine* is a generally *recognized subject of regulation* by municipal ordinance. The legislature may authorize the board of health of a town to assign the place where swine may be kept and may prohibit the keeping of swine elsewhere.⁷ Under the general welfare clause and general authority to enact police ordinances, a city may prohibit

¹ The legislature may prohibit the erection or use of any building in a city as a stable for more than four horses without a license from the board of health. Such statute is constitutional, though no provision for compensation is made, or right of appeal given. *Newton v. Joyce*, 166 Mass. 83. See also *Langmaid v. Reed*, 159 Mass. 409, 411. But a license granted under such statutory authority without limit as to its term is not revocable so long as the licensee complies with its conditions, when there is no statutory provision making it revocable. *Lowell v. Archambault*, 189 Mass. 70. As to right of *adjoining proprietor* to restrain erection of licensed stable, see *White v. Kenney*, 157 Mass. 12. Under the power to abate nuisances, a municipality may compel the objectionable use to be stopped, but cannot authorize the removal of the building. *Miller v. Burch*, 32 Tex. 209.

² *Chicago v. Stratton*, 162 Ill. 494, rev'g 58 Ill. App. 539; *St. Louis v. Russell*, 116 Mo. 248.

Ordinance requiring *consent of adjacent owners* to erection of stables held to be an unauthorized delegation of legislative power and invalid. *St. Louis v. Russell*, 116 Mo. 248. See also *St. Louis v. Howard*, 119 Mo. 41. But in *Chicago v. Stratton*, 162 Ill. 494, rev'g 58 Ill. App. 539, it was held that where a city has statutory

authority to direct the location of livery stables, it has the power to prohibit their location within residence districts, and that an ordinance prohibiting their location in any block without the consent of the lot owners is valid as a prohibition which may be avoided by the consent. An ordinance prohibiting the location of a livery stable in any block in which a school building is situated or in any block which is opposite to a block in which a school building is situated without reference to the manner in which such a stable is constructed, kept, or used, and without specifying the distance, cannot be regarded as reasonable and is invalid. *Phillips v. Denver*, 19 Colo. 179.

³ *Commonwealth v. Van Sickle*, *Bright*. (Pa.) 69.

⁴ *Whipple v. McIntyre*, 69 Mo. App. 397.

⁵ *Richards v. Holt*, 61 Iowa, 529; *Comfort v. Kosciusko*, 88 Miss. 611. *Ex parte O'Leary*, 65 Miss. 80; *Attorney-General v. Steward*, 20 N. J. Eq. 415; *State v. Speyer*, 67 Vt. 502; *McKnight v. Toronto*, 3 Ont. Rep. 284.

⁶ *Commonwealth v. Van Sickle*, *Bright*. (Pa.) 69; *Commonwealth v. Perry*, 139 Mass. 198; *In re Rolfs*, 30 Kan. 758.

⁷ *Commonwealth v. Young*, 135 Mass. 526.

the keeping of swine in particular districts.¹ But any ordinance must stand the test of reasonableness.²

§ 694. *Suppression of the Smoke Nuisance.*—At common law, the *discharge of smoke in any quantity* is not a nuisance unless it affects the health or materially interferes with the comfort of the people living in the neighborhood or injures neighboring property. When, however, either of these elements exists, it is a nuisance which may in proper cases be enjoined at the suit of a person

¹ *Commonwealth v. Patch*, 97 Mass. 221. Under power to abate nuisances which may become injurious to the public health, a city may prohibit the keeping of swine within one mile of the court-house. *Ex parte Glass*, 49 Tex. Crim. Rep. 87; 90 S. W. Rep. 1108. Under a similar power, it may prohibit the keeping of hog-pens within 200 feet of a street or alley. *Miller v. Syracuse*, 168 Ind. 230; 80 N. E. Rep. 411. It has been held that an ordinance prohibiting hog-pens in a city of 15,000 inhabitants is not unreasonable, although the effect may be to prevent the keeping of a clean and inoffensive pen with only one hog therein. *State v. Holcomb*, 68 Iowa, 107.

² Ordinances to the following effect have been sustained as valid and reasonable: Prohibiting the keeping of hogs within a town; *State v. Holcomb*, 68 Iowa, 107; *Darlington v. Ward*, 48 S. Car. 570; prohibiting the keeping of hogs within the corporate limits between April 1st and October 1st; *Smith v. Collier*, 118 Ga. 306; prohibiting the keeping of hogs within 100 yards of the residence of another; *State v. Hord*, 122 N. Car. 1092; or within 125 yards of a dwelling-house; *Brunson v. Youmans*, 76 S. Car. 128.

But under some circumstances ordinances have been held to be unreasonable. Under statutory authority to prevent or regulate the keeping of pigs, swine, and piggeries, in case they may prove to be nuisances, a city cannot adopt an ordinance prohibiting the keeping of pigs or swine within the city limits. *McKnight v. Toronto*, 3 Ont. Rep. 284. An ordinance declaring it to be a nuisance to erect hog-pens within any enclosure within the city limits except at certain places, is invalid as being too broad and sweeping. They may or may not be a nuisance, and any ordinance on the subject should be

framed accordingly. *Ex parte O'Leary*, 65 Miss. 80. In *Comfort v. Kosciusko*, 88 Miss. 611, it was held that an ordinance prohibiting the keeping of hogs and swine generally, without reference to the question whether they are or are not a nuisance, was unauthorized and void, although the power conferred was to make restrictions to secure the public health, to prevent and abate nuisances, and to suppress hog-pens (disapproving *Darlington v. Ward*, 48 S. Car. 570).

A regulation by the State board of health under legislative authority, applicable to the whole State, without reference to location or condition, that no one shall maintain a pig-pen within 100 feet of a well or spring of water used for drinking purposes, or within 100 feet of any stream or inhabited house, is unreasonable and void. It was so held upon the two-fold consideration that pig-pens located as described in the ordinance might not endanger the public health, and that while a pig-pen situated in a city or village might be a nuisance to public health, it might be perfectly harmless when situated on a farm. *State v. Speyer*, 67 Vt. 502.

Under power to make all salutary and needful by-laws, a city may prohibit the permitting of swine to go upon or obstruct or encumber the sidewalks. *Commonwealth v. Curtis*, 9 Allen (Mass.), 266. Under power to prevent and remove nuisances, a city may declare hog-pens to be nuisances when offensive to the public. *Burlington v. Stockwell*, 5 Kan. App. 569. When power is given to prohibit the keeping of swine in a town absolutely, they may be prohibited without a permit from the board of health. *Quincy v. Kennard*, 151 Mass. 563. Of the necessity of the ordinance, it has been said that the local authorities are the sole judges, unless it is unreasonable in its terms, *State v. Hord*, 122 N. Car. 1092.

aggrieved.¹ And there are decisions to the effect that emission of large quantities of smoke in a densely populated city to the annoyance of the inhabitants is a common nuisance and indictable as such.² Under the weight of authority, *it is within the power of the legislature to prohibit* the owner or occupant of any building from permitting the emission or discharge of thick or dense black smoke or cinders, to declare such issue or emission to be a public nuisance, and to impose a penalty for a violation of the statute. Such a statute is a proper exercise of the legislative power to protect the health and comfort of the municipality.³ Under appropriate delegations of

¹ *Sullivan v. Royer*, 72 Cal. 248; *Northwood v. Barber Asphalt Paving Co.*, 126 Mich. 284; *Ross v. Butler*, 19 N. J. Eq. 294; *Cogswell v. New York, N. H. & H. R. Co.*, 103 N. Y. 10; *Hyatt v. Myers*, 71 N. Car. 271; *Rhodes v. Dunbar*, 57 Pa. St. 274, 287; *Sullivan v. Jones & Laughlin Steel Co.*, 208 Pa. 540.

Smoke unaccompanied with noise or noxious vapor, although not an injury to health, may constitute a nuisance. The material question is whether the annoyance produced is such as materially to interfere with the comfort of human existence. *Crump v. Lambert*, L. R. 3 Eq. 409, *per Lord Romilly*, M. R. Occasional and recurring emission of dense smoke to the annoyance of the plaintiff, the result of periodical acts of negligence, held not to justify an injunction at the suit of the adjoining owner. The proper remedy of adjoining owner is *by action at law*, which is an adequate remedy. *Nelson v. Milligan*, 151 Ill. 462.

Prescott's Case, 2 N. Y. City Hall Rec. 161. In *People v. Detroit White Lead Works*, 82 Mich. 471, the city had authority to prevent, abate, and remove all nuisances and to punish the authors and maintainers thereof. It adopted an ordinance simply declaring that no person "shall allow any nuisance to exist or remain" on his premises. The defendant was prosecuted under this ordinance for maintaining a nuisance contrary to its provisions in that it maintained a factory constantly producing odors, smoke, and soot of a noxious character, injuring the health and tainting the food of inhabitants of the city. It was held, on appeal, that the defendant was guilty of maintaining a nuisance in violation of the ordinance, and was properly convicted. But smoke and noxious vapor occasioned

by burning infected clothing, bedding, &c., by the public authorities for the protection of the public, the method adopted being that usually resorted to by medical men in such cases, is not a nuisance if done with reasonable care. So held where a city was indicted by the State for burning infected clothing outside the city limits. *State v. Knoxville*, 12 Lea (Tenn.), 146.

² In *Moses v. United States*, 16 App. D. C. 428, it was held that an Act of Congress applicable to the District of Columbia, which declared that "any owner, agent, lessee, or occupant of any building of any description from the smoke-stack or chimney of which there shall issue or be emitted thick or dense black or gray smoke or cinders" shall be guilty of creating a public nuisance, was a valid and constitutional exercise of legislative power of congress. To the same effect, *Bradley v. District of Columbia*, 20 App. D. C. 169.

In *State v. Tower*, 185 Mo. 79, the court held that the legislature may take cognizance of the well-known fact that the emission and discharge of dense smoke into the atmosphere of a large and populous city is of itself a nuisance, a constant annoyance to the general public, and calculated to interfere with the health and comfort of the inhabitants, and may declare it a nuisance *per se*. It was also held that a statute so declaring it is not invalid, because it does not provide that it must be shown that the discharge injured property or affected the health of the inhabitants. This case seems to limit and modify the earlier case of *St. Louis v. Heitzberg Packing Co.*, 141 Mo. 375. In the latter case the city had power "to declare, prevent, and abate nuisances on public or private property, and the causes thereof." It adopted an ordinance that "the emission into

legislative authority to municipal corporations, ordinances prohibiting the emission of dense smoke have, under varying circumstances and conditions, been sustained.¹ Such ordinances are valid, al-

the open air of dense black or thick gray smoke within the corporate limits" shall be deemed a nuisance and punishable as a misdemeanor. The Supreme Court of Missouri held that the city could, under the power conferred, pass reasonable ordinances looking to the suppression of smoke when it becomes a nuisance to property or health or annoying to the public at large, but that an ordinance, such as that in question, merely prohibiting the emission of dense black smoke, whether a nuisance or not, irrespective of the quantity or length of time, was unreasonable and void. In disposing of the case, *Gantt, J.*, said: "The ordinance itself would punish every housekeeper who kindled a fire to cook his or her morning meal or to warm the house. Every replenishing of the furnace, whether in the heart of the business centres or upon the remote western boundary of the city, would alike subject the owner to punishment. No exception is made as to time or quantity. . . . This ordinance, which makes no reasonable allowance for the regulation of this smoke, but essays in advance of any known device for preventing it to punish all who produce it to any degree whatever, is wholly unreasonable." It will be observed that the city in this case had authority to declare nuisances; and it would seem that if the legislature might declare the mere emission of dense black smoke to be a nuisance, as held in *State v. Tower*, 185 Mo. 79, *supra*, the city might, under the delegated authority, exercise the same power.

In *New York*, it has been held that a statute which provides that no manufacturing establishment shall use soft coal for fuel within a radius of four miles of the city hall of the city of Brooklyn, except for the purpose of heating or welding iron or steel, is a constitutional exercise of the power vested in the legislature, and does not contravene any of the provisions of the constitution of the State of New York or of the Federal Constitution. *Brooklyn v. Nassau El. R. Co.*, 44 N. Y. App. Div. 462; *New York v. Johns-Manville Co.*, 89 N. Y. App. Div. 449.

In *England*, it has been held that a

statute (29 and 30 Vict. Ch. 90, § 19), which declared that the owner and occupant of premises, except dwelling houses, the chimney of which should send "forth black smoke in such quantity as to be a nuisance" should be punishable, did not make it necessary to show that the nuisance was injurious to health. It was only essential to show the issuing of black smoke in quantity as specified in the statute. *Gaskel v. Bayley*, 30 L. T. N. S. 516.

To legislation such as that referred to above it is not a valid objection that reasonable exceptions to the operation of the statute are made. Thus a proviso excepting dwelling-houses does not render the statute void for inequality or unjust discrimination. *Moses v. United States*, 16 App. D. C. 428; *Bradley v. District of Columbia*, 20 App. D. C. 169. A statute applicable only to cities having one thousand inhabitants or over is based on a reasonable classification, and is not special legislation. *State v. Tower*, 185 Mo. 79. The exception of the use of soft coal for heating or welding iron or steel from the operation of a statute prohibiting the use of soft coal for other purposes neither creates an exclusive privilege in favor of the excepted objects, nor renders the statute invalid as special legislation. *Brooklyn v. Nassau El. R. Co.*, 44 N. Y. App. Div. 462; *New York v. Johns-Manville Co.*, 89 N. Y. App. Div. 449. In *State v. Ramsey Co. Sheriff*, 48 Minn. 236, it was held that a statute which prohibits the emission of dense smoke within a city within certain limits as to distance, location, and surroundings, but excepting manufacturers, who limit the use of heat, light, and power resulting from the combustion of smoke-producing material wholly to the building where generated, was unconstitutional by reason of the exception, which was arbitrary and unauthorized, and hence the statute was special legislation.

¹ Under statutory authority to declare what shall constitute a nuisance, a city may by ordinance declare that the emission of dense smoke from any chimney, &c., within the corporate limits, shall be a public nuisance, al-

though there may be exceptions of specified classes of buildings provided such exceptions are made upon reasonable grounds.¹ But

though it contains no restriction as to locality. *Bowers v. Indianapolis*, 169 Ind. 105; 81 N. E. Rep. 1097. Under similar statutory authority with power to impose fines for violation of ordinances, the city council may by ordinance declare the emission of dense smoke from the smoke-stack of any boat, locomotive, or chimney within the corporate limits, with certain exceptions, to be a public nuisance. *Glucose Refining Co. v. Chicago*, 138 Fed. Rep. 209.

A city ordinance which declares that the owner or occupant of any building within the city to which is attached any chimney or smoke-stack connected with any stationary engine, steam boiler, &c., from which there is emitted dense smoke which contains soot or other substance in sufficient quantity to permit the deposit thereof on any surface within the city shall be deemed to create and maintain a nuisance, is valid. *Atlantic City v. France*, 74 N. J. L. 389; 65 Atl. Rep. 894. *Reed, J.*, said: "That the emission of smoke may be so annoying to persons and so injurious to property as to be a nuisance is well known to every lawyer to be a proposition too well settled to admit of dispute. It may be admitted that the emission of smoke may occur in sparsely settled localities, and may be of such attenuated consistency as not to constitute a nuisance. It might be urged that an ordinance which did nothing beyond ordaining that the emission of smoke should be punished as a nuisance was unreasonable and void. Indeed, it was upon this ground that the case of *St. Louis v. Heitzberg Packing Co.*, 141 Mo. 375, was decided; the ordinance in that case, which did nothing more than this, being declared unreasonable and void. In the present case, however, it is not merely the emission of smoke which is

prohibited, but the emission of dense smoke in Atlantic City, — smoke containing soot or other substance in sufficient quantities to permit a deposit of such soot or other substance on any surface. It seems too manifest for serious discussion that a use of property which results in the discharge of dense smoke which causes a discoloration of buildings and clothes, — smoke which finds its way into open windows and smuts furniture and bedding, smoke which settles on fruit and trinkets exposed for sale in scores of stores and shops in Atlantic City, — is a nuisance. If so, such use of the property is within the control of the police power lodged by the legislature in the common council of Atlantic City."

In *Harmon v. Chicago*, 110 Ill. 400, it was held that an ordinance which provided that any owner or other person in charge "who shall permit or allow dense smoke to issue or to be emitted" from any smoke-stack or chimney within the corporate limits shall be deemed guilty of creating a nuisance and shall be punishable by fine, is valid and enforceable. It was further held that smoke from a tug-boat in the harbor came within the ordinance, and that as to such tug-boat the ordinance did not regulate commerce between the States, but was a mere police regulation of the use of property. The court declared in this case that when it appears that the effect of "dense smoke" emitted from a smoke-stack or chimney is detrimental to certain classes of property within the city limits, and is a personal annoyance to the public at large within the city, it is a public nuisance whether declared by ordinance or not. See also *Field v. Chicago*, 44 Ill. App. 410. In *People v. Lewis*, 86 Mich. 273, an ordinance making the *emission of dense smoke* or smoke containing soot or

¹ In *People v. Lewis*, 86 Mich. 273, an ordinance which prohibited the issuance of smoke to the damage of property or health, or to the annoyance of the public, *excepted dwelling-houses and steamboats* from its operation. It was held that it was not discriminative by reason of the exception. In *Bowers v. Indianapolis*, 169 Ind. 105; 81 N. E.

Rep. 1097, it was held that a city ordinance which declares the emission of dense smoke, &c., within the city limits to be a public nuisance was not invalid because it excepted from its operation the chimneys of dwelling-houses. As to *exceptions under peculiar provisions*, see *Glucose Refining Co. v. Chicago*, 138 Fed. Rep. 209.

it has further been held that under a simple power to remove or abate nuisances a city council has no authority to define and declare what shall constitute a nuisance, and hence, under such statutory authority an ordinance declaring that the emission of dense smoke from smoke-stacks or chimneys is a public nuisance and punishable as such is unauthorized and void.¹ The liability of particular persons to punishment under such ordinances necessarily depends largely upon the terms of the enactment.²

other substance to the damage of property or the injury of health of any persons or the annoyance of the public, a nuisance and punishable as such, was sustained. In *St. Paul v. Haugbro*, 93 Minn. 59, an ordinance enacted by virtue of express statutory authority declared the *emission of dense smoke* to be a nuisance and punishable as such. *Lovely, J.*, said: "Unless we are entirely at fault in our apprehension of the signification of words when used in their accepted sense, the terms 'dense smoke' suggest and reasonably imply much more than counsel for defendant concedes. While it may be true that at times the emission of smoke in small quantities from chimneys may not be so offensive as to itself constitute a nuisance, it is not so easy to see how dense smoke can be regarded with toleration, or found acceptable to the senses of ordinary humanity, particularly in the residence portions of a community, such as this ordinance was intended to apply to." In *Cincinnati v. Miller*, 29 Weekly L. Bull. 364, it was held that *dense smoke* emitted in the heart of a populous city is a nuisance *per se*, and that under the power to "regulate and compel the consumption of smoke emitted by the burning of coal and to prevent injury and annoyance from the same," the city may, by ordinance, provide that any owner or occupant who should allow "dense smoke" to be discharged should be guilty of creating a nuisance. It has further been held that under a statute which provided that, if any works annoy neighbors "by diffusing smoke," they should be subject to the rules of the police or the customs of the place, the city may cause a *blacksmith shop emitting smoke*, etc., to be closed. *New Orleans v. Lambert*, 14 La. An. 247.

In *New York*, the ordinance known as the "sanitary code" prohibited the emitting of dense smoke "to the detriment or annoyance of any person or

persons not being therein or thereupon engaged." It was held that to establish a violation of the ordinance it must be shown that the escape or discharge was detrimental or annoying to some person. *People v. Sturgis*, 121 N. Y. App. Div. 407. The court said: "That is the test of liability; that there shall be in fact a nuisance, not perhaps within the full scope of a common-law nuisance, but a nuisance which by annoying one or more persons shall be constructively a public nuisance." See also *Board of Health v. Ebling Brewing Co.*, 38 N. Y. Misc. 537; *People v. Horton*, 41 N. Y. Misc. 309. So under statutory authority to pass ordinances to regulate and compel the consumption of smoke and to prevent injury and annoyance from the same, the city cannot prohibit the emission of dense smoke *unless such emission is an injury or an annoyance* to some one. *Sigler v. Cleveland*, 3 Ohio, N. P. 119. Under statutory authority to pass ordinances to maintain cleanliness and health, and to maintain good sanitary conditions and to suppress all nuisances, the city may by ordinance prohibit smoking in the street cars. *State v. Heidenhain*, 42 La. An. 483.

¹ *St. Paul v. Gilfillan*, 36 Minn. 298. In this case, *Vanderburgh, J.*, said: "The emission of dense smoke from smoke-stacks or chimneys is not necessarily a public nuisance. Whether so or not would depend largely upon the locality and surroundings."

² In *State v. Hemenover*, 188 Mo. 381, it appeared that the secretary of a corporation did some buying, looked after the manufacturing department, had charge of the engine room, and was treated by others as *de facto* president. It was held that he was a "manager" within the Missouri statute prohibiting the issuing of smoke, and that it was not necessary to show that he was the exclusive manager. Ordinance construed on the particular language used

§ 695. **Regulations of the Use and Control of Private Property.** — Of recent years, in response to a growing demand for the preservation of natural beauty and the conservation of the amenities of the neighborhood resulting from the manner in which it has been laid out and built upon, legislatures and municipalities have sought, by statute and by ordinance, to prevent the encroachment of undesirable features, unsightly erections, and obnoxious trades. This legislation, induced mainly by æsthetic considerations, has given rise to a series of novel questions affecting the legislative power of both the State and its governmental agent, the city. It has been held that, for æsthetic considerations and to promote the popular enjoyment and advantages derived from the maintenance of a public park, the legislature may, by virtue of the power of eminent domain and upon making just compensation, impose *restrictions upon the manner in which property abutting on the park may be improved and used.*¹ But

to subject only the owner or occupant, and not the servant of the owner or occupant, to a penalty for allowing dense smoke to issue from a chimney. *St. Paul v. Johnson*, 69 Minn. 184. In *Barnes v. Ackroyd*, 26 L. T. N. S. 692, the occupants were convicted and the conviction was sustained under the *English statute*, although there was no proof as to the persons who were actually in charge of the furnaces. The statute in this case merely declared that any chimney emitting black smoke in quantity should be a nuisance, and the occupants were treated as the masters or employees of the persons in charge of the furnaces.

Under the act of Congress applicable to the District of Columbia, which declares that any "owner, agent, lessee, or occupant of any building" from which thick or dense black or gray smoke or cinders shall issue, shall be guilty of creating a public nuisance, only persons having an agency in the control of the furnaces producing the smoke are liable. *Moses v. United States*, 16 App. D. C. 428; *Bradley v. District of Columbia*, 20 App. D. C. 169. In *England*, a statute authorized the local authorities to order changes, &c., in order to abate nuisance, and to avoid recurrence thereof. An order was made directing changes to avoid the issuing of dense smoke, and a conviction for disobedience thereof was sustained. *Higgins v. Guardians of Northwich Union*, 22 L. T. N. S. 752; *Reg. v. Waterhouse*, L. R. 7 Q. B. 545.

¹ In *Attorney-General v. Williams*, 174 Mass. 476, s. c. 178 Mass. 330, the Supreme Court of Massachusetts sustained the constitutionality of a statute limiting the height of buildings fronting on Copley Square, Boston, an open square and public park surrounded by buildings devoted to religious, charitable, and educational purposes. The statute enacted that "any building now being built or hereafter to be built, rebuilt, or altered," on any land abutting on certain specified streets which fronted on Copley Square, "may be completed, built, rebuilt, or altered to the height of 90 feet and no more," and upon lands abutting on other streets also fronting on Copley Square "to the height of 100 feet and no more; provided, however, that there may be erected on any such building above the limits hereinbefore prescribed, such steeples, towers, domes, sculptured ornaments, and chimneys as the board of park commissioners of said city may approve." The statute provided that any person damaged by the limitation placed upon the height of his buildings might recover his damages in the manner provided for obtaining damages sustained by any person whose land was taken in laying out a highway in the city. The court held that the statute was a proper exercise of the power of eminent domain to take an easement created by the statute and annexed to the park; that the preservation or improvement of the park in that respect was a public use for which private

it is apparent that restrictions founded, not upon the power of eminent domain, but upon the exercise of the police power, stand

property might be taken, and that it was within the power of the legislature to take the property and to impose upon the city the obligation of making compensation therefor.

In the opinion of the court, *Knowlton, J.*, said (174 Mass. 478): "In view of the kind of buildings erected on the streets about Copley Square and the uses to which some of these buildings are put, it would be hard to say that this statute might not have been passed in the exercise of the police power, as other statutes regulating the erection of buildings in cities are commonly passed. But it differs from most statutes relative to this subject in providing compensation to persons injured in their property by the limitation which it creates. In this respect it conforms to the constitutional requirements for the taking of property by the right of eminent domain." After referring to the authorities sustaining the exercise of the power of eminent domain for park purposes, he proceeded: "The grounds on which public parks are desired are various. They are to be enjoyed by the people who use them. They are expected to minister, not only to the grosser senses, but also to the love of the beautiful in nature in the varied forms which the changing seasons bring. Their value is enhanced by such touches of art as help to produce pleasing and satisfactory effects on the emotional and spiritual side of our nature. Their influence should be uplifting and, in the highest sense, educational. If wisely planned and properly cared for, they promote the mental as well as the physical health of the people. For this reason it has always been deemed proper to expend money in the care and adornment of them to make them beautiful and enjoyable. Their æsthetic effect never has been thought unworthy of careful consideration by those best qualified to appreciate it. It hardly would be contended that the same reasons which justify the taking of land for a public park do not also justify the expenditure of money to make the park attractive and educational to those whose tastes are being formed and whose love of beauty is being cultivated. . . . The counsel on both sides referred in argument to the well-known buildings which constitute

these surroundings. Trinity Church, the Museum of Fine Arts, the Boston Public Library, the New Old South Church, the Second Church of Boston, and the buildings of the Massachusetts Institute of Technology, all face the beholder who stands on Copley Square and looks around him. Some of these buildings are public in the ordinary sense of the word, and some of the corporations which own them have been the beneficiaries of the Commonwealth on account of their quasi-public character, and the public certainly feels an interest in them. It is argued by the defendants that the legislature in passing this statute was seeking to preserve the architectural symmetry of Copley Square. If this is a fact, and if the statute is merely for the benefit of independent property owners, the purpose does not justify the taking of a right in land against the will of the owner. But if the legislature, for the benefit of the public, was seeking to promote the beauty and attractiveness of a public park in the capital of the Commonwealth, and to prevent unreasonable encroachments upon the light and air which it had previously received, we cannot say that the law-making power might not determine that this was a matter of such public interest as to call for an expenditure of public money, and to justify the taking of private property."

This decision was brought before the Supreme Court of the United States by writ of error, and it was held that the statute provided a direct and appropriate means of ascertaining and enforcing payment of the damages resulting from the taking, and that the statute was not in conflict with the provisions of the Federal Constitution. *Williams v. Parker*, 188 U. S. 491. See *infra*, § 666. As to the exercise of the power of eminent domain for *ornamental purposes*, see *post*, chapter on Eminent Domain, § 1035. See also 20 *Harvard Law Review*, 35, Mr. Wilbur Larremore's excellent article on Public Æsthetics and cases cited and reviewed.

In *Tompkins v. Pallas*, 47 N. Y. Misc. 309, it was held that a park commissioner whose duties are "to maintain the beauty and utility" of the public parks, and to improve them "for ornamental purposes and for the benefi-

upon another basis, and several cases have laid down the rule that by virtue of the police power merely, neither the legislature, nor the city council exercising delegated power to legislate by ordinance, can impose restrictions upon the use of *private property* which are induced solely by æsthetic considerations, and have no other relation to the health, safety, convenience, comfort, or welfare of the city and its inhabitants.¹ The law on this point is undergoing development,

cial uses of the people of the city," has no power to grant a permit or license to use a temporary fence erected within the park to enclose a public building in course of erection for the purpose of displaying commercial signs and advertisements.

¹ "No case has been cited, nor are we aware of any case which holds that a man may be deprived of his property because his tastes are not those of his neighbors. Æsthetic considerations are a matter of luxury and indulgence, rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation." *Per Swayze, J.*, in *Passaic v. Paterson Bill Posting, &c. Co.*, 72 N. J. L. 285, rev'g 71 N. J. L. 75. See *post*, chapter on Eminent Domain, § 1035; *infra*, § 697.

Commenting on the subject, Mr. A. R. Watson, Editor of the Bench and Bar (vol. xiii. p. 10, April, 1908), makes the following interesting observations: "Some of our courts have in recent cases discussed the power and means of restraining those particular forms of private greed which express themselves in flamboyant advertisements in public places, ungainly skyscrapers, and other structures, and displays offensive to the cultivated senses of perception. These considerations received very instructive and sympathetic treatment at the hands of Mr. Wilbur Larremore, the editor of 'The New York Law Journal,' in an article in the 'Harvard Law Review' for November, 1906 (Vol. 20, p. 35), entitled 'Public Æsthetics.' In this paper, Mr. Larremore reviews the authorities and deduces conclusions which may be succinctly stated as follows:

"1. That all uses of public property which are æsthetically offensive can be prevented by the public authorities.

"2. That the right of eminent domain may be exercised for purely æsthetic purposes of a public nature in limiting the uses of private property,

compensation to the owners being made.

"3. That the police power cannot, at present, at least, be invoked to restrain, without compensation to the owner, such uses of private property as are offensive from a merely æsthetic point of view on the ground that such a use is a nuisance — although it is intimated that 'the increasing æsthetic sentiment' may eventually sanction such practice.

"4. That advertisements may be controlled to some extent by an exercise of the taxing power. See 20 *Harvard Law Review*, November, 1906, p. 42, and cases cited, and also cases cited in *Passaic v. Paterson, &c.*, 72 N. J. L. 285.

"A case having an interesting bearing upon the subject was lately tried before Mr. Justice *Leventritt* at the New York County Special Term. (*Fifth Avenue Coach Company v. City of New York*, 58 N. Y. Misc. 401; 111 N. Y. Supp. 759.) The action was brought by the plaintiff Coach Company to enjoin the City of New York from interfering with *advertising signs* of 'Bull Durham Tobacco' displayed on the outside of the plaintiff's automobile stages running on Fifth Avenue. The injunction was denied on the ground that the plaintiff did not show a sufficiently clear right to warrant the equitable interference of the court for its protection. The conclusion reached was that the signs did *not* constitute a nuisance because not producing *physical discomfort*. The powers of the plaintiff corporation were also considered, and it was denied that they authorized it to engage in the business of exterior advertising. Upon this branch of the case it was reasoned with great force and erudition that the plaintiff, being a *quasi-public* corporation, organized as a common carrier, granted special franchises in the use of the public streets, might, therefore, exercise *only* such powers as were expressly granted to it by its charter and such as were reasonably necessary to the exer-

and perhaps cannot be said to be conclusively settled as to the extent of the police power.

Perhaps the most extreme instance of the exercise of police power to regulate the use of private property is a statute of Massachusetts which prohibits the *unnecessary erection and maintenance of fences exceeding six feet in height* for the purpose of annoying neighbors. The court pointed out that the restriction only applied to "unnecessary" erections; construed the statute to require an actual malevolent motive as distinguished from merely technical malice, the malevolence being the dominant motive, and sustained the statute as a valid exercise of the police power.¹ It has been held that it is not within the power of the legislature by direct legislation, or by delegation of legislative authority to enact ordinances, to so limit and control the

cise of those expressly granted; and that engaging in the business of exterior advertising was not in any way necessary to the exercise of the plaintiff's express powers, and constituted an unauthorized use of the public streets, which was properly forbidden by a city ordinance.

"The question may be raised whether the same rule would apply to an individual operating stages under a public franchise. The substantial basis of Mr. Justice Leventritt's conclusion seems to us to be not so much that the business of advertising was outside the plaintiff's corporate powers, as that the plaintiff was operating its stages under a public franchise, and was therefore subject to such reasonable regulations as the municipality might make with regard to the use of the public streets. This line of reasoning would apply as well to an individual as to a corporation. The decision is a novel one, and is expressive of the tendency to which we have alluded, to give an increasing amount of regard to æsthetic considerations in public affairs. We may all live to see the day when offences against the æsthetic senses will be deemed quite as much nuisances in law as those which offend the merely physical senses."

¹ *Rideout v. Knox*, 148 Mass. 368; *Smith v. Morse*, 148 Mass. 407. See also as to the application of this statute and its limitations, *Spaulding v. Smith*, 162 Mass. 543; *Brostrom v. Lauppe*, 179 Mass. 315. A similar statute has been enacted and enforced in Maine. See *Lord v. Langdon*, 91 Me. 221.

We venture to observe that to make

the mere motive with which the owner of private property exercises a right pertaining to the ownership of property a ground for a limitation upon such right is a doctrine whose soundness will not pass unquestioned. In *Rideout v. Knox*, 148 Mass. 368, 372, *Holmes, J.*, who delivered the opinion of the court, admitted that at common law a man might build a fence on his own land as high as he pleases, but said that the right to use one's property for the sole purpose of annoying others is not one of the immediate rights of ownership, and under some authorities the extent of his rights have been limited by the motive with which he acted (citing *Greenleaf v. Francis*, 18 Pick. (Mass.) 117, 121; *Carson v. Western R. Co.*, 8 Gray (Mass.), 423, 424; *Roath v. Driscoll*, 20 Conn. 533, 544; *Wheatley v. Baugh*, 25 Pa. St. 528; *Swett v. Cutts*, 50 N. H. 439, 447). The courts of *Massachusetts*, however, do not so understand the common law, and he conceded that to a large extent the power to use a man's property malevolently, in any way which would be lawful for other ends, is an incident of property which cannot be taken away even by legislation. But the curtailment effected by the statute is insignificant. It is limited to fences *unnecessarily exceeding six feet in height*, and there must be an actual malevolent motive, as distinguished from merely technical malice; and finally malevolence must be the dominant motive. So construed the statute was held to be within the police power and constitutional.

use of private property as to deprive the owner of the beneficial use thereof for causes other than the health, safety, convenience, or public welfare of the people. Thus, the legislature cannot, for the purpose of promoting the beauty of parkways or boulevards, *authorize a city to establish by ordinance a building line within the limits of private property* to which all buildings must conform without complying with the constitutional requirements as to making compensation for property taken.¹ Nor can the legislature confer authority on a city to *exclude from boulevards business occupations* which are not noxious in their nature and to restrict buildings thereon to residence uses only.² Nor can a city by virtue of the power to regulate the construction of buildings, or to pass police ordinances or ordinances to promote the interests and good government of the city, pass an ordinance *prohibiting the erection of new buildings* without a permit and directing that the permit shall not be granted unless in the judgment of certain public officers the size, general character, and appearance of the building will conform to the general character of buildings previously erected in the locality and will not tend to depreciate the value of surrounding improved or unimproved property.³

¹ *St. Louis v. Hill*, 116 Mo. 527. In *Pennsylvania*, under statutory enactment owners have been *required to recede from the former building line* and have been given a right of action for the damages thus accruing. This right of action accrues as soon as the owner removes his building and proceeds to rebuild. For cases involving these statutes, see *Philadelphia v. Linard*, 97 Pa. St. 242; *In re Chestnut St.*, 118 Pa. 593; *Brower v. Philadelphia*, 142 Pa. 350; *Bornot v. Bonschur*, 202 Pa. 463.

² *St. Louis v. Dorr*, 145 Mo. 466. But the legislature may authorize and the city council may accordingly enact an ordinance setting apart a limited number of streets as *pleasure driveways* and excluding wagon traffic therefrom. *Cicero Lumber Co. v. Cicero*, 176 Ill. 9.

³ *Bostock v. Sams*, 95 Md. 400. In this case the court did not consider the power of the legislature to impose this restriction or to authorize its imposition without compensation, but the grounds of the decision seem to be sufficient to negative the existence of any such power on the part of the legislature. *Jones, J.*, said: "Undoubtedly the proviso in the ordinance under consideration attempts

to confer powers that affect the citizen in his right of property and his common right. It cannot be pretended that the citizen has not the common law right to acquire title to a lot of land, qualified or absolute, in a city as elsewhere, and to build upon, and improve as his taste, his convenience, or his interest may suggest, or as his means may justify without taking into consideration whether his buildings and improvement will conform in 'size, general character, and appearance' to the 'general character of the buildings previously erected in the same locality'; even though there might be those in whose 'judgment' his so building might in some way 'tend to depreciate the value of surrounding improved or unimproved property.'"

A city ordinance prohibited the *erection of shanties, huts, tents, &c.*, on the edge of the bank *between the road or street and the sea* without a special permit from the board of aldermen. It was held that the legislature has no authority to declare or to authorize municipal authorities to declare the building of a private residence on one's land to be a nuisance, because it may have a tendency to depreciate the value of adjoining property by shut-

The right of an owner to *use his property in the prosecution of a lawful business*, and one that is recognized as necessary in all civilized communities, cannot be made to rest upon the caprice of a majority, or any number of those owning property surrounding that which he desires to use.¹ Even in the case of those *trades or occupations which are natural uses of land*, such as quarrying, mining, brick making, etc., and which involve some danger in conducting them, the legislature or city council cannot as a general rule *prohibit them within the city limits*, although it may *regulate* the manner in which they may be conducted.² The occupation of *manufacturing works* is not within the class of employments presumably offensive which *per se* may be regulated or restrained by ordinance. Hence, an ordinance prohibiting the use of any lands (other than those used for brick making at the time of its enactment) for the purpose of brick making without a permit is unreasonable.³

ing out the gulf breeze and obstructing the view of the sea and thereby actually deprive the owner of the use of his property without compensation. *Quintini v. Bay St. Louis*, 64 La. 483.

¹ An ordinance providing that *no permit to maintain a laundry* shall be granted unless the applicant shall first have obtained the written consent of a majority of the real property owners within the block and in certain neighboring blocks imposes an unlawful condition on the use of the property for a lawful purpose and is void. *Ex parte Sing Lee*, 96 Cal. 354. An ordinance prohibiting the *erection of stables in any block* without the consent of the owners of one-half the ground of the block is invalid as an unauthorized delegation of legislative power and as discriminatory in its nature and effect. *St. Louis v. Russell*, 116 Mo. 248. Ordinance prohibiting the *operation of slaughter-house* within a certain distance of any dwellings without the written consent of the occupants of the dwellings is invalid. *St. Louis v. Howard*, 119 Mo. 41. An ordinance prohibiting the *erection of a gas tank holder* without the written consent of all the owners of property within a radius of 1000 feet is void. *State v. Ithnell*, 78 Neb. 33; 110 N. W. rep. 680. But in *Chicago v. Stratton*, 2 Ill. 494, it was held that where a city had *statutory authority to erect the location of livery stables*, it had the power to prohibit their loca-

tion within residence districts, and that an ordinance prohibiting their location within any block without the consent of a majority of the lot owners was valid as a prohibition, which might be avoided under the condition of the consent.

² See *ante*, §§ 684-688, *Cuba v. Mississippi Cotton Oil Co.*, 150 Ala. 259; 43 So. Rep. 706. An ordinance absolutely prohibiting the maintenance or operation of a *rock or stone quarry* within a large portion of a city deprives the owners of real property within such limits of a valuable right incident to their ownership, and is unreasonable and invalid. *In re Kelso*, 147 Cal. 609. In *Reg. v. Mutters*, 10 Cox Cr. C. 6, it was held that a *quarry worked by blasting* in such a way and under such circumstances as to occasion injury to others, was a public nuisance for maintaining which the owner might be convicted and punished. Ordinance prohibiting under penalty the *blasting of rock* with gunpowder within the city limits "without written consent from the board of aldermen" held to be valid and reasonable. *Commonwealth v. Parks*, 155 Mass. 531. Ordinance regulating the *blasting of rock* construed and applied. *Spokane v. Patterson*, 46 Wash. 93; 89 Pac. Rep. 402.

³ *Belmont v. New England Brick Co.*, 190 Mass. 442. In this case, the ordinance required that applicants for a license should furnish bond with sureties for the observance of the

§ 696. **Regulation of the Height of Buildings.** — Statutory restrictions upon the *height of buildings* having been before the courts incidentally and the opinion having been expressed that statutes regulating the height of buildings are a proper and valid exercise of the police power,¹ the question came directly before the Supreme Judicial Court of Massachusetts, which held that the legislature, in the exercise of the police power, may regulate the height of buildings in cities so that none can be erected above a prescribed number of feet; that it can classify parts of a city so that in some parts one height is prescribed and in others a different height; that it can delegate to a commission the determination of the boundary of these different parts so as to conform to the general provisions of the statute; and that it can also delegate to a commission the making of rules and regulations in such manner as to permit different heights in different places according to the different conditions in different parts of one of the general classes of territory as defined in the general statute.¹

terms of the permit and for the filling of any excavation within a reasonable time and in a manner satisfactory to the board of health. The right to require filling in was claimed on the theory that the excavations became receptacles for water which when stagnant became breeding places for mosquitos, which convey disease. But the court disposed of this contention, *Bradley, J.*, saying: "But it also follows that any pool of water thus artificially formed, when of sufficient age, would be equally objectionable, and the real condition to be remedied is the creation and maintenance of this source of sickness. Until the water stagnated, and mosquitos were bred, the action of the landowner had not become injurious to the community, and for the benefit of the public to destroy, or impair his right to convert his property into money, where the process of conversion in itself is innocent, is unnecessary and oppressive."

¹ In *People v. D'Oench*, 111 N. Y. 359, a statute provided that the height of all dwelling-houses and of all houses used or maintained to be used as dwellings for more than one family thereafter to be erected in the city of New York should not exceed 80 feet upon all streets and avenues exceeding 60 feet in width. The immediate question before the court was whether this statute applied to hotels. The court held that its application was intended to be limited to tenement

and apartment houses, and that it had no application to hotels, but incidentally, in delivering the opinion of the court, *Earl, J.*, remarked, "We have no doubt of the competency of the legislature in the exercise of the police power under the constitution to pass such an act." In *Attorney-General v. Williams*, 174 Mass. 476 (aff'd *sub nom. Williams v. Parker*, 188 U. S. 491), the *Copley Square Case*, — where a statutory restriction was placed upon buildings fronting upon a public park and provision for compensation was made, *Knoutton, J.*, delivering the opinion of the court, said, that "in view of the kind of buildings erected on the streets about Copley Square and the uses to which some of these buildings are put, it would be hard to say that this statute might not have been passed in the exercise of the police power, as other statutes regulating the erection of buildings in cities are commonly passed." The case, however, was decided upon the ground that the statute was a proper exercise of the power of eminent domain and the police power of the State was not involved in the case. See also *Parker v. Commonwealth*, 178 Mass. 199, 203; *Attorney-General v. Williams*, 178 Mass. 330; *supra*, § 695.

² In *Welch v. Swasey*, 193 Mass. 364, the constitutionality of statutes regulating the height of buildings in Boston was sustained by the court. By an act passed in 1904 it was di-

The grounds upon which the court sustained this exercise of the police power were that buildings may be erected to such a

rected that the city of Boston be divided into two districts, viz. District A being the part of the city devoted to business or commercial pursuits, and District B, being the residential portion of the city. The statute prescribed that in District A no building should be erected of a greater height than one hundred and twenty-five feet above the grade of the street, and in District B that no building should be erected of a greater height than eighty feet above the grade of the street. In 1905 a supplementary act was enacted providing for the appointment of a commission by the mayor of Boston, which commission was entrusted with the general execution of the provisions of the acts of 1904 and 1905. Discretionary power was conferred upon the commission to allow in District B—the residential district—buildings of a height of one hundred feet instead of eighty feet above the level of the grade of the street, and of one hundred and twenty-five feet above the grade of the street when situated within fifty feet of the boundary line of District B. The commission adopted regulations for District B, which among other things prescribed that on streets exceeding sixty-four feet in width, buildings might be erected to a height not greater than one and one-quarter times the width of the street, but not exceeding one hundred feet above the grade of the street in all. The regulations of the commission also permitted buildings to be erected to a height of one hundred and twenty-five feet in certain designated parts of the fifty feet belt outside of but adjoining the boundary of District A. An application was made by the plaintiff for a permit to erect a building in District B in excess of the height prescribed by the statute and by the regulations of the commission. This application was denied, and the question was raised before the court whether the statute was constitutional.

Knouton, C. J., who delivered the opinion of the court sustaining the constitutionality of the statute, stated the questions before the court to be as follows: *First*, can the legislature in the exercise of the police power limit the height of buildings in cities so

that none can be erected above a prescribed number of feet? *Second*, can it classify parts of a city so that in some parts one height is prescribed, and in others different heights? *Third*, if so, can it delegate to a commission the determination of the boundaries of these different parts so as to conform to the general provisions of the statute? *Fourth*, can it delegate to a commission the making of rules and regulations so as to permit different heights in different places according to different conditions in different parts of the one of the general classes of territory made in the original statute? *Fifth*, if it can, are the rules and regulations made by the commissioners within the statute and within the constitutional authority of the legislature and its agents? The court answered all these questions in the affirmative.

On the general question of the power of the legislature to restrict the height of buildings in the exercise of the police power, *Knouton*, C. J., said: "The erection of very high buildings in cities, especially upon narrow streets, may be carried so far as materially to exclude sunshine, light, and air, and thus affect the public health. It may also increase danger to persons and property from fire, and be a subject for legislation on that ground. These are proper subjects for consideration in determining whether, in a given case, rights of property in the use of land should be interfered with for the public good." On the subject of provisions prescribing different heights in different parts of the city, he said: "The next question is whether the general court may establish different heights for different neighborhoods according to their conditions and the use to which the property in them is put. The statute should be adapted to the accomplishment of the purposes in which it finds its constitutional justification. It should be reasonable not only in reference to the interests of the public, but also in reference to the rights of landowners. If these rights and interests are in conflict in any degree, the opposing considerations should be balanced against each other, and each should be made to yield reasonably to those upon the other side. The value of

height as materially to exclude sunshine, light, and air, and thus affect the public health, and they might also increase the danger to persons and property from fire. These and other matters in which the extreme height of buildings may affect the public interests seem to us to be sufficient to justify the exercise of the police power in this respect, and the general competency of the legislature under the police power to regulate the height of buildings in cities does not appear to us to be open to any serious question.

§ 697. **Regulation of Signs and Bill-Boards.** — The prohibition of the *erection and maintenance of signs and bill-boards within the limits of private property* for purely æsthetic reasons, and without reference to the safety or welfare of the inhabitants, has been held to be a substantial appropriation of that property, which the legislature cannot make without compensation to the owner. Therefore, the legislature cannot authorize municipal corporations to prohibit by ordinance the construction of bill-boards and signs for advertising upon such property.¹ But it is within the power of the legislature

land and the demand for space in those parts of Boston where the greater part of the buildings are used for purposes of business or commerce is such as to call for buildings of greater height than are needed in those parts of the city where the greater part of the buildings are used for residential purposes. It was therefore reasonable to provide in the statute that buildings might be erected to a greater height in the former parts of the city than in the latter, even if some of the streets in the former are narrower than those in the latter. The general subject is one that calls for a careful consideration of conditions existing in different places. In many cities there would be no danger of the erection of high buildings in such localities and of such a number as to affect materially the public health or safety, and no statutory restrictions are necessary. Such restrictions in this country are of very recent origin, and they are still uncommon. Unless they place the limited height at an extreme point, beyond which hardly any one would ever wish to go, they should be imposed only in reference to the uses for which the real estate probably will be needed, and the manner in which the land is laid out, and the nature of the approaches to it." But the court further pointed out that statutes, rules

and regulations for the purpose must be reasonably directed to an accomplishment of the objects in which the constitutional authority rests, and must have a real substantial relation to the public purposes which the government can accomplish.

¹ *Chicago v. Gunning System*, 214 Ill. 628, aff'g 114 Ill. App. 377; *Bill Posting Sign Co. v. Atlantic City*, 71 N. J. L. 72; *Passaic v. Paterson Bill Posting &c. Co.*, 72 N. J. L. 285, rev'g 71 N. J. L. 75; *People v. Green*, 85 N. Y. App. Div. 400; *Crawford v. Topeka*, 51 Kan. 756; *Commonwealth v. Boston Adv. Co.*, 188 Mass. 348; *Bryan v. Chester*, 212 Pa. 259. See *supra*, §§ 695, 696, also Mr. Larremore's article, 30 *Harvard Law Review* (November, 1906), p. 35. By statute park commissioners had authority to "make such reasonable rules and regulations respecting the display of signs, posters, or advertisements in or near to and visible from" parks in their care "as they may deem necessary for preserving the objects for which such parks and parkways are established and maintained." A rule having been adopted forbidding the maintenance of business signs so near a parkway as to be plainly visible to the naked eye of persons in the parkway, the court held that it was unreasonable and void, because it amounted to a taking of property

to authorize the city authorities to *regulate boards erected for the purpose of bill posting*, so far as the regulation is necessary to the wel-

for public use without compensation. *Commonwealth v. Boston Adv. Co.*, 188 Mass. 348. *Barker, J.*, pointed out that the education of youth was a public purpose of the highest kind, yet no one would contend that the State could take a man's land for a school-house without just compensation, and added: "If the police power technically so called will not justify a taking of property without compensation to promote the education of youth, it cannot justify such a taking for the promotion of merely æsthetic purposes. Therefore, if the rules of the commission amount to a taking of property, as no compensation is provided, they cannot be held valid. The plain and intended purpose of the rule is to prohibit the use of land near public parks and parkways for advertising. This has come to be an ordinary and remunerative use of lands near largely travelled streets, parkways, public parks, railroads, and other places frequented in numbers by the public. It is as natural a use of such lands as is the use of store-fronts and show-windows for the display of goods kept for sale, or for other modes of advertising. It resembles the placing of advertising pages on each side of the literary portion of a periodical, or the placing in street cars or railway stations of advertisements disconnected with the business of transportation. All these at present are usual, common, and profitable uses of property, of which every one sees daily numerous instances."

In *People v. Green*, 85 N. Y. App. Div. 400, a statute authorized the department of parks of New York City to regulate and determine the *height and character of all fences* in and about all vacant or unimproved lands *fronting upon or adjacent to all public parks, &c.*, and to regulate and control the exhibition of advertisements thereon or structures intended for advertisement or the exhibition of advertisements upon any lands fronting upon the public parks, squares, and places in the city. The department was also authorized to enforce obedience to such ordinances or rules by suitable penalties. The park board adopted a rule or ordinance, the effect

of which was to prohibit the placing upon any fence or other structure of any advertisement or advertising devices intended for advertisement in, about, or upon any vacant or unimproved land fronting upon or adjacent to any public park, &c., "until a description or drawing of the same shall be filed with the commissioners of public parks, approved by them, and a permit in writing issued therefor." The court considered that the rule or ordinance so adopted pursuant to the statute was in effect an attempt to appropriate or control the use of private property without regard to the public health or welfare; that it was an appropriation of private property which could only be made by due process of law, and upon just compensation; and that the rule or ordinance was beyond the power of the legislature to authorize or the commissioners of public parks to enact. *Ingraham, J.*, said: "It is not claimed that these advertisements affected the health or welfare of the community. They were not dangerous to pedestrians using the streets; did not in any respect interfere with the public parks, places, streets, or avenues; created no condition which would justify the interference of the police power of the State, but prevented a use of private property by the owners unless such use was approved by the park department. I suppose it would not be claimed that the legislature would have power to provide that no building of any kind should be erected upon such property. The provision of the Constitution that private property shall not be taken for public use without compensation certainly prohibits the legislature from interfering with the use of private property by its owner, unless such use would justify the interference by the State under what is called the police power. But the placing of a fence upon private property upon which is displayed an advertisement is certainly no more subject to the police power of the State than would be the placing upon the property of a shop, house, or other structure. The prohibition of such a use of the property does not come within any of the definitions of the police power to which our attention has been called. While the

fare of the inhabitants of the city, or the safety of persons passing along its streets.¹ Signs and bill-boards may be erected in such a manner as *to be dangerous to the public* by falling or being blown down, or constructed of such materials and dimensions as to be dangerous, or placed upon buildings or other structures in such a manner as to endanger the life and limb of the citizen, or erected within the fire limits in such proximity to buildings as to increase the danger of loss by fire, or have printed or displayed on them obscene characters tending to demoralize and injure the public morals. If boards are erected in violation of these public rights or interests, and of others which might be mentioned, ample power may be conferred by statute to regulate them, provided such regulations are reasonably

legislature might prohibit such a structure as would expose those using the parks or streets to danger, or prevent the exhibits of immoral advertisements or pictures, or the use of property in a way that would endanger the health of the community, it has no power to prevent the owners of private property adjacent to a public park from using their property to advertise what they or others have to sell so long as the public health or welfare is not affected; and being without power to prohibit, they are without power to require the consent of any public officer before the property can be used for that purpose. If this ordinance were enforced, no owner of a house could place upon it a notice that it was for rent or for sale without the consent of the park board. No person keeping a shop upon any street adjacent to the park could place his name upon the front of the building, or an advertisement of the business that he carried on, without the consent of the department. It seems to me that this is an attempt to appropriate private property for public use without compensation and without due process of law, and prohibited by section 6 of article 1 of the Constitution."

¹ *St. Louis v. St. Louis Theatre Co.*, 202 Mo. 690; *Rochester v. West*, 164 N. Y. 510, aff'g 29 N. Y. App. Div. 125; *Crawford v. Topeka*, 51 Kan. 756. The fact that at a time when there was no ordinance prohibiting it, a property owner erected an illuminated sign projecting more than eighteen inches over the street, does not prevent conviction for a violation of an ordinance subsequently adopted

imposing a penalty for maintaining such signs. *St. Louis v. St. Louis Theatre Co.*, 202 Mo. 690. The word "structures" in an ordinance which provides that "before the erection, construction, or alteration of any building or part of any building, *structure*, or part of any structure, or wall," the owner, &c., shall file plans and specifications, and shall not proceed with the work until the plans and specifications have been approved by the commissioner of buildings, includes "sky signs" erected on the top of a building for advertising purposes. *Matter of New York*, 122 N. Y. App. Div. 741; *City of New York v. Wineburgh Adv. Co.*, 122 N. Y. App. Div. 748.

When a statute or ordinance requires the approval of the building department to any structure or erection in such language as to include therein "sky-signs" on buildings, a person who has erected or who proposes to erect a sky-sign and who has not applied for or procured a permit from the building department, is not in a position to attack the constitutionality of a provision of the statute or ordinance limiting the height of sky-signs when erected wholly on private property. He must first either procure the permit or apply therefor, and if the permit be refused because the proposed sky-sign exceeds the height prescribed by ordinance, he must apply for *mandamus* to compel the permit to be issued notwithstanding the limitation. *Matter of New York*, 122 N. Y. App. Div. 741; *City of New York v. Wineburgh Adv. Co.*, 122 N. Y. App. Div. 748.

necessary for the protection of the public health, morals, or safety. Nor will the fact that such structures are placed upon private property, and not on the public streets, protect those owning or using them against such reasonable regulations.¹

A legislative delegation of authority to enact ordinances and by-laws regulating the erection of signs and bill-boards may be made by any general delegation of power to enact ordinances for police purposes. Authority to enact such ordinances is conferred by charter power to pass ordinances, "to regulate the police of the city and to pass and enforce all necessary police ordinances,"² or to pass ordinances for the good government of the city and the preservation of peace and good order,³ or to enact ordinances to prevent and abate nuisances.⁴ The power to regulate the construction and maintenance of signs and bill-boards is also, by necessary implication, conferred by charter authority to license and regulate bill-posters and bill distributors and sign advertising. The power to regulate means to govern by, or subject to, certain rules or restrictions; it implies a power of restriction and restraint not only as to the manner of conducting a specified business, but also as to the erection in or upon which the business is to be conducted.⁵ But power to regulate signs and bill-boards by ordinance conferred on a municipal corporation must be exercised in a reasonable manner, and if the purport or effect of the ordinance is to so unreasonably restrict or interfere with the use and enjoyment of private property as to prevent the erection of any signs or bill-boards thereon, or to deprive the owner of the use or enjoyment of any substantial portion of it, the ordinance will be invalid as unreasonable.⁶ An ordinance which prohibits the erec-

¹ *Chicago v. Gunning System*, 214 Ill. 628, aff'g 114 Ill. App. 377. In this case the court also says that the erection of signs and bill-boards on private property may be regulated for the purpose of preventing obstruction of the view of railroad crossings which endanger life by accident. But *quære* whether this view of the court may not require qualification.

² *Chicago v. Gunning System*, 214 Ill. 628, aff'g 114 Ill. App. 377; *In re Wilshire*, 103 Fed. Rep. 620.

³ *Gunning System v. Buffalo*, 75 N. Y. App. Div. 31.

⁴ *Whitmire & Filbrick Co. v. Buffalo*, 118 Fed. Rep. 773; *Chicago v. Gunning System*, 214 Ill. 628, aff'g 114 Ill. App. 377.

⁵ *Rochester v. West*, 164 N. Y. 510, aff'g 29 N. Y. App. Div. 125. A

city cannot *enforce by injunction* an ordinance prohibiting the posting of advertising bills in the city without a permit, unless the complaint contains allegations tending to show that the business, as conducted, is a nuisance. *Mt. Vernon v. Seeley*, 74 N. Y. App. Div. 50. But the legislature may confer upon the city by express enactment the right to this remedy. *New York v. Wineburgh Advertising Co.*, 122 N. Y. App. Div. 748. See Index, *Equity; Injunction*.

⁶ *Chicago v. Gunning System*, 214 Ill. 628, aff'g 114 Ill. App. 377; *Passaic v. Paterson Bill Posting, &c. Co.*, 72 N. J. L. 285, rev'g 71 N. J. L. 75; *Crawford v. Topeka*, 51 Kan. 756. A city ordinance requiring that signs or bill-boards shall be constructed *not less than 10 feet from the street line* is a

tion of signs and bill-boards without the permission of the common council and which requires every applicant for permission to erect such bill-boards to give notice to the owners and occupants of the adjacent houses and lots, has been sustained as a reasonable exercise of the power to regulate.¹ Similarly, ordinances *restricting the height of signs and bill-boards* within reasonable limits unless permission be given by the common council to erect bill-boards exceeding the restricted height, have been sustained as a valid exercise of the powers conferred upon the common council.²

regulation not reasonably necessary for the public safety and cannot be justified as an exercise of the police power. *Passaic v. Paterson Bill Posting, &c. Co.*, 72 N. J. L. 285, rev'g 71 N. J. L. 75. So an ordinance which requires signs and bill-boards to be "placed at such distance from the public street or sidewalk as *shall exceed by at least 5 feet* the height of such bill-board or structure" and which does not have any reference to the manner of constructing the bill-board or the safety or welfare of the public is unreasonable. *Crawford v. Topeka*, 51 Kan. 756. In *Chicago v. Gunning System*, 214 Ill. 628, aff'g 114 Ill. App. 377, the court had before it an elaborate ordinance, which placed numerous restrictions upon the erection of signs and bill-boards. This ordinance required bill-boards to be made of sheet or galvanized iron or other incombustible material; that they should not exceed 100 square feet; that they should be located at least 25 feet from the front of the lot; that they should not exceed 10 feet in height; that the base should be three feet above the street level or above the ground when the grade of the street was not established; that no bill-board should be erected within five feet of any other bill-board; and that each bill-board should have independent supports. In addition, it was provided that no bill-boards should be erected on boulevards, or public drives, or in streets three-fourths of which were devoted to private residences, without the written consent of three-fourths of the owners thereon. The ordinance applied to bill-boards in every part of the city, remote and thinly settled, as well as thickly settled and devoted to business purposes. The court held that the ordinance was unreasonable and void, and in so holding it said that while an ordinance might be reasonable

as to the thickly settled and well built parts of the city, it might be unreasonable as to thinly settled and unimproved parts. In this case the ordinance also imposed a *license tax of fifty cents per square foot*. This license tax, if imposed upon the bill-boards maintained by the plaintiff, amounted to \$200,000 per year, while the gross income of the plaintiff from its bill-boards only amounted to \$72,000. It was held that the license tax was unreasonable, prohibitive in its terms, unjust, and oppressive, and therefore void.

A city ordinance providing that "no person shall place or carry, or cause to be placed or carried, on any sidewalk any show-board, placard, or sign for the purpose of there displaying the same," is reasonable and valid as a regulation of the use of the city streets. *Commonwealth v. McCafferty*, 145 Mass. 384. A *store sign overhanging the sidewalk* may be removed by the city authorities under their police powers and incidentally to their express powers, where such sign amounts to an obstruction "hindering, delaying, or endangering" the use of the sidewalk. *State v. Higgs*, 126 N. Car. 1014. Ordinance making it a misdemeanor to erect or maintain any *sign extending over the sidewalk more than 18 inches* held to be reasonable and valid. *St. Louis v. St. Louis Theatre Co.*, 202 Mo. 690.

¹ *Rochester v. West*, 164 N. Y. 510, aff'g 29 N. Y. App. Div. 125; *Gunning System v. Buffalo*, 75 N. Y. App. Div. 31.

² *Whitmier & Filbrick Co. v. Buffalo*, 118 Fed. Rep. 773 (bill-boards more than 7 feet in height); *Gunning System v. Buffalo*, 75 N. Y. App. Div. 31 (bill-boards more than 7 feet in height.) In *In re Wilshire*, 103 Fed. Rep. 620, the ordinance contained an absolute prohibition of the erection

§ 698. **Regulation of Tenement Houses.**—Tenement houses as popularly known, and also as defined by statute,¹ have been regarded as a distinct class of buildings, *susceptible of and requiring regulation* by virtue of the police power.² It is therefore within the power of the legislature, either directly by statute or by authority conferred

of any bill-boards exceeding 6 feet in height. The court adopted the view that it was impossible to say that this ordinance was so unreasonable as to justify judicial interference, and it therefore declined to adjudge the ordinance to be void.

¹ *Definition:* By the New York Tenement House Act (Laws, 1901, chap. 334), "A *tenement house* is any house or building or portion thereof, which is rented, leased, let, or hired out to be occupied, or is occupied as the home or residence of three families or more, living independently of each other and doing their cooking upon the premises, or by more than two families upon any floor so living and cooking, but having a common right in the halls, stairways, yards, water-closets, privies, or some of them." An act for the regulation of tenement and lodging houses in the cities of New York and Brooklyn was enacted in 1867 (Laws, 1867, chap. 908), by which tenement houses were defined substantially as above. The same definition is to be found in the Charter of New York City of 1882 (Laws, 1882, chap. 410, § 666).

The exercise of the police power in New York City has been confined to tenement houses as defined by the statute. The statutory definition is different from the popular conception of the term, and in covenants and restrictions in deeds prohibiting the erection of tenement houses these words have been construed to mean dwellings for the poorer classes occupied by three families or more in crowded parts of cities. See *Kitching v. Brown*, 180 N. Y. 414, modifying 92 App. Div. 160, where *Werner, J.*, refers to the legislation on the subject and to the philanthropic movements for tenement-house reform in New York City, and points out the difference between "*tenement houses*," "*flats*," and "*apartment houses*." See also on the subject of what are tenement houses within the meaning of restrictive covenants, *Musgrave v. Sherwood*, 53 How. Pr. (N. Y.) 311; *Levy v. Schreyer*,

27 N. Y. App. Div. 282; s. c. 71 N. Y. App. Div. 616, modified 177 N. Y. 293; *Sonn v. Heilberg*, 38 N. Y. App. Div. 515; *White v. Collins Building, &c. Co.*, 82 N. Y. App. Div. 1; *Boyd v. Kerwin*, 15 N. Y. Supp. 721; *McClure v. Leaycraft*, 183 N. Y. 36; *Marx v. Brogan*, 188 N. Y. 431, rev'g 111 N. Y. App. Div. 480. As to the meaning of the term *tenement houses* when used in statutes, see also *Young v. Boston*, 104 Mass. 95; *Rose v. King*, 49 Ohio St. 213, 227.

² In *Matter of Paul*, 94 N. Y. 497, 505, where a collateral question was involved, *Finch, J.*, who delivered the opinion of the court, said: "These houses, as a known and distinct class, are recognized and defined by law. They are apt to be ill-ventilated, unclean, and packed full of inmates, and to become centres or radiating points of contagious disease. As such they might be the proper subjects of sanitary regulation in the interest of public health." In *New York Health Department v. Trinity Church*, 145 N. Y. 32, where the validity of an exercise of the police powers was directly involved, *Peckham, J.*, said with reference to the evils incident to *tenement houses*: "The tenement house in New York is a subject of very great thought to the residents of that city. The numbers of people that live in such houses, their size, their ventilation, their cleanliness, their liability to fires, the exposure of their occupants to contagious diseases, and the consequent spread of the contagion through the city and the country, the tendencies to immorality and crime where there is very close packing of human beings of the lower order in intelligence and morals, all these are subjects which must arouse the attention of the legislator and which it behooves him to see to in order that such laws are enacted as shall directly tend to the improvement of the health, safety, and morals of the men and women that are to be found in such houses."

upon municipal corporations, to enact rules and ordinances to *regulate the manner of constructing* these buildings for the purpose of promoting the health and safety of the inhabitants. It is not a valid objection to the exercise of this power that the *expense of making changes* in such buildings is imposed upon the owner, so long as the object of the law is without doubt the promotion or the protection of the health of the inmates of these houses, or the preservation of the houses themselves, and consequently much other property, against loss or destruction by fire, and so long as the alterations or changes can be effected at a reasonable cost to the owner.¹

By virtue of the power to regulate these houses, the legislature may require that tenement houses previously erected shall be *furnished by the owners with water*, when they shall be directed so to do by the board of health or other local authority, in sufficient quantity at one or more places on each floor occupied or maintained to be occupied by one or more families. This is a proper exercise of the police power of the State in regard to the public health and as a protection against fire.² It is also a proper and constitutional

¹ In *New York Health Department v. Trinity Church*, 145 N. Y. 32, 50, *Peckham, J.*, said with reference to the obligation placed upon owners to make alterations and improvements in tenement houses: "We feel that we ought to inspect with very great care any law with regard to tenement houses in New York and to hesitate before declaring any such law invalid so long as it seems to tend plainly in the direction we have spoken of and to be reasonable in its provisions. If we can see that the object of this law is without doubt the promotion or the protection of the health of the inmates of these houses, or the preservation of the houses themselves, and consequently much other property from loss or destruction by fire, and if the act can be enforced at a reasonable cost to the owner, then, in our opinion, it ought to be sustained. We believe this statute fulfils these conditions."

The fact that a statute regulating and affecting tenement houses is *applicable only to cities of the first class and to tenement houses only*, does not make it *unconstitutional* under the provision of the Federal Constitution that no State shall deny to any person within its jurisdiction the equal protection of the laws, nor does the act by reason of its application to existing

buildings violate the constitutional provisions against taking private property for public uses without just compensation. *Tenement House Dept. v. Moeschel*, 179 N. Y. 325, s. c. 9 N. Y. App. Div. 526; 90 N. Y. App. Div. 605, *aff'd*, 203 U. S. 583.

² In *New York Health Dept. v. Trinity Church*, 145 N. Y. 32, 48, *Peckham, J.*, said: "We think the act is valid as an exercise of the police power with respect to the public health and also with respect to the public safety regarding fires and their extinguishment. We cannot say as a legal proposition that it tends only to the convenience of the tenants in regard to their use of water. We cannot say that it has no fair, and plain, and direct tendency towards the promotion of the public health, or towards the more speedy extinguishment of fires in crowded tenement houses. That the free use of water, especially during the summer months, tends towards the healthful condition of the body by reason of the increased cleanliness occasioned by such use, there can be no reasonable doubt. The supply of water to the public in a city has become not only a luxury, but an absolute necessity for the maintenance of the public health and safety. . . . The water is brought into the

exercise of the police power of the State for the protection of the public health to require by statute that *all school sinks, privy vaults, &c.*, in existing tenement houses in cities be *removed and replaced by individual water-closets*.¹

But this power is *not without limit*. It must be exercised reasona-

city so that it may be used in every house and building within its limits, and although we may, and indeed must, admit that no health law could practically be enforced which should provide that every individual inhabitant of the tenement houses should use the water, yet we think that it is perfectly clear that facilities for the use of the water will almost necessarily be followed by its actual use in larger quantities and more frequently than would be the case without such facilities, and to the great benefit of the health of the inhabitants of such houses. Those occupants require it more even than their more favored brethren living in airy, larger, more spacious and luxurious apartments. Their health is a matter of grave public concern. The legislature cannot in practice enforce a law so as to make a man wash himself; but when it provides facilities therefor, it has taken a long step towards the accomplishment of that object. Dirt, filth, nastiness in general, are great promoters of disease. That they breed pestilence and contagion, sickness and death, cannot be successfully denied. . . . That opportunities, conveniences for the use of water in these tenement houses will unquestionably tend towards and be followed by more cleanly living on the part of the occupants of those houses cannot, it seems to me, admit of any real doubt; and if so, then the law which provides at a reasonable cost for the furnishing of such facilities is plainly and honestly a health law."

Fire escapes. At common law there is no obligation on the owner of buildings to put fire escapes upon them for the protection of tenants or other persons therein. *Arms v. Ayer*, 192 Ill. 601; *Jones v. Granite Mills*, 126 Mass. 84; *Keith v. Granite Mills*, 126 Mass. 90; *Pauley v. Steam Gauge & L. Co.*, 131 N. Y. 90, rev'g 61 Hun (N. Y.), 254; *Schmalzried v. White*, 97 Tenn. 36. Statutory provisions requiring fire escapes on factories, tenement houses, and other buildings of a like nature, are a *valid and constitutional* exercise of the

police power. *Arms v. Ayer*, 192 Ill. 601; *Wiley v. Mulledy*, 78 N. Y. 310; *Pauley v. Steam Gauge & L. Co.*, 131 N. Y. 90, rev'g 61 Hun (N. Y.), 254; *Rose v. King*, 49 Ohio St. 213; *Cincinnati v. Steinkamp*, 54 Ohio St. 284; *Schott v. Harvey*, 105 Pa. 222; *Keely v. O'Conner*, 106 Pa. 321; *Sewell v. Moore*, 166 Pa. 570. Such a statute is not unconstitutional as a delegation of legislative power because it refers to the discretion of the factory inspector the number, location, material, and construction of the fire escapes. *Arms v. Ayer*, 192 Ill. 601. For instances of ordinances requiring fire escapes on buildings, see *Schmalzried v. White*, 97 Tenn. 36; *Weeks v. McNulty*, 101 Tenn. 495.

¹ *Tenement House Dept. v. Moesch*, 179 N. Y. 325; s. c. 89 N. Y. App. Div. 526; 90 N. Y. App. Div. 605, aff'd 203 U. S. 583. In *Commonwealth v. Roberts*, 155 Mass. 281, a statute requiring that certain buildings in Boston situated on a street in which there was a sewer should have *water-closets* connected therewith and no cesspools or privies was held to be a constitutional exercise of the police power. In *Harrington v. Providence Board of Aldermen*, 20 R. I. 233, a statute providing for the *drainage of land into sewers* and directing the removal of privy vaults was also upheld as a constitutional exercise of the police power. Ordinance prohibiting the *maintenance of any privy vault* within twenty-five feet of any door or window of any residence and declaring the same a nuisance, held to be reasonable. *Cartwright v. Cohoes*, 39 N. Y. App. Div. 69.

In *Tenement House Dept. v. Moesch*, 179 N. Y. 325; s. c. 89 App. Div. 526; 90 App. Div. 603, it appeared that the cost of removing school sinks and constructing individual water-closets in the case of a tenement house valued at \$16,500 amounted to from \$750 to \$2800. It was held that this cost did not affect the constitutionality of the act as to the owner of the property.

bly with reference to the nature and cost of the improvement and without imposing an undue burden upon the owners.¹

§ 699 (380). **Markets, and of the Power to establish and regulate.**

— The States, under their police power, may delegate to municipal corporations the *authority to establish, or authorize the establishment of markets*; and it is competent to such corporations, under proper grants of power, to enact ordinances forbidding sales and purchases of marketable articles, except at designated market-places.² The extent of the power possessed by a particular corporation depends upon its charter. In England, the regulation of markets by by-laws has long been exercised, and such by-laws are sustained as being reasonable, and conducive to the health and good government of the municipality.³ In this country the practice is almost uni-

¹ In *New York Health Dept. v. Trinity Church*, 145 N. Y. 32, *Peckham, J.*, pointed out that under this legislation the owners of the buildings could not be compelled to furnish each room with all the modern conveniences found in a well-appointed hotel. Reasonable provision for the health and safety of the inhabitants of the tenement house and the welfare of the community is the test. Simple convenience will not authorize the passage of this kind of legislation, and on this subject he said (p. 42): "These exactions must be regarded as legal so long as they bear equally upon all members of the same class and their cost does not exceed what may be termed one of the conditions upon which individual property is held. It must not be an unreasonable exaction either with reference to its nature or to its cost. . . . The difference between what is and what is not reasonable frequently constitutes the dividing line between a valid and a void enactment by the legislature in the exercise of its police power. In commenting on the difference in any given case which would render an act valid or otherwise, Mr. Justice *Holmes* in *Rideout v. Knox*, 148 Mass. 368, 372, said: 'It may be said that the difference is only one of degree; most differences are, when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the legislature to exercise police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of pre-

venting a manifest evil; larger ones could not be except by the exercise of the right of eminent domain.'"

² *Ex parte Byrd*, 84 Ala. 17; *Henry v. Macon*, 91 Ga. 268; *State v. Namias*, 49 La. An. 618, citing text; *New Orleans v. Faber*, 105 La. 208, 213, citing text; *Crowley v. Rucker*, 107 La. 213; *State v. McMahon*, 62 Minn. 110. See also *State v. Davidson*, 50 La. An. 1297. Under the police power it is competent for the legislature to prohibit private markets within a reasonable designated distance of the public market. *New Orleans v. Stafford*, 27 La. An. 417; *Natal v. Louisiana*, 139 U. S. 621; *New Orleans v. Kients*, 52 La. An. 950; *New Orleans v. Graffina*, 52 La. An. 1082. Where an ordinance fixes reasonable market hours, it is not invalid because the statute authorizing it prohibits sales elsewhere than in the city market without any express limitation as to time or hours. *Henry v. Macon*, 91 Ga. 268. Power to establish and regulate markets authorizes the prohibition under penalty of the retail sale of meat at any other place on the sidewalk or street appointed for market-places except upon the stalls erected for the purpose. *Keek v. Cincinnati*, 6 Ohio Dec. 97.

³ *Pierce v. Bartram*, Cowp. 270; *Player v. Jenkins*, 1 Sid. 284; *Rex v. Cottrell*, 1 B. & Ald. 67. See also *Mosley v. Walker*, 7 Barn. & Cr. 40; *Macclesfield v. Pedley*, 4 Barn. & Adol. 397; *Grant on Corp.*, 166, as to exclusive privileges in England as to markets and market tolls. *Definition*: A market is a franchise or liberty

versal on the part of the legislature to confer upon the municipal agencies more or less authority with respect to markets and market-places, and such grants are not so strictly construed as those which invest the corporation with powers of a more extraordinary or unusual character; at least such is the case unless a monopoly in favor of private individuals is sought to be sustained, against which the courts strongly lean.¹

§ 700 (381). **Power to build and establish Markets.** — Incorporated cities and towns may have the power to build market-houses without an *express* grant. Thus it has been held that a town having authority "to make by-laws for managing and ordering its *prudential* affairs" has power — the court looking somewhat to usage and custom to ascertain what subjects of common interest are embraced under the term "*prudential*" — to appropriate money for the erection

derived from the crown, by grant, or prescription which presupposes a grant. 2 Black. Com. 37. "It is a designated place in a town or city to which all persons can repair who wish to buy or sell articles there exposed for sale." *Per Breeze, J., Caldwell v. Alton*, 33 Ill. 416.

"A municipal market consists: 1. In a place for sale of provisions and articles of daily consumption. 2. Convenient fixtures. 3. A system of police regulations, fixing market hours, making provisions for lighting, watching, cleaning, detecting false weights and unwholesome food, and other arrangements calculated to facilitate the intercourse and insure the honesty of buyer and seller. 4. Proper officers to preserve order and enforce obedience to the rules." *Per Lane, C. J., Cincinnati v. Buckingham*, 10 Ohio, 257. See further as to the definition of a market, *Jacksonville v. Ledwith*, 26 Fla. 163, 189.

Under power "to regulate the sale of meats, fish, and vegetables," the city council may, by ordinance, prohibit the sale thereof *outside of the public markets* without a license. *Buffalo v. Hill*, 79 N. Y. App. Div. 402. Under a similar power sales may be confined to the public markets established under a grant of power to establish and regulate markets. *Jacksonville v. Ledwith*, 26 Fla. 163; *Blanchard v. Ivers*, 40 Fla. 117. But under its power to establish and regulate markets, the city cannot forbid the peddling of meat in the streets, until it has established a meat market, and then only as a regu-

lation of the market. *Burlington v. Dankwardt*, 73 Iowa, 170.

¹ *Wartman v. Philadelphia*, 33 Pa. St. 202, 209; *LeClaire v. Davenport*, 13 Iowa, 210; *White v. Kent*, 11 Ohio St. 550; *St. John v. Mayor, &c. of New York*, 6 Duer (N. Y.), 315; *Ash v. People*, 11 Mich. 347; *St. Louis v. Jackson*, 25 Mo. 37; *St. Louis v. Weber*, 44 Mo. 547; *Nightingale, In re*, 11 Pick. (Mass.) 168; *Cougot v. New Orleans*, 16 La. An. 21; *Buffalo v. Webster*, 10 Wend. (N. Y.) 100; *Yates v. Milwaukee*, 12 Wis. 752; *Bethune v. Hughes*, 28 Ga. 560; distinguished, *Badkins v. Robinson*, 53 Ga. 613; *Ketchum v. Buffalo*, 14 N. Y. 356; *Municipality No. 1 v. Cutting*, 4 La. An. 335; *New Orleans v. Guillotte*, 12 La. An. 818 (corporate partnership with individuals); *State v. Lieber*, 11 Iowa, 407; *Dubuque v. Miller*, 11 Iowa, 583; *Morano v. New Orleans*, 2 La. 217; *St. Paul v. Colter*, 12 Minn. 41; *Atlanta v. White*, 33 Ga. 229; *Jacksonville v. Ledwith*, 26 Fla. 163; *Blanchard v. Ivers*, 40 Fla. 117; *State v. Sarradat*, 46 La. An. 700; *State v. Namias*, 49 La. An. 618; *State v. McMahon*, 62 Minn. 110.

The power to establish and regulate markets, like most other municipal powers, is a *continuing one*, and markets once established may be abandoned or changed at the pleasure of the corporation, and the taxpayers or property owners cannot restrain the action or determination of the council entrusted by the charter with the exercise of the power. *Gall v. Cincinnati*, 18 Ohio St. 563.

of a market-house, and to raise the amount by taxation. This power, it was admitted, more clearly exists in the case of large towns and populous villages.¹

§ 701 (382). **Power to establish and regulate Markets.** — Power conferred upon a municipality “to *establish* and regulate markets” authorizes, as a necessary incident, the purchase of ground upon which to erect a market building.² If the title to land purchased for the erection of a market-house be taken by the municipal corporation in fee, no length of use of the same for a market will *dedicate* it for market purposes; and the markets may be abandoned or changed at the will of the council, and the land thus acquired and held be sold.³ It is incident to the general power to build a market to determine upon the form, dimensions, and style of the edifice, and therefore to employ an architect to prepare plans, specifications, &c.⁴

§ 702 (383). **Limitation of such Power.** — But power to a municipal corporation to establish markets and build market-houses will not give the authority *to build them on a public street*. Such

¹ *Spaulding v. Lowell*, 23 Pick. (Mass.) 71. If the real and principal object is the building of a market-house, the appropriation of a portion of the building for other purposes, as the holding of courts, does not render the erection of the building illegal. If, however, the building of the market-house is merely colorable, that is, done for the purpose of accomplishing distinct and unauthorized objects, it would, says Chief Justice *Shaw*, probably be treated as an abuse of power and a nullity. *Ib.* Power “to appoint market-places and to regulate the same” was held, in connection with a general welfare clause, to authorize the corporation to build a market-house. *Smith v. Newbern*, 70 N. Car. 14.

² *Ketchum v. Buffalo*, 14 N. Y. 356; 17 N. Y. 449; *Caldwell v. Alton*, 33 Ill. 416; *Jacksonville v. Ledwith*, 26 Fla. 163, 192, citing text. It is immaterial whether this power is conferred in express or direct terms, or given only as part of the power to make by-laws, ordinances, &c. *Per Selden, J.*, in *Ketchum v. Buffalo*, 14 N. Y. 356, 362. Purchase of land for market. *People v. Lowber*, 28 Barb. (N. Y.) 65; s. c. more fully, 7 Abb. (N. Y.) Pr. 158; *Gale v. Kalamazoo*, 23 Mich. 344.

³ *Gall v. Cincinnati*, 18 Ohio St. 563;

Cooper v. Detroit, 42 Mich. 584; *Jacksonville v. Ledwith*, 26 Fla. 163. Construction of market-grants in England. Where according to the grant of a market it was to be held in a town, the grantee might from time to time remove the place for holding it according to the convenience of the inhabitants for the time being. *Dixon v. Robinson*, 3 Mod. 108; *Curwen v. Salkeld*, 3 East, 538; *King v. Cotterill*, 1 B. & Al. 67; *Wortley v. Nottingham Local Board*, 21 L. T. N. s. 582. And this applies, although the limits of the town be afterwards extended and the market established within the extended limits. *Mayor, &c. of Dorchester v. Ensor*, L. R. 4 Ex. 335. But this is subject to the rights of any person owning property adjoining the site of the old market. *Ellis v. Corporation of Bridgnorth*, 4 L. T. N. s. 112; *Biggar's Mun. Manual* (Canada, 1900), p. 718 *et seq.*

⁴ *Peterson v. Mayor, &c. of New York*, 17 N. Y. 449. His unauthorized employment by a committee is ratified by a resolution of the council passed with notice of the facts, adopting his plans, drawings, &c., and he may recover of the city for the labor and service of preparing them. *Ib.*; *State v. Dubarry*, 46 La. An. 33 (prescribing dimensions of private market).

erections are nuisances, though made by the corporation, because the street, and the entire street, is for the use of the whole people. They are nuisances when built upon the streets, although sufficient space be left for the passage of vehicles and persons. Such erections may, it seems, be legalized by an express act of the legislature. But unless so legalized, a nuisance erected and maintained by a public corporation may be proceeded against, criminally or otherwise, the same as if erected by private persons.¹

§ 703 (384). **Power over Markets under General Welfare Clause.**

— Every municipal corporation which has power to make by-laws and establish ordinances to promote the general welfare and preserve the peace of a town or city may fix the time or places of *holding public markets* for the sale of food, and make such other regulations concerning them as may conduce to the public interest.² The right to establish a market includes the right to abandon it, or shift it to another place when the public convenience demands it; and of this the council is the judge.³

§ 704 (385). **Nature of Power to establish and regulate.** — A city corporation was invested by its charter with power "to erect market-houses, to establish markets and market-places, and to provide for the government and regulation thereof," and it was at first decided, and in the author's judgment properly decided, by the Supreme Court of the State, that this did not authorize the corporation to pass an ordinance *delegating* to an individual the right to erect market-houses, and to charge rent for the use of the stalls therein, reserving to itself no power to *control* the same, and that the corporation could not compel persons to go to such markets; but subsequently this ruling was reversed, and it was held that such an ordinance was valid, and that the city had the power to authorize the erection of market-houses by an individual, and to declare the same a public market, and to covenant to protect the owner in the

¹ *Wartman v. Philadelphia*, 33 Pa. St. 202, 210; *St. John v. New York*, 3 Bosw. (N. Y.) 483; *State v. Mobile*, 5 Port. (Ala.) 279; *Commonwealth v. Rush*, 14 Pa. St. 186; *Commonwealth v. Bowman*, 3 Pa. St. 203; *McDonald v. Newark*, 42 N. J. Eq. 136. See chapter on Streets, *post*. Under the Constitution of *New Jersey*, the legislature cannot authorize a market in the public streets without providing compensation to adjoining lot owners.

² *Per Black, C. J.*, *Wartman v. Philadelphia*, 33 Pa. St. 202, 209. Note his observations in this case upon the necessity and convenience of markets.

³ *Ib.*; *Jacksonville v. Ledwith*, 26 Fla. 163. "The right to establish markets is a branch of the sovereign power, and the right to regulate them is necessarily a power of municipal police." *Per Eustes, C. J.*, *Municipality No. 1 v. Cutting*, 4 La. An. 335.

exclusive privilege thereof; and that the city was liable for failing to protect him by the passage of the requisite ordinances, he having, on the faith of the ordinance, erected an expensive market-house.¹

§ 705 (386). **Construction of Special Powers in Relation to Markets.** — Power to make "by-laws relative to the public markets," &c., while it would not authorize a corporation entirely to prohibit the sale of meats, &c., within its limits, because this would be in general restraint of trade, will nevertheless authorize a by-law forbidding the *hawking about* or *selling by retail* meats, &c., except

¹ *Le Claire v. Davenport*, 13 Iowa, 210; overruling *Davenport v. Kelly*, 7 Iowa, 102. It may be suggested that the right to pass such an ordinance, and the liability for failing to pass others, may admit, at least, of fair debate, in view of the surrender by the city of its charter powers, and its inability in law to make binding contracts with reference to the future exercise of its legislative authority. The soundness of this suggestion is confirmed by the decision in *Gale v. Kalamazoo*, 23 Mich. 344; *post*, chap. xxxii. In the *Kelly* case, *supra*, the point was decided, and is not overruled, that the charter power to establish markets, &c., conferred upon the council the authority to prohibit the exposing and offering for sale meat in any other places than those the ordinance designated. *Ash v. People*, 11 Mich. 347; *Hatch v. Pendergast*, 15 Md. 251.

A city in granting a license and selling to a party the right to occupy a stall in the market *does not impliedly contract to protect the lessee* from competition by unlicensed persons; nor can such a contract be implied against the corporation from the existence of an ordinance prohibiting the same; and the failure of the officers of the corporation, though wilful, to enforce the ordinance against unlicensed sellers, is no defence to a bond given by the lessee for the payment of stall rent. *Peck v. Austin*, 22 Texas, 261. Nor does a city owning and leasing a market-house impliedly engage or covenant that it will not exercise its power to establish markets by erecting other market-houses and leasing them to others; if it does so, the injury to the first lessees is *damnum absque injuria*. *Cougot v. New Orleans*, 16 La. An. 21. A municipal corporation may contract for building a market-house with an indi-

vidual or corporation, conceding in consideration of such building, and the use of part of the same, exclusive market privileges in such city, with right to lease stalls, collect rents, and exemption from taxes for twenty-one years; but a purchaser at a sale under a judgment against the owner takes only the right of the owner bound by the judgment, but this will not affect the rights of the city to use of the rooms contracted for, of which it had possession. *Palestine v. Barnes*, 50 Tex. 539.

As to duty of corporation where they sell or farm out an exclusive privilege to vend articles, to enforce ordinances designed to protect the privilege. *La Rosa v. New Orleans*, 4 La. 24; *Rosa v. Same*, 1 La. 126; *New Orleans v. Peyroux*, 6 Martin, n. s. (La.) 155; *Griffon v. New Orleans*, 5 Martin, n. s. (La.) 279. City corporation cannot agree to abdicate its legislative powers in relation to markets, nor contract to create a monopoly. *Gale v. Kalamazoo*, 23 Mich. 344; *ante*, § 668. See Index, *Delegation of Power; Monopolies*. In its common-law sense the term *monopoly* is not predicable of a thing which is not of common right. Lord Coke defined a monopoly to be: "An exclusive right granted to a few of something which was before of common right — so that it is not a case of monopoly if the subject had not the common right or liberty before. To do the act, or possess or enjoy the privilege or franchise granted as a common right." As to the authority of a municipal corporation having the power to regulate markets, *to farm them out* provided the control of the rates charged and of the markets is reserved to the corporation, see *New Orleans v. Faber*, 105 La. 208, 215.

at the public markets and within certain limits about the same.¹ The courts differ somewhat in their construction of the extent of the power to *establish* and *regulate* markets, as will be seen by the cases cited in the note.²

¹ *Buffalo v. Webster*, 10 Wend. (N. Y.) 100. Chief Justice *Savage* affirms, *arguendo*, that such an ordinance would be valid under the common-law power of corporations to make by-laws for the general good of the corporation. *Ib.* Approving *Pierce v. Bartram*, Cowp. 270; following *Bush v. Seabury*, 8 Johns. (N. Y.) 418, and distinguished from *Dunham v. Rochester*, 5 Cow. (N. Y.) 462; *Shelton v. Mobile*, 30 Ala. 540. "The fixing the place and times at which markets shall be held and kept open," says the Supreme Court of *New York* in *Bush v. Seabury*, 8 Johns. (N. Y.) 418, "and the prohibition to sell at other places and times, are among the most ordinary regulations of a city or town police, and would naturally be included in the general power to pass by-laws relative to the public markets. If the corporation had not the power in question, it is difficult to see what useful purpose could be effected, or what object was intended, by the grant of power to pass laws 'relative to the public markets.'"

It is clearly competent for the legislature to delegate to a municipal corporation power to establish and regulate public markets, even though the exercise of such power should result in the destruction of an existing and long-established business. *Ex parte Byrd*, 84 Ala. 17.

² Power to make ordinances concerning "markets, health, and good order" of the town authorizes an ordinance prohibiting the sale of butcher's meat within the corporate limits, except at the public market. *Winnsboro v. Smart*, 11 Rich. (S. Car.) Law, 551. It seems the defendant was convicted, though he sold the meat inside his own blacksmith shop. Such ordinances are sustained, says the court, on the ground that they are not in restraint of trade, but a proper regulation of it. *Ib.* Legislative power to a city "to erect market-houses, establish markets and market-places, and provide for the government and regulation thereof," authorizes an ordinance with a pecuniary penalty, providing that fresh beef shall not be sold in the city less than by the quarter at any other

than the market-place during market hours. *Bowling Green v. Carson*, 10 Bush (Ky.), 64. So, in *St. Louis v. Jackson*, 25 Mo. 37, where it appeared that the city, under proper authority, had erected a public, or city, market-house, and that by its charter it had power also, "to regulate," by ordinance, the sale of meats, it was held that this gave the city authority to provide, by ordinance, that "no person, not a lessee of a stall in the market, shall sell, or offer for sale, meat in less quantities than one quarter." The court considered such an ordinance as reasonable, highly proper, and not in restraint of trade, and not embraced in the reasoning in the case of *Dunham v. Trustees of Rochester*, 5 Cow. (N. Y.) 462; *s. p.* see also *St. Louis v. Weber*, 44 Mo. 547; *Le Claire v. Davenport*, 13 Iowa, 210; *Davenport v. Kelly*, 7 Iowa, 102, cited *supra*, § 704, note; *Ash v. People*, 11 Mich. 347.

An ordinance under legislative authority providing for the establishment and regulation of markets at several points in the city of Mobile, and prohibiting the sale of fresh meats outside of those markets, except by tenants of the market stalls, who are permitted to hawk about the streets after 8 o'clock A. M. of the day, was held valid; and a green grocer who long previous to and at the time of the adoption of the ordinance had been engaged in selling fresh meat from his store was convicted of a violation of the ordinance. The validity of the ordinance as respects "hawking about the streets" was not involved in the case. *Ex parte Byrd*, 84 Ala. 17. But in *Caldwell v. Alton*, 33 Ill. 416, where the city, by its charter, had power "to establish and regulate markets," and under the power passed an ordinance forbidding, during market hours, the sale of vegetables outside the limits of the market, it was held that the city could not restrain a regular dealer or merchant from vending vegetables at his place of business outside of market limits during any part of the day, such a restraint of trade being unreasonable. The court reviewed many of the cases in other States on this subject, and were of

§ 706 (387). **Market Stands in Streets.** — In a well-considered case in Massachusetts it is decided that a city corporation has the

opinion that the power to *regulate* could only extend to the market limits, and that these limits could not, under this power, be made to extend throughout the city. The court adhered to its views in a subsequent case, in which it was held that power "to erect market-houses, establish markets and market-places, and provide for the government and regulation thereof," does not authorize the council of a large and growing town to fix upon one market-place, and prohibit all persons at all hours of the day from selling fresh meats elsewhere. Such an ordinance was regarded as unreasonable, in restraint of trade, and tending to create a monopoly. It was admitted, however, that if the ordinance had fixed a reasonable number of hours each day in which the prohibition should operate, leaving persons free to sell outside of market hours, it would probably be unobjectionable. *Bloomington v. Wahl*, 46 Ill. 489. So, in *Bethune v. Hughes*, 28 Ga. 560, the court, leaning against exclusive privileges, held that power by the charter to the corporation "to establish and keep up a public market in the city for the sale of," &c., does not confer upon the city power to pass an ordinance prohibiting the sale of marketable articles elsewhere than at the market-place. *Distinguished*, *Badkins v. Robinson*, 53 Ga. 613; s. r. *St. Paul v. Laidler*, 2 Minn. 190; commented on and disapproved in *St. Louis v. Weber*, 44 Mo. 547; see *St. Paul v. Colter*, 12 Minn. 41.

Charter power to a city, "to establish public markets and other public buildings, and make rules and regulations for the government of the same, to appoint suitable officers for overseeing and regulating such markets, and to restrain all persons from interrupting or interfering with the due observance of such rules and regulations," does not confer upon its common council authority to pass an ordinance prohibiting "every farmer, gardener, or person producing vegetables" from selling the same in and along its streets without first procuring an annual license from the city authorities, paying therefor into the city treasury the sum of twenty-five dollars. *St. Paul v. Tredeger*, 25 Minn. 248; and see *Burlington v. Dankwardt*, 73 Iowa, 170.

The nature of the power "to establish public markets," &c., is very satisfactorily discussed by *Cornell, J.*, in *St. Paul v. Tredeger*, *supra* (25 Minn. 248). An ordinance regulating the killing and bleeding of meats is authorized by power to regulate butchers, the place and mode of selling, and to prevent unlicensed persons from acting as butchers. *Brooklyn v. Cleves, Hill & Denio* (N. Y.) Suppl. 231. Under power to regulate the vending of meats, a conviction under an ordinance forbidding the sale of unwholesome meats and other provisions cannot be sustained for selling putrid eggs. *Rochester v. Rood, Hill & Denio* (N. Y.) Suppl. 146.

By the *Municipal Act of Canada* the council may pass by-laws "for establishing and regulating all markets; for preventing or regulating the sale by retail in the public streets of any meat, vegetables, fruit, or beverages; for regulating the place and manner of selling and weighing butcher's meat, fish, hay, straw, fodder, wood, and lumber, &c. *Biggar's Mun. Manual* (Canada, 1900), p. 719. The following cases, digested by Mr. Biggar, show the judicial construction of the act.

The power under the act is to regulate *all* markets established, apparently including those established by the Crown, as well as those established by municipal authority. "Regulation must of necessity include the appropriation of one or more parts of the market for one purpose, and other part or parts for other purposes; of providing that free passage through the market be kept open for ready access to shops, stalls, or other places where different commodities are exposed for sale. *Per Draper, C. J.*, in *Kelly v. Toronto*, 23 Upper Can. Q. B. 426." A by-law enacting "that no butcher or other person shall cut up or expose for sale any fresh meat in any part of the city except in the shops and stalls in the public markets, or at such places as the Standing Committee on Public Markets may appoint," was held good. *Id.* But a by-law enacting "that no person should expose for sale any meat, fish, poultry, eggs, butter, cheese, grain, hay, straw, cord-wood, shingles, lumber, flour, wool, meal, vegetables, or fruit (except wild fruit), hides or skins,

clear right to prohibit, by ordinance, the occupation of a stand for the vending of commodities in the streets. It may thus prohibit not only its own inhabitants, but others. It may make the prohibition absolute, or it may make it conditional on obtaining license or permission. It is in the nature of a police regulation, and does not violate private rights or improperly restrain trade.¹

§ 707 (388). Power to tax Marketmen must be plainly conferred.

— But authority to erect a market, and power “to regulate the general police,” and “to preserve the peace and good order of the city,” do not authorize the corporation to impose a tax for revenue purposes upon persons occupying market stands in the streets, or

within the town, at any place but the public market, without having first paid the market fee thereon as therein provided, except all hides and skins from animals slaughtered by the licensed butcher of the corporation, holding a stall in the market,” was held bad. *Fennell v. Guelph, In re*, 24 Upper Can. Q. B. 238. Also, “that meat, fish, poultry, eggs, cheese, grain, hay, straw, cord-wood, shingles, lumber, flour, wool, meal, vegetables, or fruit (except wild fruit), should not be exposed for sale within the municipality, except in the market, before 12 o'clock, noon,” was held bad as to the articles mentioned in italics. *Ib.* See *In re Snell and Belleville*, 30 Upper Can. Q. B. 81; *Biggar's Mun. Manual* (Canada, 1900), 719, 720, and cases.

¹ *Nightingale, In re*, 11 Pick. (Mass.) 168. In this case the ordinance of the city (Boston) provided “that no inhabitant of the city of Boston, or of any town in the vicinity thereof, not offering for sale the produce of his own farm, &c., should, without the permission of the clerk of Faneuil Hall market, be suffered to occupy any stand with cart, sleigh, or otherwise, for the purpose of vending commodities in either of the streets mentioned in the first section of this ordinance,” &c. It was objected against this ordinance that it was void: 1. Because it was partial, not operating upon all the citizens of the State equally. 2. Because it was uncertain, the term “vicinity” being indefinite. And, 3. Because it was in restraint of trade. But neither of these objections was considered tenable. The validity of such an ordinance was again affirmed by the same court in *Commonwealth v. Rice*, 9 Met. (Mass.) 253. See this case

also as to requisites in certain respects of complaints for the violation of such an ordinance, and as to what acts will be deemed to be violations. To the same effect, *Tomlin v. Cape May*, 63 N. J. L. 429, 432, citing text.

In *Louisiana*, on the other hand, an ordinance imposing a tax upon every load of supplies carried to the public markets by persons not occupying stalls in the markets, was held to be void as being a tax for revenue and not in the exercise of the police power. *State v. Blaser*, 36 La. An. 363. See *supra*, § 589, note; *Shelton v. Mayor, &c.*, of Mobile, 30 Ala. 540; *Wartman v. Philadelphia*, 33 Pa. St. 202. An ordinance forbade the sale of fresh meats except by persons licensed, but contained a proviso in favor of farmers, authorizing them to sell meats, the produce of their own farms. The evident object was considered to be to protect licensed butchers, and at the same time to allow farmers to come in and sell the produce of their own farms. It was held that an unlicensed butcher was not a “farmer” within the meaning of the proviso, although the meats which he sold came from sheep fattened on his farm, if the farm was only a convenient appendage to his business as a butcher. *Rochester v. Pettinger*, 17 Wend. (N. Y.) 265; *St. Paul v. Tredeger*, 25 Minn. 248, cited *supra*, § 705, note. The city authorities may restrict the use of the streets by hucksters and others to certain streets and certain portions thereof, for the preservation of the peace and health of the city and the proper use of the streets. *Tomlin v. Cape May*, 63 N. J. L. 429, approving text.

selling produce therein. Such a power must be plainly conferred or it will not be held to exist.¹

§ 708 (389). **Power to regulate Markets is a Police Power.**—The right to *regulate markets* established by a city under its charter is one of municipal police. The city authorities may, if their action be not unreasonable, provide what articles shall or shall not be sold at the public markets, and may impose penalties on those who violate their ordinances. They may, for example, prohibit groceries and oysters from being sold at the public markets, and require oysters, which have a great tendency to putrefaction, to be sold at certain designated stands, and prevent their being sold elsewhere.²

§ 709 (390). **Inspection Ordinances.**—A municipal corporation, says Mr. Willcock, may *regulate the manner* of carrying on trade within a municipality so far as to prevent monopolies or the sale of unfit commodities, and to insure proper conduct in those who practise it within their jurisdiction.³ In general, it may be said that incorporated cities and larger towns in this country have conferred upon them the power to pass ordinances regulating, to a reasonable extent, the mode in which the traffic of the place shall be conducted; but they can exercise no powers in this respect not conferred.⁴ Laws requiring articles to be inspected or weighed and

¹ *Kip v. Paterson*, 26 N. J. L. 298. This power, it was said, would authorize "the renting of stalls in the market-house, and perhaps of even prohibiting sales in the public streets." *Ib. per Elmer, J.*

² *Municipality No. 1 v. Cutting*, 4 La. An. 335; *Morano v. New Orleans*, 2 La. 217. Power of city to vacate leases and stalls in public market, under ordinance reserving the right, see *Charleston v. Goldsmith*, 2 Speers (S. Car.) Law, 428. Occupant of city market failing to pay rent in advance, according to contract, held a tenant *at will*. *Dubuque v. Miller*, 11 Iowa, 583. Control over tenants. *Woelpper v. Philadelphia*, 38 Pa. St. 203. An individual may construct a building for market purposes only on a square dedicated by the town for market purposes provided the building does not interfere with the rights of others to use it for such purposes. *McReynolds v. Broussard*, 18 Tex. Civ. App. 409.

³ *Willc. Corp.*, 142, pl. 332.

⁴ *Nightingale, In re*, 11 Pick. (Mass.) 168; *Stokes v. New York*, 14 Wend. (N. Y.) 87; *Raleigh v. Sorrell*, 1 Jones (N. Car.) Law, 49; *Chicago v. Quimby*, 38 Ill. 274; *Howe v. Norris*, 12 Allen (Mass.), 82; *Libby v. Downey*, 5 Allen (Mass.), 299; *Collins v. Louisville*, 2 B. Mon. (Ky.) 134. See also *Chicago v. Burke*, 226 Ill. 191; *Tomlin v. Cape May*, 63 N. J. L. 429, 432, citing text. Power to appoint measurers of wood, and affix a reasonable allowance to them, does not justify the imposition of a tax for revenue. *Ib.* The legislature created a board of *railroad and warehouse commissioners* composed of three persons, appointed by the governor and confirmed by the senate for the term of two years, and empowered them to fix the rate of charges for the inspection of grain in cities. The court sustained this legislation. It regarded the board as a *quasi* public corporation, and held that it was competent for the legislature to delegate the power of inspection to it, instead of to the corporate authorities of the city of Chicago,

measured before being sold are in the nature of police regulations, and are valid in the absence of special constitutional provisions. When reasonable in their nature, they are not regarded as being in restraint of trade.¹

and that the official bond of such inspector was a valid obligation against him and his sureties. *People v. Harper*, 91 Ill. 357, distinguishing *People v. Salomon*, 51 Ill. 37, and other cases holding, under the Constitution of Illinois, that local and municipal taxation can only be imposed by the local "corporate authorities."

¹ *Cooley*, Const. Lim. 596; *Raleigh v. Sorrell*, 1 Jones L. (N. Car.) 49, *supra*; *Stokes v. New York*, 14 Wend. (N. Y.) 87, *supra*; *Paige v. Fazackerly*, 36 Barb. (N. Y.) 392; *Mayor, &c. of New York v. Nichols*, 4 Hill (N. Y.), 209. Compare *New York v. Hyatt*, 3 E. D. Smith (N. Y.), 156; *Rogers v. Jones*, 1 Wend. (N. Y.) 237; *Yates v. Milwaukee*, 12 Wis. 752; *Lamar v. Weidman*, 57 Mo. App. 507, 512, citing text.

The system of inspection laws, and the hosts of officers which they engendered, were considered by the constitutional convention of *New York* to entail annoyances and burdens upon the community sufficient to outweigh any benefits resulting from them; and the Constitution of 1846 (art. V. § viii.) abolished all such offices and forbade the legislature to re-create them, in this language: "All officers for the weighing, measuring, culling, or inspecting of any merchandise, produce, manufacture, or commodity whatever, are hereby abolished, and no such offices shall hereafter be created by law." See *Tinkham v. Tapscott*, 17 N. Y. 144, 147, where the origin, scope, and purpose of this provision are very satisfactorily discussed by *Denio, J.* In *Illinois*, it is held that inspection power conferred upon a board of trade, to be exercised when requested by its members, may co-exist with like power in the city authorities, to be exercised in all cases when requested. *Chicago v. Quimby*, 38 Ill. 274. Statute providing for inspection of fresh meat from animals slaughtered one hundred miles or more from place of sale held void. *Brimmer v. Rehman*, 138 U. S. 78. Ordinance providing for the inspection of oil held unreasonable because of excessive inspection fees. *Ford v. Standard Oil Co.*, 32 N. Y. App. Div. 596.

An ordinance declaring that any

store or building, not a place licensed for the sale of provisions, wherein shall be sold or offered for sale any kind of merchandise, shall be deemed a public place, and no article shall be sold until an inspection of such merchandise shall be made, and a certificate of inspection obtained, and authorizing the city marshal to report articles injurious to the health and welfare of the citizens, or which are a fraud upon the public, held not to be authorized by power "to regulate the inspection, weighing, and measuring of brick, lumber, fire-wood, coal, or any article of merchandise," and to be invalid for that reason, and also as delegating power to the marshal to determine whether articles are injurious to the public welfare or health, or a fraud upon the public. *Cairo v. Coleman*, 53 Ill. App. 680.

The following cases are referred to as showing the solicitude of the law to preserve the public health; but in this country the power of municipal corporations in this respect depends on their charters or other legislative provision.

Knowingly to expose for sale in a public market meat which is not fit for human food is indictable. *Regina v. Stevenson*, 3 F. & F. 106. So knowingly taking unfit meat to public market for sale. *Queen v. Jarvis*, 3 F. & F. 108. But in either event the knowledge of the unfitness of the food is essential to the creation of the offence. *Regina v. Crawley*, 3 F. & F. 109. The offence is a nuisance at common law. *Shillito v. Thompson*, L. R. 1 Q. B. Div. 112. Each single act of exposure of tainted meat is a distinct offence. *Hartley, In re*, 31 L. J. M. C. 232. A salesman who sells in a public market meat which is afterwards found to be unfit for human food, but which he has no means of knowing or reason to suspect was other than good and wholesome meat, is not liable to an action upon an implied warranty or for money had and received. *Emmerton v. Mathews*, 7 H. & N. 586; but a person who sends animals destined for human food to a public market for sale impliedly represents that they are, so far as he knows, not infected with any contagious disease dangerous to life or health.

§ 710 (391). **Weighing.** — Power to a city “to regulate the public market, and to pass such other ordinances as shall seem meet for the improvement and good government of the city,” authorizes an ordinance *requiring oats, hay, &c., to be weighed by the public weigh-master* before being offered for sale, and imposing a penalty for its violation.¹

§ 711 (392). **Same Subject.** — A grant to the common council of “all powers, rights, &c., incident to municipal corporations and necessary to the proper government of the same,” might authorize a city *to prevent the sale of bread made out of unwholesome flour*, and, as a consequence, to provide for its inspection, but it would not give the power to regulate the assize, that is, the weight and price of bread, for the latter is a power not absolutely necessary for the proper government of a city. Power, however, to a city, “to regulate everything which relates to bakers,” does authorize an ordinance regulating the weight, size, and, it seems, the price, of bread, and the forfeiture of bread illegally baked; and such an ordinance, it has been held, is not in violation of any provision of the Constitution of Louisiana.²

¹ *Raleigh v. Sorrell*, 1 Jones (N. Car.) Law, 49, approving *Nightingale's Case*, 11 Pick. (Mass.) 168; *Stokes v. Corporation of New York*, 14 Wend. (N. Y.) 87; *Lamar v. Weidman*, 57 Mo. App. 507, citing text. This power was also held to authorize the creation of the office of weighmaster and the payment of his salary. *Raleigh v. Sorrell*, 1 Jones (N. Car.) Law, 49, *supra*. Construction of ordinance as to weighing hay on public scales. *Gass v. Greenville*, 4 Sneed (Tenn.), 62; *Yates v. Milwaukee*, 12 Wis. 752. Construction of statute as to mode of measuring grain. *Frazier v. Warfield*, 13 Md. 279. Of ordinance as to survey of lumber before sale. *Briggs v. Boat*, 7 Allen (Mass.), 287. An ordinance requiring that every person selling meat or articles of provision by retail, whether by weight, count, or measure, should provide himself with scales, weights, and measures, but that no spring balance, spring scale, spring steelyards, or spring weighing machine should be used for any market purpose, was held valid. *Snell and Belleville, In re*, 30 Upper Can. Q. B. 81.

In *New York*, although the legislature has the power to provide that sealers of weights and measures may recover for unsolicited services or to delegate power to the city to so provide, the policy of the State, as manifested by the uniform course of legislation, is that they shall not charge such fees. Hence, authority to a city “to define the duties of the sealer of weights and measures and to regulate his compensation” will not be construed to confer power to ordain that such services shall be paid by the person for whom they are rendered. *Ford v. N. Y. Central & H. R. R. Co.*, 33 N. Y. App. Div. 474; *Fausnaugh v. Rogers*, 62 N. Y. App. Div. 535. The *general welfare clause* does not authorize an ordinance requiring vendors to pay inspection fees. *Springfield v. Stark*, 93 Mo. App. 70; *Waters-Pierce Oil Co. v. McElroy*, (Tex. Civ. App.); 47 S. W. Rep. 272.

Defendant's intent in using false scales or measures or his knowledge that they were incorrect held immaterial in prosecution for violating ordinance forbidding use of false weights or scales under penalty. *City of New York v. Hewitt*, 91 N. Y. App. Div. 445.

² *Guillotte v. New Orleans*, 12 La. An. 432; *Paige v. Frazier*, 36 Barb. (N. Y.) 392. But as to forfeiture, *quare*, in absence of express power, and see *Phillips v. Allen*, 41 Pa. St. 481;

§ 712 (393). **Police Regulations respecting the Public Peace and Safety; Use of Streets.** — Our city governments usually possess the power, either by express grant or by virtue of their authority, to make by-laws relating to the public safety and good order of the inhabitants, to regulate the rate of *speed of travel in the public streets*; the route or streets over which omnibuses, stage coaches, drays, &c., may run; the time of day in which the streets may be used for certain purposes; to interdict stoppages in the street to the delay of others; to exclude vehicles of all kinds from entering upon or passing over the sidewalks, &c. The public safety and convenience may require regulations of this character; but they must not, unless made by virtue of specific authority, be unreasonable or improperly in restraint of trade.¹ Power to make by-laws

Mobile v. Yuille, 3 Ala. 137. In *New York*, an ordinance regulating the weight of baker's bread was held to be void as an unreasonable interference with a lawful business. *Buffalo v. Collins Baking Co.*, 39 N. Y. App. Div. 432, affirming 24 N. Y. Misc. Rep. 745.

¹ *Commonwealth v. Stodder*, 2 Cush. (Mass.) 562, where the subject of the power of cities over streets, particularly in reference to omnibuses, is fully considered by Mr. Justice *Dewey*; *Commonwealth v. Robertson*, 5 Cush. (Mass.) 438, as to stoppages in streets contrary to ordinance; *Baker v. Boston*, 12 Pick. (Mass.) 184; *Vanderbilt v. Adams*, 7 Cow. (N. Y.) 349; *ib.* 385; *Austin v. Murray*, 16 Pick. (Mass.) 126; *St. Paul v. Smith*, 27 Minn. 364; *post*, chapter on Streets; *infra*, § 714; *Pittsburg, &c. Ry. Co. v. Hood*, 94 Fed. Rep. 518, approving text and holding that a provision in an ordinance granting a franchise to construct and operate a railway, by which the use of the track was prohibited during the daytime was in its nature and effect a municipal or police regulation operating in the interest of public safety.

A regulation or ordinance *prohibiting the stoppage of vehicles* in a public street for a longer time than twenty minutes is a valid police regulation. *Commonwealth v. Brooks*, 109 Mass. 355; *Commonwealth v. Fenton*, 139 Mass. 195. The license of a hawker or peddler does not authorize him to violate such an ordinance. *Commonwealth v. Fenton*, *supra*; *Commonwealth v. Lagorio*, 141 Mass. 81. An ordinance *prohibiting selling and trading in the public streets* is a valid exer-

cise of the power to regulate the city streets. *State v. Barbelais*, 101 Me. 512. See also *Commonwealth v. Ellis*, 158 Mass. 555. Under power to regulate by general ordinance the use of the sidewalks, streets, and public ways, and to keep the same free from obstructions, a city may by ordinance require *hucksters and peddlers* not to stop in any street, &c., except when actually engaged in the sale of an article. *Shreveport v. Dantes*, 118 La. 113.

Under power to make ordinances and by-laws "for the regulation of carriages and vehicles used therein, however propelled," a city may require persons keeping vehicles for the conveyance of goods for hire to *take out a license*. *Commonwealth v. Beck*, 194 Mass. 14. An ordinance which prohibits the construction or use of *gates that swing outward upon a sidewalk* is reasonable and is authorized by authority to pass ordinances for the health and safety of the inhabitants and for the free and uninterrupted use of the streets. *Rosedale v. Hanner*, 157 Ind. 390.

Handbills. Under the general welfare clause the city may prohibit the distribution of handbills in the streets, which people will probably throw upon the streets, and which will thus become a nuisance by littering the streets and frightening horses. *Wettengel v. Denver*, 20 Colo. 552; *Philadelphia v. Brabender*, 201 Pa. 574. See also *Anderson v. State* (Neb.), 96 N. W. Rep. 149. But in *People v. Armstrong*, 73 Mich. 288, a somewhat similar ordinance was under consideration, and it was held that it was not authorized

for "the good rule and government" of the borough¹ has reference to the government of the borough as a corporation and the making

by authority to provide for cleaning the streets, to prevent encumbering or obstructing the streets, and to regulate the manner in which highways shall be used. In this case the articles complained of were small Y. M. C. A. invitation cards. None of them were to be seen upon the ground and they were only given to those who expressed or showed a desire to receive them.

Bicycles on sidewalks. Although the sidewalks are primarily for pedestrians and a bicycle is a vehicle, the city may by ordinance authorize the use of its sidewalks by bicyclists and will be liable for injuries sustained by a bicyclist in a defective sidewalk. *Lee v. Port Huron*, 128 Mich. 533; *Lechner v. Newark*, 19 N. Y. Misc. 452; *Gagnier v. Fargo*, 11 N. Dak. 73. See also *Purple v. Greenfield*, 138 Mass. 1, 7; *Jones v. Williamsburg*, 97 Va. 722. But the city is under no obligation to permit bicyclists to use the sidewalk, and they may be excluded therefrom. *Mercer v. Corbin*, 117 Ind. 450; *Swift v. Topeka*, 43 Kan. 671. But being a vehicle, bicycles cannot be excluded from that part of a street on which vehicles are allowed to travel. *Swift v. Topeka*, 43 Kan. 671. See also *Holland v. Barch*, 120 Ind. 46.

Under the "power to prohibit the gathering and assembling of persons upon the public streets" of a city, coupled with authority to the police to disperse such gatherings, a city may prohibit by ordinance *the making of any noise, or disturbance or improper diversions* in the streets, &c., and the collection of crowds to the annoyance and disturbance of the citizens and to the hindrance of the free and unmolested travel. *People v. Pierce*, 85 N. Y. App. Div. 125. An ordinance prohibiting the hitching of horses or leaving them standing in the streets under penalty of a fine, except that horses may be hitched to the public hitching rack, is reasonable and valid and a proper exercise of the police power. *Wells v. Mt. Olivet*, 126 Ky. 131; 102 S. W. Rep. 1182; *Rowe v. Reneer* (Ky.), 99 S. W. Rep. 250.

Special charter construed to authorize an ordinance for filling a street,

although it is covered by a plank road laid under special legislative authority. *State v. Jersey City*, 26 N. J. L. 444; *post*, chapter on Streets, § 1272. In *Napman v. People*, 19 Mich. 352, a lawful arrangement between a railroad company and an omnibus company as to the delivery of passengers was held to be beyond municipal interference.

An ordinance is not unreasonable which prohibits any person from making excavations in a highway until he has obtained a permit, paid a fee, given bond to fill up the excavation, and agreed to take the lines from the borough surveyor. *Springfield Water Co. v. Darby*, 199 Pa. 400. But under the peculiar provisions of the *California Constitution* granting to every person the right to lay pipes for light and water under specified conditions, viz.; that the work be done under the direction of the superintendent of streets and such regulations as the municipality may prescribe for "damages and indemnity for damages," the power of a municipality to regulate excavations is limited, and a city ordinance which requires any person desiring to lay pipes in the streets for the supply of water or light to make a verified application for a permit from the superintendent of streets and making it a misdemeanor not to comply therewith, is invalid. *In re Johnston*, 137 Cal. 115.

A by-law prohibiting rapid driving in the streets of a city by carters and others is not in restraint of trade, and is reasonable and valid; and in a prosecution for its violation, it is not necessary to prove that any individual was actually endangered by the fast driving. As the mayor and aldermen have no authority to give a person permission to violate an ordinance, evidence of such permission, as well as evidence of the defendant's general character as a careful driver, is inadmissible. *Commonwealth v. Worcester*, 3 Pick. (Mass.) 462; *Commonwealth v. Stodder*, 2 Cush. (Mass.) 562, 570; *Washington v. Nashville*, 1 Swan (Tenn.), 177. Commented on. *McBean v. Chandler*, 9 Heisk. (Tenn.) 349; *post*, chapter on Streets, § 1272. Where an intent to injure is not made an essential ingredient of the of-

¹ *Ante*, § 609.

of regulations for carrying into effect the purposes for which it was incorporated.¹ General powers of this character, without more, do not enable a town council to carry out any unreasonable ideas of general good government, and to impose penalties for the doing of things which are not prohibited by any public statute, nor by the common law.²

§ 713 (394). **Same Subject; Salutory By-Laws.** — Under a general power to make "needful and salutory by-laws," a city ordinance of Boston, requiring the tenant or occupant, or, in case there shall be no tenant, the owners of buildings bordering on *certain streets, to clear the snow from the sidewalks adjoining their respective buildings*, is reasonable and valid. It was objected against this ordinance that it violated the fundamental maxim that all burdens and taxes laid upon the people for the public good shall be equal. The objection was overruled. And it was justly regarded by the court as in the nature of a police regulation, requiring a duty to be performed highly salutory and advantageous to the citizens of a populous and closely built city, and imposed upon the persons named because they are so situated that they can promptly and conveniently perform it; and it is laid not upon a few, but upon a numerous class, and equally upon all who are within the description composing the class and who commonly derive a peculiar benefit from the duty required. It would doubtless be otherwise if the ordinance arbitrarily imposed this duty upon the mechanics or merchants, or any other class of citizens between whose convenience and the labor required there is no natural relation.³

fence of rapid driving under the ordinance, the intent necessary to a criminal assault and battery is not supplied by a mere intent to violate the ordinance. *Commonwealth v. Adams*, 114 Mass. 323.

An ordinance prohibiting "night-walking" is not "class legislation," but a proper police regulation. *Braddy v. Milledgeville*, 74 Ga. 516.

There is no obligation, in the absence of a valid municipal by-law or statute, on the part of people to keep *roofs clear of snow*, or to detain the snow so that it cannot slide into the street, though there may be, it seems, such a faulty construction of roof as, on proof thereof, would involve a liability on the part of the owner or occupier for accidents. *Lazarus v. Toronto*, 19 Upper Can. Q. B. 9, *per Robinson*, C. J. Power to local board to provide for the re-

moval of "dirt, ashes, rubbish, filth, dung, and soil" does not authorize a by-law for the removal of snow. *Reg. v. Wood*, 5 E. & B. 49; *infra*, § 713, note. See *ante*, § 678.

¹ *Ante*, § 634.

² *Addison on Torts*, 34; *Rex v. Westwood*, 4 B. & C. 721; *Reg. v. Wood*, 5 Ell. & Bl. 49; *ante*, § 634; *post*, § 718.

³ *Goddard, In re*, 16 Pick. (Mass.) 504; *Union Railway Co. v. Cambridge*, 11 Allen (Mass.), 287; *Kirby v. Boylston Market Assoc.*, 14 Gray (Mass.), 249; *post*, chap. xxxii., note and cases cited. The same power held to authorize an ordinance to prevent the placing of *show boards and signs* upon the sidewalks so as to obstruct them, and also to prevent the carrying of placards and signs on the sidewalk for the purpose of

§ 714. **Use of Streets; Regulation of Automobiles.** — The uses of the streets of a city *must be extended to meet new means of locomotion*,¹ and it may be doubted whether the *regulation and control of automobiles* have developed any new principles of law. Under certain circumstances the use of automobiles in the city streets may come under and be affected by existing regulations, whether by ordinance or by statute, although they may have been adopted at a time when automobiles were unknown.² State statutes have generally been adopted providing for the *registration of automobiles*, the payment of a registration fee, and the marking of the registered number in clear and distinct numerals upon the vehicles. These statutes have uniformly been sustained as a constitutional exercise of the police power.³ These statutes are not open to the objection that they are *class legislation*, discriminating against certain persons in the use of the public highways. The high speed at which automobiles may

displaying them. As the tendency of this is to collect crowds and thus to interfere with the use of the sidewalks by the public, such an ordinance is not unreasonable. *Commonwealth v. McCafferty*, 145 Mass. 384. Where an overhanging store sign amounts to an obstruction of the sidewalks by hindering, delaying, or endangering the use thereof, its removal may be ordered. *State v. Higgs*, 126 N. Car. 1014.

In *Illinois*, it is held that a city has no power by ordinance to compel an abutter, under penalty, to *remove the snow* from the sidewalk within a certain time. He has no more interest in such removal than any other citizen. *Gridley v. Bloomington*, 88 Ill. 554; *supra*, § 712, note.

An ordinance requiring personal labor upon streets, or, in lieu thereof, payment of a specified sum, held valid; held also that labor so required is not "involuntary servitude" within the meaning of the Constitution of Kansas or of the United States. *In re Dassler*, 35 Kan. 678; *Ex parte Bowen*, 34 Tex. Crim. Rep. 107.

¹ *Chicago v. Banker*, 112 Ill. App. 94, 99.

² Statutes or ordinances declaring that no person shall "ride or drive" at greater than a *specified speed* are not confined to vehicles drawn by animals, but include automobiles. *Commonwealth v. Crowninshield*, 187 Mass. 221; *State v. Thurston*, 28 R. I. 265; 65 Atl. Rep. 589. See also to the same effect, *Taylor v. Goodwin*, L. R.

4 Q. B. D. 228. A statute intended to apply primarily to automobiles and motor cycles may be framed in such terms as to apply to other vehicles. Thus, in *Emerson Troy Granite Co. v. Pearson*, 74 N. H. 22, it was held that a statute which requires the licensing of the operators of automobiles and motor cycles, and which defines these vehicles as all vehicles propelled by other than muscular power, is applicable to road locomotives or traction engines. Where a license tax was imposed on "hacks, cabs, omnibuses, and other vehicles for the transportation of passengers for hire," it was held that it was *not* applicable to automobiles, having been imposed at a time when automobiles were unknown. *Washington El. Veh. Transportation Co. v. District of Columbia*, 19 App. D. C. 462. Where a bridge company was authorized by its charter to collect tolls for certain vehicles and animals, it was held that it could *not demand tolls for the passage of an automobile*, the terms of the charter not being sufficient to include such vehicles. *Mallory v. Saratoga Lake Bridge Co.*, 53 N. Y. Misc. 446.

³ *Christy v. Elliott*, 216 Ill. 31; *Commonwealth v. Boyd*, 188 Mass. 79; *State v. Swagerty*, 203 Mo. 517; *State v. Unwin*, 75 N. J. L. 500; 68 Atl. Rep. 110, *aff'g* 73 N. J. L. 529; *People v. McWilliams*, 91 N. Y. App. Div. 176; *Commonwealth v. Denamore*, 29 Pa. Co. Ct. Rep. 217.

be operated, and the peculiar dangers attending their use, justify the legislature in legislating for them as a distinct class.¹ The exaction of a small fee or charge in connection with the registration of an automobile is *not a tax*, but is simply a *license fee*.²

Municipal legislation pursuant to statutory authority has, almost of necessity, followed the same general lines as the various statutory requirements; and it has been held that the mere fact that the use and operation of automobiles are regulated by statute, *does not preclude a municipal corporation* under properly delegated authority from adopting compatible local ordinances and regulations,³ unless the statute should be framed in such terms as necessarily or plainly to preclude municipal regulation of the subject.⁴

¹ *Christy v. Elliott*, 216 Ill. 31; *State v. Swagerty*, 203 Mo. 517; *Commonwealth v. Densmore*, 29 Pa. Co. Ct. Rep. 217. An ordinance imposing a *tax upon vehicles is not invalid* because it *excludes* from its operation electric street cars and automobiles. *Kersey v. Terre Haute*, 161 Ind. 471. Requirement that a *number shall be displayed* is not unconstitutional as an unreasonable search or as compelling the operator to furnish evidence against himself, or as depriving the operator or owner of property without due process of law. It is a reasonable exercise of the police power in the interests of the safety of the travelling public. *People v. Schneider*, 139 Mich. 673. *Missouri statute* construed to require a separate license for each city or county in which it is proposed to operate an automobile. *State v. Cobb*, 113 Mo. App. 156.

A statute which simply declares that no city ordinance shall require an automobile or motor vehicle to travel at a slower rate than eight miles per hour within the closely built up portions of the city or at a slower speed than fifteen miles per hour where the houses are more than 100 feet apart, and which declares that any person who shall violate any of the provisions of the statute or of any speed ordinance adopted pursuant thereto, shall be punished, *does not, in itself, create any punishable offence*, but is dependent for its operation upon the adoption of an ordinance regulating the speed. *People v. Ellis*, 88 N. Y. App. Div. 471.

² *Commonwealth v. Boyd*, 188 Mass. 79; *State v. Unwin*, 75 N. J. L. 500; 68 Atl. Rep. 110, aff'd 73 N. J. L. 529. A city ordinance regulating automobiles and requiring registration and number-

ing, at a cost to the owner of one dollar to cover the value of the number furnished by the city, does not impose a *license tax for revenue*, but merely a license fee. *People v. Schneider*, 139 Mich. 673. Under power to license and regulate every description of carriers, &c., a city has authority to impose a license fee on automobiles. *Commonwealth v. Hawkins*, 14 Pa. Dist. Rep. 592.

³ *Commonwealth v. Crowninshield*, 187 Mass. 221; *Commonwealth v. Hawkins*, 14 Pa. Dist. Rep. 592; *Radnor Township v. Bell*, 27 Pa. Super. Ct. 1; *Bellingham v. Cissna*, 44 Wash. 397. A city ordinance, enacted under the power to regulate the use of the streets for the protection of the inhabitants, required the owner of any automobile to take out a license, to carry a city license tag, limited the speed to seven miles per hour within the built-up portions of the city, and to eight miles per hour in other portions. It was held that this ordinance was *not repealed by a subsequent statute requiring a State license*, the carrying of a State license tag, and limiting the speed of automobiles to eight miles per hour in cities. *Brazier v. Philadelphia*, 215 Pa. 297.

⁴ Under a statute which forbids any ordinance imposing a penalty for any act which is punishable by statute, an ordinance imposing a penalty upon any person who drives an automobile on the public streets at a greater speed than fifteen miles an hour is in conflict with a statute imposing a fine on "every person who shall ride or drive faster than a common pace" and is void. *State v. Thurston*, 28 R. I. 265; 65 Atl. Rep. 580.

In *New York*, the Motor Vehicle Law

Under statutory authority to regulate or to control the use of city streets, ordinances may be adopted *limiting the speed of automobiles*¹; reasonable *safety appliances*, such as gongs and brakes, may be required;² and provision may be made for the *registration* of automobiles and other motor vehicles.³ Under this authority, too, the city council may properly *prescribe different rates* of speed in different parts of the municipality.⁴ Ordinances on these subjects are generally sustained so long as they are reasonable in their provisions.⁵

of 1904 declared that local authorities should have no power to pass any ordinance, &c., requiring any license or permit to use the public highways, or in any way affecting the registration or numbering of motor vehicles. It was held that a city had no authority to impose a charge upon such vehicles using its streets; and that such a charge could not be upheld by designating it in the ordinance as a tax, and providing that its proceeds should go to the repair of the streets. *Buffalo v. Lewis*, 192 N. Y. 193.

¹ *Chicago v. Banker*, 112 Ill. App. 94; *Commonwealth v. Crowninshield*, 187 Mass. 221; *Bellingham v. Cissna*, 44 Wash. 397. See *ante*, § 712.

² *Chicago v. Banker*, 112 Ill. App. 94.

³ *People v. Schneider*, 139 Mich. 673. When the *statutory authority* conferred upon municipal corporations to limit the speed is *qualified by express conditions*, such as that the municipality shall conspicuously place signs designating the speed, the operation of the ordinance is dependent upon a compliance with the conditions required by the statute, and a failure to perform the conditions is fatal to its enforcement. *People v. Keeper of Prison*, 121 N. Y. App. Div. 645, rev'g 55 N. Y. Misc. 611.

⁴ *Chittenden v. Columbus*, 26 Ohio Cir. Ct. 531; 16 Ohio Cir. Dec. 531.

⁵ *Ordinances limiting the speed of automobiles as follows have been sustained as reasonable*: eight miles per hour, *Commonwealth v. Crowninshield*, 187 Mass. 221; seven miles per hour, *Chittenden v. Columbus*, 26 Ohio Cir. Ct. 531; six miles per hour, *Bellingham v. Cissna*, 44 Wash. 397; six miles per hour between street crossings and four miles per hour at street crossings. *Eichman v. Buchheit*, 128 Wis. 385. It is no objection to the

validity of an ordinance limiting speed that street cars are allowed to travel at a greater rate. *Chittenden v. Columbus*, 26 Ohio Cir. Ct. 531; 16 Ohio Cir. Dec. 531.

A *county ordinance* prohibiting the use of automobiles on public roads at night is not unreasonable on its face. The burden of showing that it is unreasonable is on the person attacking it. *In re Berry*, 147 Cal. 523. Express power to a city to regulate the business of driving omnibuses, automobiles, and locomobiles, *authorizes the city to fix the fare* to be charged and to declare that it shall be unlawful to refuse to convey any passenger desiring transportation. *Fonsler v. Atlantic City*, 70 N. J. L. 125. An ordinance will not be sustained *when it is discriminative* in its effect. Thus, in *Chicago v. Banker*, 112 Ill. App. 94, it was held that an ordinance which requires the owners of automobiles who use their vehicles for *private business and pleasure only*, to submit to examinations and take out licenses, imposes a burden on a single class of citizens in the use of the city streets which is not imposed upon others, and is invalid by reason of its discriminative effect.

As to the *jurisdiction of the Federal courts* over the subject matter of a suit to enjoin as invalid the enforcement of an ordinance requiring the registration of automobiles, examination of operators, &c., see *Farson v. Chicago*, 138 Fed. Rep. 184. See Index, *Federal Courts*; *Public Utilities*.

England. Under a provision that no person shall drive a light locomotive at any speed greater than is reasonable and proper *having regard to the traffic on the highway*, defendant was convicted on evidence that he drove his motor along a highway at eighteen to twenty miles per hour. There was no direct evidence that any traffic was inter-

But authority to regulate the use of city streets does not authorize an ordinance assuming to grant to individuals the right to appropriate a highway for a private purpose, *e.g.*: as a race course for speed tests to the exclusion of the public.¹

§ 715 (395). **Use of Streets for removing Buildings.** — It has been held that the removal of a building along a highway is a *legitimate use of the highway*, not requiring, in the absence of an ordinance or by-law, the assent or permission of the municipal authorities.² The power to make "salutary by-laws" with respect to the use of streets will, it seems, authorize a city to pass by-laws regulating the *removal of buildings* and the temporary use of the streets and highways for that purpose.³ Under the power to regulate the use of city streets

rupted or affected by defendant's act. It was held on appeal that the conviction was proper; that the words "having regard to the traffic on the highway" meant having regard to the traffic on the road, and not to the traffic in the immediate vicinity of the motor. *Smith v. Boon*, 84 L. T. N. S. 593. Under a provision making it an offence to drive a light locomotive on a highway "to the common danger of passengers," it was held that a person who drove a light locomotive on a highway at an excessive speed might be guilty of the offence, although there was no evidence that there were any passengers on the highway at the time. *Mayhew v. Sutton*, 86 L. T. N. S. 18.

¹ An ordinance was passed *permitting the use of a public highway within a city as a race course for automobiles competing against time*, and the holding of an automobile race thereon by certain specified persons. It was held that it was illegal, not only because it was invalid as a regulation of the speed of automobiles, but also because it permitted the use of a public highway for a private purpose. It was also held that by the enactment of the ordinance the city become a participant in the commission of the unlawful act, but that where a person came to the highway at the time of the race, not as a traveller or casually, but for the express purpose of witnessing the race, knowing it was to be a contest, and that the automobiles were to be driven at the greatest possible speed, and while witnessing the race was injured by an automobile being deflected from the course when running at a high speed, *such person could not assert the illegality*

of the act as a ground of liability, or recover from the city or the other participants in the act without proof of negligence. *Johnson v. New York City*, 186 N. Y. 139, rev'g 109 App. Div. 821, citing and approving *Scanlon v. Wedger*, 156 Mass. 462.

² *Graves v. Shattuck*, 35 N. H. 257; *Hinman v. Clarke*, 121 N. Y. App. Div. 105, aff'g 51 N. Y. Misc. 252; *Toronto Street R. Co. v. Dollery*, 12 Ont. App. 679; *Rice v. Whitby*, 25 Ont. App. 191. In *Graves v. Shattuck*, 35 N. H. 257, 265, it is said that if the public highways of a city have been commonly used for the purpose of moving buildings, it is not a nuisance to use them for that purpose, provided suitable streets are selected, proper expedition used, and the use is reasonable under all the circumstances. In *Toronto St. R. Co. v. Dollery*, 12 Ont. App. 679, 683, it is declared that whether the moving of a building on the city streets creates a nuisance depends on the size of the building, the width of the highway, &c. In *Massachusetts*, the court seems to deny the right of a person to use the streets of a city for moving buildings. See *Morrison v. Howe*, 120 Mass. 565, 673.

³ *Day v. Green*, 4 Cush. (Mass.) 433, 437, *per Shaw*, C. J. And where such a by-law prohibits the moving without a license granted by the mayor and aldermen, a license granted by the mayor is void, even though the board of aldermen, by a vote, had previously undertaken to delegate the power to grant such license to the mayor alone. The by-law contemplates that the mayor and aldermen should act unitedly as one body. *Ib.*

and to prevent obstructions, the city council may prohibit the moving of a building thereon without a permit from the mayor or other public officer.¹

§ 716. **Ordinances regulating the Speed of Trains.** — The police power of the State over railroads to regulate the manner of operation and the speed of trains within the city limits *may be constitutionally delegated to cities* and other municipalities.² An *express delegation of authority* to the municipality is not necessary to enable it to exercise this power. Such ordinances may be enacted under the general welfare clause,³ and it has also been sustained under authority to declare what shall constitute nuisances, to regulate the police, and to pass such ordinances as the good of the inhabitants may require.⁴

¹ Eureka City v. Wilson, 15 Utah, 53; Toronto St. R. Co. v. Dollery, 12 Ont. App. 679, 683. A license to move buildings on the city streets, granted upon conditions, does not justify the use of the streets, if the conditions are not complied with. Morrison v. Howe, 120 Mass. 565, 573. It has been held that it is a proper and valid exercise of the police power for the city to enact an ordinance regulating the moving of buildings on streets occupied by street railways, which requires the person moving a building which necessitates removing or raising railway wires, to obtain a license from the city and to give twenty-four hours' notice to the railway company of his intention, and which thereupon makes it the duty of the railway company to raise or remove its wires. The railway company holds its franchises subject to the exercise of the police power, and such an ordinance will relieve the party moving the building from liability to the street railway company for obstructing its tracks. Indiana R. Co. v. Calvert, 168 Ind. 321; 80 N. E. Rep. 961. Construction and application of ordinance regulating the moving of houses on city streets and requiring the consent of the owners of property. See Blocki v. Krueger, 121 Ill. App. 357.

² Toledo, P. & W. R. Co. v. Deacon, 63 Ill. 91; Chicago & A. R. Co. v. Carlinville, 200 Ill. 314, aff'g 103 Ill. App. 251; Whitson v. Franklin, 34 Ind. 392; Cleveland, C. C. & I. R. Co. v. Harrington, 131 Ind. 426; Bluedorn v. Missouri Pac. R. Co., 108 Mo. 439; Jackson v. Kansas City, F. S. & M. R. Co., 157 Mo. 621. Incorporated towns in Indiana have the power to

pass reasonable ordinances regulating the speed of railroad trains within the corporate limits. Baltimore & O. R. Co. v. Whiting, 161 Ind. 228. An ordinance regulating the speed of trains within a municipality is *neither a regulation of interstate-commerce nor an interference with the transportation of the mails*. It is simply an exercise of the police power. Chicago & A. R. Co. v. Carlinville, 200 Ill. 314, aff'g 103 Ill. App. 251.

³ Meyers v. Chicago, R. I. & P. R. Co., 57 Iowa, 555.

⁴ Chicago, B. & Q. R. Co. v. Haggerty, 67 Ill. 113; Bluedorn v. Missouri Pac. R. Co., 108 Mo. 439; Jackson v. Kansas City, F. S. & M. R. Co., 157 Mo. 621. Power to a city "to regulate the running of railroad cars" held to authorize the adoption of an ordinance prohibiting the propulsion of cars by steam within the corporate limits. Buffalo & N. F. R. Co. v. Buffalo, 5 Hill (N. Y.) 209.

Power to the city of Richmond to make "ordinances, not contrary to the Constitution and laws of the State, as shall be thought necessary for the good ordering and government" of its inhabitants, was considered by the Supreme Court of the United States to imply the power to ordain and establish suitable police regulations, and that includes the power to prohibit the use of locomotive engines propelled by steam on the public streets, when such action does not interfere with any vested rights; and legislative authority to a specified railway company to construct its road "from some point within the corporation of Richmond to be approved by the common council," does not give it

The power may also be exercised under authority to regulate and control the use of the streets.¹ Under the general rule applicable to all ordinances, *the regulation must be reasonable* in view of all the circumstances.² But if it is sought to apply the ordinance to a part of the railroad which is in a sparsely settled portion of the city with a few or no streets crossing it, and when the right of way is fully fenced, the ordinance *may be held to be unreasonable* when applied to the particular locus and void.³ It is also essential to the validity of the

a vested right to the use of a particular street free from municipal control, when the city, in consenting to such use, reserved its chartered powers in that behalf. *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 521.

¹ *Cape May, D. B. & S. P. R. Co. v. Cape May*, 59 N. J. L. 393 (electric street railway). The operation of an ordinance is not limited to the portion of the city used by the public. It has been held to apply to switch yards as well. *Crowley v. Burlington, C. R. & N. R. Co.*, 65 Iowa, 658.

² A city had statutory authority to regulate the speed of cars and locomotives, but not so that the same should be less than ten miles per hour for passenger trains and six miles per hour for other trains. It was held that subject to the limitations prescribed the rate of speed was left to the discretion of the municipality, but that the rate prescribed *must within these limitations be reasonable*. *Chicago & A. R. Co. v. Carlinville*, 200 Ill. 314, aff'g 103 Ill. App. 251. An ordinance limiting the speed of trains within the corporate limits to four miles per hour is not so unreasonable on its face as to be void. *Knobloch v. Chicago, M. & St. P. R. Co.*, 31 Minn. 402; *Weyl v. Chicago, M. & St. P. R. Co.*, 40 Minn. 350. When express authority is conferred upon a municipality to regulate the speed of trains, courts will not interfere with the reasonable exercise of such authority by the municipality. Held that an ordinance limiting the speed to four miles per hour was not unreasonable when adopted pursuant to express authority. *Cleveland, C. C. & I. R. Co. v. Harrington*, 131 Ind. 426. Limit of five miles per hour sustained as reasonable. *Toledo, P. and W. R. Co. v. Deacon*, 63 Ill. 91. Limit of six miles per hour held reasonable. *Buffalo v. New York, L. E. & W. R. Co.*, 152 N. Y. 276; *Cape May, D. B. & S. P. R. Co. v. Cape May*, 59 N. J. L. 393

(electric cars on street railway). Ordinance limiting the speed of trains to ten miles per hour in an incorporated town held not to be unreasonable although the particular locality involved was three quarters of a mile from the passenger depot. *Larkin v. Burlington, C. R. & N. R. Co.*, 85 Iowa, 492.

³ An ordinance limited the speed of trains to four miles per hour in the city limits. The road passed for three miles through agricultural lands, fenced on both sides, before reaching the inhabited portion of the city. It was held that the ordinance was unreasonable and void when applied to this portion of the railroad. *Meyers v. Chicago, R. I. & P. R. Co.*, 57 Iowa, 555. An ordinance limited the speed of trains to six miles per hour. There were no platted streets across the railroad track for a long distance and the right of way was fenced. It was held that the ordinance was unreasonable as to the particular locus and was void. *Burg v. Chicago, R. I. & P. R. Co.*, 90 Iowa, 106.

The conditions under which an ordinance will be sustained as *reasonable as to one part of the city and unreasonable as to another* are well illustrated by the course of the decisions in *Minnesota*. A city ordinance limited the speed of railroad trains to four miles per hour. The court held that the ordinance was not on its face so unreasonable as to be void, although it indicated that under some conditions it might be unreasonable. *Knobloch v. Chicago, M. & St. P. R. Co.*, 31 Minn. 402. In a later case, the same city ordinance came before the court. Testimony was offered that sixty-six daily trains used the portion of the railroad carrying over 3500 passengers and 3000 tons of freight per day. It was held that the evidence was not sufficient to show that the ordinance was unreasonable; that in order to do so it was necessary

ordinance that it should *not be discriminative* and confined in its operation to a single railroad when others similarly situated are exempted from its provisions.¹

§ 717. **Regulation of Operation of Railroads.** — The power of the municipality under delegated authority to regulate the operation of railroads *is not confined to the enactment of ordinances regulating the speed*. By virtue of delegated authority, it may control the operation of street and steam railroads in other respects. Under properly delegated authority, it may require *electric street cars to come to a full stop* before crossing intersecting streets.² It may require the *introduction of air brakes* on street cars,³ *fenders* on electric street railway cars,⁴ and the presence of *one or more persons in addition to the driver* to assist in the control of the car and the passengers, and to prevent accidents and disturbances.⁵ It may also require street car conductors

to show the character of the locality, and that the ordinance had no reasonable necessity in relation thereto. *Weyl v. Chicago, M. & St. P. R. Co.*, 40 Minn. 350. In a third case the same ordinance came before the court, and it appeared that it was sought to apply it to a portion of the railroad constructed on its own right of way, securely fenced and running for two miles through sparsely settled and comparatively unimproved country to the city limits. It was held that the ordinance was unreasonable when applied to the *locus*. *Evison v. Chicago, St. P. M. & O. R. Co.*, 45 Minn. 370. This ruling was followed under similar circumstances in *Schulz v. Chicago, M. & St. P. R. Co.*, 57 Minn. 271.

¹ In *Buffalo v. New York, L. E. & W. R. Co.*, 152 N. Y. 276, a municipal ordinance prohibited railroad trains from crossing certain specified streets without first stopping. It was applicable on its face to all railroads without exception, but it appeared that the streets named were but little frequented and were crossed by no other railroad. Other railroads were permitted to cross more frequented streets without any such restriction. It was held that the ordinance was an *unfair discrimination against the particular railroad* which crossed the streets named.

² *Cape May, D. B. & S. P. R. Co. v. Cape May*, 59 N. J. L. 404 (power to regulate the use of streets). In *Central R. Co. v. Elizabeth*, 70 N. J. L. 578, it was held that power conferred upon

a city to regulate the speed and running of locomotive engines and railroad cars through the city does not confer authority on the city to require a *steam railroad* to bring its trains to a stop before crossing a street.

³ In *People v. Detroit United R. Co.*, 134 Mich. 682, an ordinance granting the franchise to a railroad to use the city streets reserved authority to the city to prescribe rules, orders, or regulations to protect the public welfare. It was held that, under this authority, the city might require air brakes on the street cars, and that such an ordinance was not unreasonable in the absence of evidence that there was no more effectual brake than that then in use.

⁴ *Cape May, D. B. & S. P. R. Co. v. Cape May*, 59 N. J. L. 396. The power conferred upon the city in this case was to regulate the use of the streets, to prevent immoderate driving, to provide the manner in which corporations shall exercise any privilege granted to use the city streets, and to regulate the running of locomotive engines and railroad cars. In *Brooklyn v. Nassau El. R. Co.*, 38 N. Y. App. Div. 365, it was held that an ordinance which required fenders on all street cars to be within "not more than three inches from the tracks" was unreasonable in its provisions.

⁵ In *Trenton Horse R. Co. v. Trenton*, 53 N. J. L. 132, the city had power to pass ordinances necessary and proper for good government and order and for the protection of per-

and drivers to keep a lookout for foot passengers and children and on the first approach of danger to stop the car,¹ and may, within reasonable limitations, regulate the frequency with which cars shall be run.²

Other regulations which a city may adopt in the case of street railroads is a prohibition against the placing of salt on railway tracks,³ prohibiting the sprinkling of sand on the railway tracks,⁴ regulating the use of snowplows,⁵ requiring street railway corporations to keep the tracks watered,⁶ and other similar matters.⁷ Other regulations which have been sustained in the case of steam railroads are requirements that the bell shall be rung before starting and while the train is in motion,⁸ that the whistle be not sounded in the city limits except for necessary signals,⁹ that steam be not permitted to escape except in starting;¹⁰ to prohibit the obstruction of the streets by railroad cars;¹¹ and to require the maintenance of gates at street crossings.¹²

sons and property; and also to prescribe the manner in which corporations or persons should exercise any privilege granted to them in the use of any street. It was held that these powers authorized reasonable regulations controlling the running of street cars, and that an ordinance requiring an agent on each street car in addition to the driver to assist in the control of the car and passengers and to prevent accidents and disturbances was not upon its face unreasonable.

¹ *Fath v. Tower Grove & L. R. Co.*, 105 Mo. 537 (power to regulate streets, and to regulate and control street railways).

² In *Mayor, &c. of New York v. Dry Dock, E. B. & B. R. Co.*, 133 N. Y. 104, a city had power to regulate the running of street cars; an ordinance was adopted which required cars to be run every twenty minutes between midnight and six A. M. It was held that the ordinance was not unreasonable on its face, and that the burden was on the railway company to show that it was unreasonable as applied to its railroad.

³ *Consolidated Traction Co. v. Elizabeth*, 58 N. J. L. 619.

⁴ *Dry Dock, E. B. & B. R. Co. v. Mayor, &c. of New York*, 47 Hun (N. Y.), 221.

⁵ *Broadway & S. A. R. Co. v. Mayor, &c. of New York*, 49 Hun (N. Y.), 126.

⁶ *City & Suburban R. Co. v. Savannah*, 77 Ga. 731; *State v. Canal & C. R. Co.*, 50 La. An. 1189. See also *Newcomb v. Norfolk W. R. Co.*, 179 Mass. 449.

⁷ A city may, by ordinance, control the manner in which an electric street railway may use or cut and trim trees in the streets for railway purposes. *Consolidated Traction Co. v. East Orange*, 61 N. J. L. 202. An ordinance directing a street railroad company to maintain only one track in a city street was held to be an exercise of the right of the city to make reasonable regulations concerning the use of the street by the railroad company. *Baltimore v. Baltimore Trust & Guar. Co.*, 166 U. S. 673. It has been held that under a statute authorizing such municipal regulations concerning street railways as public interest and convenience may require, a city may require quarterly reports of the number of passengers carried by a street railway. *St. Louis v. St. Louis R. Co.*, 89 Mo. 44.

⁸ *Texas & Pacific R. Co. v. Nelson*, 2 U. S. App. 213; *Illinois Central R. Co. v. Gilbert*, 157 Ill. 354.

⁹ *Chicago, R. I. & P. R. Co. v. Steckman*, 224 Ill. 500.

¹⁰ *Pittsburg, C. C. & St. L. R. Co. v. Robson*, 204 Ill. 254; *Chicago, R. I. & P. R. Co. v. Steckman*, 224 Ill. 500.

¹¹ In *Duluth v. Mallet*, 43 Minn. 204, the city had power to prevent the encumbering of the streets with carriages. It was held that it might by ordinance prevent the obstruction of the streets by railroad cars, and for that purpose prohibit the switching of railroad cars at street crossings.

¹² *Chicago, B. & Q. R. Co. v. Ottawa*, 65 Ill. App. 631 (power to provide

§ 718 (396). **Ordinances under Police Power and General Welfare Clause.** — Other illustrations of what a municipal corporation may do *under the general welfare clause* in its organic act, or *under its police power* or its implied right to pass by-laws, or under a general grant of authority for that purpose, may be here given.

Under authority "to ordain and publish such acts, laws, and regulations, not inconsistent with the Constitution and laws of the State, as shall be needful to the *good order* of the city," it can, says *Howard, J.*, "subject to these restrictions and certain statute regulations, establish all suitable ordinances for administering the government of the city, the preservation of the health of the inhabitants, and the convenient transaction of business within its limits, and for the performance of the general duties required by law of municipal corporations."¹

protection to persons and property in the use of railroads crossing streets). But see *West Jersey & S. R. Co. v. Bridgeton*, 64 N. J. L. 189, where it was held that "power to regulate the speed and running of locomotive engines and railroad cars through the city" does not authorize the city to require the erection of gates at railroad crossings. Cities having exclusive control of streets may take such precautions as are necessary for the safety of their inhabitants in the use of them, as by *erecting gates at railroad crossings* or by permitting the railroad company to erect them. *Textor v. Baltimore & O. R. R. Co.*, 59 Md. 63. In *Pittsburg, C. C. & St. L. R. Co. v. Crown Point*, 146 Ind. 421, it was held that authority to a city to control the use of city streets, to declare what shall constitute nuisances, and to prevent, abate, and remove the same, and to prevent interference with the free use of the city streets and general authority to pass ordinances, did not authorize an ordinance requiring a railroad company to *keep a watchman and maintain gates at all railroad crossings*.

Authority to a city to regulate the police of a city and to pass and enforce all necessary police ordinances, does not authorize the enactment of an ordinance which prohibits passengers from leaving moving trains without the consent of the person in charge under penalty of a fine. Such a requirement is unnecessary as a police regulation, restrains the passenger when he may have the right to leave the train, and is a regulation of the operation of the

train and of the relation between the passenger and the carrier, and is arbitrary and unreasonable. *Wice v. Chicago & N. W. R. Co.*, 193 Ill. 351, rev'g 93 Ill. App. 266.

Charter power to a municipal corporation to require railroad companies to *fence their respective railroads* within the municipal limits, to *keep flagmen at street crossings*, and to *provide protection* against injury to persons and property in the use of such railroads, confers plenary police power over railroads within the corporate limits to provide protection against injuries to person and property; and the grant of a right of way to a railroad company by an ordinance which provides that the company shall erect suitable fences, &c., is not a mere contract, but is an exercise of the right of municipal legislation, and as such has the force of law within the corporate limits. *Hayes v. Michigan Central R. R. Co.*, 111 U. S. 228. The duty thus devolved on the railroad is one due, not to the city as a municipal body, but to the public considered as composed of individuals, and each person specially injured by breach of the obligation is entitled to his individual compensation, and to an action for its recovery. *Ib.* and cases cited.

¹ *Per Howard, J.*, *State v. Merrill*, 37 Me. 229. Such would undoubtedly be the proper construction if this were the only power given to the city to pass ordinances or by-laws. It should then be somewhat liberally construed. But if such a general grant is given in connection with, or at the end of, a long

§ 719 (397). **Observance of the Sabbath.**—Power to pass such ordinances “to maintain the peace, good government, and order of the city, and the trade, commerce, and manufactures thereof, as the council may deem expedient, not repugnant to the Constitution and laws of the State,” authorizes an ordinance prohibiting the *keeping open of stores, shops, and places of business on Sunday*, if its provisions do not conflict with State legislation.¹ But the general wel-

list of specific powers, perhaps so extended a construction might not then be due to it. The power conferred by the general welfare clause is or may be restricted by reference to other provisions of the charter or constitutional act. *Montgomery City Council v. Montgomery & W. Pl. R. Co.*, 31 Ala. 6; *Mount Pleasant v. Breeze*, 11 Iowa, 399, 400, *per Wright, J.* Under the general welfare clause a city may require sellers of meat, &c. to take out licenses. *Kinsley v. Chicago*, 124 Ill. 59. The general welfare clause has been held to confer power to prevent the keeping of *bowdy-houses*. *State v. Williams*, 11 S. Car. 288. See *ante*, § 686, 712; *post*, §§ 749-753.

A city government under the usual grants of power has the general authority to so regulate the use and enjoyment of private property in the city as to prevent its proving pernicious to the citizens generally, and may, when the use to which the owner devotes his property becomes a nuisance, compel him to cease so to use it, and punish him for refusing to obey its ordinances and regulations concerning such use. *Louisville City Railway Co. v. Louisville*, 8 Bush (Ky.), 415. See *Index, Nuisance*.

The statute of *California*, authorizing supervisors of San Francisco “to make all regulations which may be necessary or expedient for the preservation of the public health,” is within the constitutional power of the legislature to enact; and under it the supervisors may pass an ordinance against *feeding cows on distillery slops*, and *vending the milk of cows thus fed*. *Johnson v. Simonton*, 43 Cal. 342; *ante*, §§ 301, 304, 677, 684, 689.

A common council has power to adopt a penal ordinance requiring auctioneers to procure licenses from the city. This power is in the nature of a police regulation. *Goshen v. Kern*, 3 Ind. 468; *Kinsley v. Chicago*, 124 Ill. 59. See further, *Index*, title *Licenses*.

¹ *St. Louis v. Cafferata*, 24 Mo. 94; see *State v. Cowen*, 29 Mo. 330; *State v. Ambs* (constitutionality of Sunday laws affirmed), 20 Mo. 214; *s. p.* *Frolickstein v. Mobile*, 40 Ala. 725; *Hudson v. Geary*, 4 R. I. 485; *Specht v. Commonwealth*, 8 Pa. St. 312; *Cincinnati v. Rice*, 15 Ohio, 225; *Karwisch v. Atlanta*, 44 Ga. 204; *McPherson v. Chebanse*, 114 Ill. 46; *Lovilia v. Cobb*, 126 Iowa, 557; *Lieberman v. State*, 26 Neb. 464. In the case of *Charleston v. Benjamin*, 2 Strob. (S. Car.) 508, it was decided by the Court of Appeals of *South Carolina* that an ordinance of the city of Charleston, prohibiting “public exposures for sales, or sales of merchandise, on Sunday,” was not a violation of that section of the State Constitution which declares that “the free exercise and enjoyment of religious profession or worship, without discrimination or preference, shall forever hereafter be allowed within this State to all mankind.” In that case the defendant was a Jew, and the city was not denied to be possessed of all the power on the subject which the legislature could constitutionally bestow. In the case of *Columbia v. Duke and Marks*, cited 2 Strob. (S. Car.) 530, and approved, a similar decision was made at *nisi prius* by Mr. Justice *Martin*. And in this last case it was further ruled, that power in the charter to “establish such by-laws as may tend to the quiet, peace, safety, and good order of the inhabitants,” authorized the passage of such an ordinance. Power to make rules for the good order and public peace of a city held to imply power to *appoint policemen*. *State v. Sims*, 16 S. Car. 486. A mere power to “secure the health, peace, and improvement of the city” held not to authorize an ordinance prohibiting the keeping open of stores on Sunday. *Corvallis v. Carlile*, 10 Ore. 139.

Statute providing for *Sunday closing of barber shops* sustained as a proper

fare clause does not authorize a city to construct, or aid in constructing, a *plank road or toll bridge* built by a private company beyond the corporate limits of the city.¹

§ 720 (398). **Limitation of Power under the General Welfare Clause.** — The general welfare clause to pass ordinances for the good government, &c., of the corporation does not authorize an ordinance requiring the *proprietor of a theatre*, circus, or other exhibition licensed by the corporation, to *pay a peace or police officer* of the place two dollars, or any sum, for each night's attendance upon such place for the purpose of enforcing order. Such an ordinance is unreasonable and can only be passed when clearly authorized.² Under such a clause an ordinance subjecting to a fine "any person whose known character is that of a prostitute," was held to be unlawful.³

§ 721 (399). **Shade Trees in Streets.** — Shade trees in the city streets are regarded with favor,⁴ and do *not constitute a nuisance* unless they are an actual obstruction to travel along the street or

exercise of the police power. *People v. Bellet*, 99 Mich. 151; *State v. Petit*, 74 Minn. 376, *aff'd sub nom. Petit v. Minnesota*, 177 U. S. 164; *People v. Havnor*, 149 N. Y. 195; *State v. Sopher*, 25 Utah, 318. But see *Ex parte Jentsch*, 112 Cal. 468; *Eden v. People*, 161 Ill. 296; *Ragio v. State*, 86 Tenn. 272. Sunday closing ordinance directed against barbers held to be void as special legislation. *Tacomoma v. Kretch*, 15 Wash. 296.

¹ *Montgomery v. Montgomery & W. Pl. R. Co.*, 31 Ala. 76; *ante*, § 321.

² *Waters v. Leech*, 3 Ark. 110; *supra*, § 589; *post*, § 1134. But in *Tannenbaum v. Rehm*, 152 Ala. 494; 44 So. Rep. 532, it was held that under the general police power, a city may assign a fireman to each theatre and require the owner to pay for the fireman's services. Such an ordinance is not unreasonable.

³ *Buell v. State*, 45 Ark. 336. A city ordinance prohibiting prostitutes from being on the streets of the city between the hours of 7 p. m. and 4 a. m. except in cases of reasonable necessity to be clearly shown by the party charged, held reasonable and valid under express statutory authority to restrain and punish vagrants, prostitutes, rakes, and whoremongers. *Dunn v. Commonwealth*, 105 Ky. 834.

⁴ When the abutting owner *owns*

title to the centre of the street or highway, he has a title to the shade trees growing therein. *Southern Bell Tel. Co. v. Francis*, 109 Ala. 224; *Atlanta v. Holliday*, 96 Ga. 546; *Clark v. Dasso*, 34 Mich. 86; *Winter v. Peterson*, 24 N. J. L. 524; *Avis v. Vineland*, 56 N. J. L. 474; *Daily v. State*, 51 Ohio St. 348. The abutting owner may recover for the destruction of shade trees in the street in front of his lot. *White v. Godfrey*, 97 Mass. 472; *Bliss v. Ball*, 99 Mass. 597. The unlawful cutting down of shade and ornamental trees is deemed an irreparable injury and will be enjoined. *Tainter v. Morristown*, 19 N. J. Eq. 46; *Cross v. Morristown*, 18 N. J. Eq. 305, 313.

Although an abutting owner may *not own the fee* of the highway, he has an *equitable easement* or interest in shade trees planted by him in it with the assent of the municipal authorities which entitles him to redress for their destruction. *Donahue v. Keystone Gas Co.*, 181 N. Y. 313, *aff'g* 90 N. Y. App. Div. 386; *Lane v. Lamke*, 53 N. Y. App. Div. 395. See *post*, chapter on Streets. Where the title to the soil of the highway is not vested in either the abutting owner or the municipality, the owner thereof has no right, as in a question with the abutting owner, to cut down and remove trees standing in it. *Edsall v.*

highway. Hence, in many cases it is laid down that the city authorities cannot declare such trees to be a nuisance, and direct their abatement as such, in the absence of actual obstruction to travel.¹ But other decisions seem to have adopted a *qualified rule* and hold that by virtue of the control of the city over the streets the question whether trees growing on a sidewalk are an obstruction is to be determined by the city, and its determination that they are and should be removed as nuisances will not be reviewed by the courts.² The

Howell, 86 Hun (N. Y.), 424. The assent of the city authorities to the planting of shade trees will be presumed if they have been set out for more than a year. *Lane v. Lamke*, 53 N. Y. App. Div. 395. Although the abutting owner owns no part of the bed of the street, his interest in the shade trees in front of his property is sufficient to entitle him to recover damages for their negligent destruction by escaping gas from the pipes of a gas light company. *Donahue v. Keystone Gas Co.*, 181 N. Y. 313, aff'g 90 N. Y. App. Div. 386.

¹ *Atlanta v. Holliday*, 96 Ga. 546; *Bills v. Belknap*, 36 Iowa, 383; *Everett v. Council Bluffs*, 46 Iowa, 66; *Patterson v. Vail*, 42 Iowa, 143; *Burget v. Greenfield*, 120 Iowa, 432; *Frostburg v. Wineland*, 94 Md. 239; *Winter v. Peterson*, 24 N. J. L. 524; *Avis v. Vineland*, 56 N. J. L. 474; *Evans v. Street Commissioners*, 84 Hun (N. Y.), 206; *Phifer v. Cox*, 21 Ohio St. 248.

Trees in highways are property of the adjacent owner, and if they encroach upon the highway, and must be removed, he has a right and must be afforded a reasonable opportunity to take them as living trees and transplant them elsewhere. *Clark v. Dasso*, 34 Mich. 86. *Cooley, C. J.*, said: "It should be borne in mind that a tree in the highway is not under our law *per se* a nuisance, and that it only becomes such when it constitutes an actual injury or obstruction."

An ordinance passed under the power to declare nuisances and to remove obstructions, encumbrances, and nuisances in any street which declares healthy growing trees planted over twenty-five years before on or near the edge of the roadway of a street a nuisance and obstruction and directs their removal as such, held void because they were not an obstruction in fact and were planted on the soil of the

abutting owner. *Avis v. Vineland*, 56 N. J. L. 474.

Where an abutting owner, with the consent or acquiescence of the city, has caused shade trees to be set out in the street along or near the line of his property, the municipal authorities will not be permitted to wantonly or without reasonable cause destroy them, even though they become a part of the realty and the title to the soil of the street is in the city. *Burget v. Greenfield*, 120 Iowa, 432; *Gallaher v. Jefferson*, 125 Iowa, 324, 331.

² *Vanderhurst v. Tholcke*, 113 Cal. 147; *Tate v. Greensboro*, 114 N. Car. 392. In *Illinois*, shade trees in the public streets of a city are the property of the municipality which has complete control of them and will not be enjoined from cutting down when they obstruct the sidewalk. *Mt. Carmel v. Shaw*, 155 Ill. 37. Under statutory authority to control and regulate the streets and to remove and abate any obstructions and encroachments therein, the council may cause to be summarily cut down and removed shade trees standing within the limits of a sidewalk and belonging to the abutting lot owner. Whether such trees are obstacles to travel and ought to be removed is a matter to be determined by the council in its discretion, and, except in the case of abuse of such discretion, the courts will not interfere. Shade trees standing within the limits of a sidewalk are not an encroachment upon the street, but an obstruction, and their removal by the proper authorities need not be preceded by a hearing or notice. *Chase v. Oshkosh*, 81 Wis. 313.

Abutting owner who has fee to centre of street has only a *qualified and limited ownership* in trees standing in street which is subservient to the public right to convenient passage, and the other rights, powers, and duties of the governing bodies in the protection,

title or interest of the abutting owner in the shade trees must *yield to the power of the city* to grade the street, or to build sidewalks, or otherwise improve it. For any injury resulting therefrom the abutting owner has no redress.¹

Where a city corporation is authorized "to ordain such laws not inconsistent with the Constitution and laws of the State as shall be needful to the *good order* of the city," it may pass an ordinance imposing a penalty upon any person who shall "mutilate or *destroy any ornamental tree planted in any of the streets*, lanes, or other public places within the limits of the city." Such an ordinance is not inconsistent with a State law punishing the *malicious* or *wanton* destruction of trees growing for ornament or use. Under the ordinance it is not necessary to allege or prove that the mutilation was malicious or wanton, and it would seem to be considered that it was no defence that the tree alleged to be mutilated was upon the street in front of the lot of the accused, who owned, subject to the public easement, *ad medium filum viæ*.²

promotion, and establishing of every public use in and upon the streets of the city. *Southern Bell Tel. Co. v. Francis*, 109 Ala. 224.

¹ *Castleberry v. Atlanta*, 74 Ga. 164; *Gallaher v. Jefferson*, 125 Iowa, 324, 331; *Wilson v. Simmons*, 89 Me. 242; *Tate v. Greensboro*, 114 N. Car. 392.

But in *Michigan*, the rule has been adopted that although a municipal corporation has the right to remove shade trees for the purpose of improving a highway it cannot do so *without giving notice* to the owner that he may have an opportunity to transplant or remove them himself. *Stretch v. Cassopolis*, 125 Mich. 167. See also *Miller v. Detroit, Y. & A. A. R. Co.*, 125 Mich. 171. If the proceedings to grade a street are void for failure to comply with the statute, the *abutting owner may recover* in trespass for the destruction of his trees. *Fisher v. Naysmith*, 106 Mich. 71; *Richardson v. Webster City*, 111 Iowa, 427; *Blanden v. Ft. Dodge*, 102 Iowa, 441.

Telegraph, telephone, and street railway companies have been held to have the *right to cut and trim trees* so far as necessary for running wires, &c. *Southern Bell Telephone Co. v. Francis*, 109 Ala. 224; *Wyant v. Central Telephone Co.*, 123 Mich. 51; *Dodd v. Consolidated Traction Co.*, 57 N. J. L. 482. But in *Ohio*, it is held that an abutting owner, whose title extends to the centre of the street or highway, has a

property right in shade trees, of which he cannot be deprived without compensation by the acts of the telegraph company in running its wires. *Daily v. State*, 51 Ohio St. 348. In *Connecticut*, it is held that the selectmen of the town have no power, without the owner's consent, to cut or trim trees to enable a telephone company to construct and maintain its line, and the telephone company cannot justify so doing under authority received from the selectmen. *Bradley v. Southern New England Tel. Co.*, 66 Conn. 559. But a telephone company is answerable for wanton and unnecessary damage to trees. *Wyant v. Central Tel. Co.*, 123 Mich. 51; *Osborne v. Auburn Tel. Co.*, 111 N. Y. App. Div. 702. In *Michigan*, an electric street railway cannot remove trees without first giving notice to the owner to afford him an opportunity to remove and transplant them himself. *Miller v. Detroit, Y. & A. A. R. Co.*, 125 Mich. 171. The right to construct a street railway or a telegraph or telephone line, does not justify an entrance on *private property* to cut the limbs of trees to more conveniently run wires. *Tissot v. Great Southern Tel. Co.*, 39 La. An. 996; *Memphis Bell Tel. Co. v. Hunt*, 16 Lea (Tenn.), 456.

² *State v. Merrill*, 37 Me. 229. *Contra*, as to right of adjoining owner. *Lancaster v. Richardson*, 4 Lansing (N. Y.), 136; see *post*, § 1134, note.

401). **Vagrants; Powers under Authority to regulate the Power** "to regulate the police of the city," and to pass not inconsistent with law, authorizes an ordinance for *and fining vagrants*, although, by the general law of the *rants* may be proceeded against before a justice of the court considering that this did not forbid the corporation local regulation on the same subject not in conflict with the w.¹

Maine is a quite liberal construction of the words "good order." necessary that cities should have authority, and the power of ordinance could, perhaps, be as incidental to the power over its streets and public places, chapter on Streets. to shade trees. *Post*, § 1134, as been held that an ordinance prohibits the *hitching of shade trees* is reasonable and the owner of the adjoining subject to prosecution and if he violates it. *Baker v. Ill.* 108.

uis v. Bentz, 11 Mo. 61, and from *Jefferson City v. 9 Mo.* 683, which was a proceeding for an *indictable* *State v. Cowen*, 29 Mo. *uis v. Schoenbush*, 95 Mo. *v. Commonwealth*, 42 Pa. *Strong, J.*; *Shafer v. Mum-* 331; *supra*, § 752; *post*,

Case, 11 Me. 208; *s. p.* *Portland v. Bangor*, 42 Me. 403, *Rice, J.*, dissenting. It is now admitted by the Supreme Court of *Maine* that this statute is in conflict with the 14th amendment of the Constitution, "That no State shall deprive any person of life, liberty," &c., "without due process of law," and that *Nott's Case* and *Portland v. Bangor, supra*, are no longer the law. Now there can be no restraint of liberty without first having a judicial investigation of the charge. *Portland v. Bangor*, 65 Me. 120. See *Byers v. Commonwealth*, 42 Pa. St. 89; *post*, § 744, note, § 750. In *Illinois*, the Supreme Court of that State decided that the act creating the Reform School was unconstitutional, and that the act, so far as it restrained liberty for any cause except actual crime, was in violation of the Bill of Rights. *People v. Turner*, 55 Ill. 280; *People v. Weisenbach* (power to bind out children), 60 N. Y. 385.

by which "two or more the town" were authorized to the workhouse, until dis-law, by writing under their e there employed and gov- ding to the rules and orders e, &c., "all persons, able of ck, and not having estate or erwise to maintain them- refuse or neglect to do so, dute, vagrant life, and ex- ordinary calling or lawful ficient to gain an honest does not violate the con- right to "life and liberty," , in "criminal proceedings, d by counsel, confronted ses," &c. The court did not a criminal proceeding, but atory or correctional one, so rson proceeded against was and designed to protect the from becoming chargeable person's support. *Nott's*

Vagrancy is distinguished from disorderly conduct and breaches of the peace and includes only such cases of vagabondage as are known to the common law. Under statutory authority to punish "vagrants" by ordinance the scope of the term cannot be enlarged. *Way's Case*, 41 Mich. 299. Under authority granted to restrain and punish *vagrants* the city council may declare what acts shall constitute vagrancy, but such power must be confined within reasonable bounds and limited to the generally accepted meaning of the term and scope of the law relating to the subject. *State v. Stone*, 96 Minn. 482. Under power to define "vagrant," a city ordinance which declares that any person living idly, or without any settled home, or without any visible means of living, or lawful occupation and employment, or found begging, or living or frequenting certain disreputable houses, shall be deemed a vagrant, is a valid exercise of the power con-

§ 723 (402). **Strays.** — By virtue of its police power a municipal corporation may pass an ordinance imposing a fine upon the owner of any *animal found astray or at large* within the limits of the corporation.¹

§ 724. **Regulation of Dogs.** — Although a property right in a dog is recognized by the decisions, it is qualified in its nature, and the courts uniformly consider that the regulation of the keeping or harboring of dogs is a proper subject for the exercise of the police power of the State.² The *police power of the State on this subject* may either

ferred. *Nichols v. Salem*, 49 Oreg. 298; 89 Pac. Rep. 804. So much of an ordinance to punish vagrants as provides that any person who "is found trespassing on private premises without giving a good account to the court for his or her conduct" is not authorized by statutory authority to restrain and punish vagrants and is void. *State v. Stone*, 96 Minn. 482; 105 N. W. Rep. 187. In order to charge a person with vagrancy by reason of going about in the community without any visible means of support, it must appear that he is idle and seeking to live upon the charity of others and unwilling, though able, to work for his maintenance. *In re Jordan*, 90 Mich. 3. Prosecution for violation of ordinance. *St. Louis v. Babcock*, 156 Mo. 148.

It is said that one who has been loitering about the streets of a city and in bar-rooms in idleness for two weeks without apparent habitation and without any means of support, giving no satisfactory explanation of his conduct, would be punishable as a *disorderly person* at common law. *In re Stegenga*, 133 Mich. 55, *per Hooker, J.* Charter authority to provide by ordinance for the punishment of "*disorderly persons of all kinds*" is to be construed in its ordinary sense, and is not limited to such conduct as would be regarded as disorderly under the general statutes of the State or at common law. A complaint alleging that defendant was found loitering about in common bar-rooms and wandering about the streets by day and by night without any lawful means of support and without being able to give a satisfactory account of himself for a period of two weeks in violation of a city ordinance relating to disorderly persons does not charge the defendant with vagrancy and is not open to objection on that account.

In re Stegenga, 133 Mich. 55. A complaint alleging that the defendant was guilty of indecent, insulting, and immoral conduct by peeking into the windows of an occupied house which was not his residence, sufficiently charges a violation of an ordinance against indecent, insulting, or immoral conduct. *Grand Rapids v. Williams*, 112 Mich. 247.

¹ *Municipality No. 3 v. Blanc*, 1 La. An. 385; *Case v. Hall*, 21 Ill. 632; *Commonwealth v. Bean*, 14 Gray (Mass.), 52; *Commonwealth v. Curtis*, 9 Allen (Mass.), 266; *Roberts v. Ogle*, 30 Ill. 459; *McKee v. McKee*, 8 B. Mon. (Ky.) 433; *Waco v. Powell* (hogs at large), 32 Texas, 258; *Cartersville v. Lanham*, 67 Ga. 753; *Dunn v. Wilcox*, 85 Ala. 144, 149, citing text; *ante*, § 592, note; *supra*, § 620. Construction of ordinance prohibiting the suffering of animals to run at large, and what must be shown to subject a person to liability under such an ordinance. *Collinsville v. Scanland*, 58 Ill. 221; *Kinder v. Gillespie*, 63 Ill. 88.

² *Sentell v. New Orleans & C. R. Co.*, 166 U. S. 698; *Ex parte Ackerman*, 6 Cal. App. 5; 91 Pac. Rep. 429; *Cranston v. Augusta*, 61 Ga. 572; *Cole v. Hall*, 103 Ill. 30; *Mitchell v. Williams*, 27 Ind. 62; *State v. Cornnall*, 27 Ind. 120; *State v. Topeka*, 36 Kan. 76; *Tower v. Tower*, 18 Pick. (Mass.) 262; *Blair v. Forehand*, 100 Mass. 136; *Morewood v. Wakefield*, 133 Mass. 240; *Van Horn v. People*, 46 Mich. 183; *Faribault v. Wilson*, 34 Minn. 254; *Julienne v. Jackson*, 69 Miss. 34; *Nehr v. State*, 35 Neb. 638; *Morey v. Brown*, 42 N. H. 373; *Fox v. Mohawk & H. R. Humane Soc.*, 165 N. Y. 517, 522; *Mowery v. Salisbury*, 82 N. Car. 175; *Holst v. Roe*, 39 Ohio St. 340; *Ex parte Cooper*, 3 Tex. App. 489; *Jenkins v. Ballantyne*, 8 Utah, 245; *Carter v.*

revised directly by statutory enactment, or may be delegated to and other municipal corporations. It usually takes the form of provisions prohibiting dogs from running at large without a collar and license tag; requiring dogs to be kept or kept upon the owner's premises, and authorizing the mayor or other public officer to kill all dogs found running at large in violation of the statute or ordinance, and if such officer kills a dog at large in violation of the statute or ordinance, no action is sustained against him for the act.¹ A license fee or tax is

Wis. 298; *Tenney v. Lenz*, 163

statute providing that *only dogs upon the assessment rolls* shall be liable to the protection of the law, and in a civil action for killing a dog the owner cannot recover beyond the sum fixed by himself at the last assessment preceding the killing, is the police power of the State. *v. New Orleans & C. R. Co.*, 166 398. Mr. Justice *Brown* said: "Although dogs are ordinarily harmless, they preserve some of their hereditary instincts, which occasionally break forth in the destruction of and other helpless animals. They are too small to attack these animals simply vicious, noisy, and dangerous. As their depredations are committed at night, it is usually difficult to identify the dog or to fix liability upon the owner, who, therefore, is likely to be pecuniarily liable. In short, the damages usually such as are beyond the reach of judicial process, and legislative drastic nature is necessary to protect persons and property from destruction and annoyance. Such action is clearly within the police power of the State. It ordinarily takes the form of a license tax, and the identification of the dog by a collar and tag, which the name of the owner is usually required to be engraved, and other remedies are not uncommon." statute which provides that "the mayor of cities may issue warrants to officers or constables directing them to kill or cause to be killed any dog not licensed and collared according to the provisions of the act, is an exercise of the police power of the State, although it permits the summary destruction of dogs without judicial adjudication. *Blair v. Foreman*, 100 Mass. 136. See also *Morey*

v. Brown, 42 N. H. 373; *Nehr v. State*, 35 Neb. 638. Application of statute, see *Morewood v. Wakefield*, 133 Mass. 240; *Moore v. Mills*, 191 Mass. 56. Dogs in cities may be classified and owners, &c., may be required to register all dogs of one class and not the dogs of another class, and to pay a greater fee for the registration of dogs of one class than for the registration of dogs of another class, *e. g.*, male and female dogs. *State v. Topeka*, 36 Kan. 76. As to the power to enter private houses for the purpose of killing a dog, see *Kerr v. Seaver*, 11 Allen (Mass.), 151; *Bishop v. Fahay*, 15 Gray (Mass.), 61; *Cozzens v. Nason*, 109 Mass. 275.

¹ An ordinance which prohibits permitting of dogs to run at large within the corporate limits, provides for the appointment of persons to seize and kill dogs running at large in violation of the ordinance, that all dogs so seized shall be detained for twenty-four hours, that notice shall be given to the owner of any dog with a collar with the owner's name engraven thereon, that the same may be ransomed upon the payment of specified fees, and that all dogs not redeemed shall be killed is a proper and valid exercise of the police power. *Hagerstown v. Witmer*, 86 Md. 293.

An ordinance which authorizes the mayor of a city whenever he may apprehend danger of the existence or spread of hydrophobia to issue a proclamation requiring all owners of dogs to confine or muzzle such animals is not invalid as delegating legislative power to an executive officer. *Walker v. Towle*, 156 Ind. 639. A city having authority to regulate keeping of dogs has power to impose a fine upon a person for keeping a dog within its limits without having obtained a license to do so in violation of the city ordinance. *Carthage v. Rhodes*, 101 Mo. 175. Under a statutory provision that no ordinance

usually charged, and such license fee or tax is regarded a proper exercise of the police power, and not as a tax upon property.¹

The authority of a municipal corporation to pass ordinances on the subject is sometimes conferred in express terms,² but it has also

shall contain more than one subject, which must be clearly expressed in its title, a provision of an ordinance prohibiting the keeping of any dog without the payment of a tax, registration, and procuring of tag and collar, and which provides for killing any dog running at large without such collar and tag, is not within a title which expresses that it is to prohibit animals from running at large in a city. *Stebbins v. Mayer*, 38 Kan. 573. An ordinance which prohibits the keeping in any stable or other premises "any dog or other animal which shall by noise disturb the quiet or repose of any person therein or in the vicinity" does not apply to horses kept in any stable. The expression "other animal" used after "dog" must be construed upon the principle of *ejusdem generis*. *People v. Edelstein*, 91 N. Y. App. Div. 447.

In two cases, ordinances such as are referred to in the text have been held to be invalid. Under authority "to regulate or restrain the running at large of dogs and to authorize their destruction when at large, contrary to ordinance," a city ordinance requiring all dogs running at large to be killed, and authorizing the marshal to shoot them when running at large in violation of the ordinance, was held to violate the *Texas Constitution* by depriving a citizen of his property without adequate compensation or due process of law. *Lynn v. State*, 33 Tex. Crim. Rep. 153. In *Washington v. Meigs*, 1 McArthur (D. C.), 53, it was held that the law recognizes property in dogs, and that a city ordinance requiring the owner of such property to obtain a license for keeping a dog is illegal. This case seems to make a distinction between the act of simply keeping a dog and requiring the owner at certain seasons to muzzle, and to prevent him from running at large. The latter power is conceded to exist as a police regulation for the safety of a community. This decision is contrary to the great weight of authority.

¹ *Gibson v. Harrison*, 69 Ark. 385; *Cole v. Hall*, 103 Ill. 30; *Commonwealth v. Markham*, 7 Bush (Ky.), 486; *Mowery v. Salisbury*, 82 N. Car. 175;

Ex parte Cooper, 3 Tex. App. 489. *Per capita* tax on dogs is an exercise of the police power and is not in violation of a constitutional provision requiring all taxes to be by uniform rule. *Holst v. Roe*, 39 Ohio St. 340; *Van Horn v. People*, 46 Mich. 183; *Cole v. Hall*, 103 Ill. 30; *State v. Topeka*, 36 Kan. 76; *Kidd v. Reynolds*, 20 Tex. Civ. App. 355 (distinguishing *Lynn v. State*, 33 Tex. Crim. Rep. 153). As an incident to the right to regulate the management and ownership of dogs, conferred upon it by statute, a city may enforce a license tax upon dogs. *Ex parte Ackerman*, 6 Cal. App. 5; 91 Pac. Rep. 429; *Gibson v. Harrison*, 69 Ark. 385. Under a statute empowering a city to "tax, regulate, restrain, and prohibit the running at large of dogs . . . to provide for the impounding or destruction . . . of them when found running at large contrary to ordinance," a city may impose a *per capita* tax upon dogs by way of license. Such tax is an exercise of the police power of the State and is not prohibited by constitutional provision requiring all property to be taxed in proportion to its value. *Carthage v. Rhodes*, 101 Mo. 175.

An ordinance which provides that the owner of a dog upon payment of a prescribed license tax shall attach to a collar to be worn by the dog a seal or device as evidence of the ownership of the dog and of payment of the license tax, and which also provides for the destruction of a dog upon which a license tax has not been paid, and provides further for the enforcement of a penalty for any violation, is an exercise of the police power, and not of the taxing power. *Ex parte Ackerman*, 6 Cal. App. 5; 91 Pac. Rep. 429.

License fees exacted for the keeping of dogs are public moneys which cannot be diverted to the use of a private individual or corporation even under express statutory authority. So held under statute appropriating license fees to use of humane society. *Fox v. Mohawk & H. R. Humane Soc.*, 165 N. Y. 517, aff'g 25 N. Y. App. Div. 26.

² See *State v. Topeka*, 36 Kan. 76; *Faribault v. Wilson*, 34 Minn. 254;

been sustained under such general grants of authority as power to declare what shall be deemed to constitute a nuisance and to abate the same,¹ or to enact ordinances for the protection of health, life, and property,² or to make by-laws for the comfort and security of the citizens.³

§ 725 (403). **Power under Authority to preserve Good Order, &c.** — If a municipal corporation has, by its charter, power to pass ordinances to preserve the peace and good order of the place, this gives it authority to provide for the punishment, in the manner allowed by its charter, of persons who shall rescue, or attempt to *rescue*, *prisoners* from the lawful custody of municipal officers.⁴ But the general power, though expressly conferred, to enact by-laws for the good government of the town, does not confer the power to *levy taxes* of any kind, not even upon retailers of ardent spirits.⁵

§ 726 (404). **Storage of Gunpowder.** — The general welfare clause in a charter empowering the city council to pass such other ordinances as appear necessary for the *security* of the city, authorizes an ordinance regulating the *mode of keeping and the sale of gunpowder*, within the limits of the corporation, such as requiring all gunpowder brought into the city to be conveyed to the public magazine of the city, except when it is to be retailed, and then to be kept in limited quantities and in secure canisters. And it was so held, notwithstanding the point was made in argument that the general welfare clause in the charter could not enlarge the powers of the corporation further than is necessary to carry into effect the specific grants of power.⁶

§ 727 (405). **Public Safety; Fire Limits.** — Municipal corporations, with general power to provide for the safety of their inhab-

Julienne v. Jackson, 69 Miss. 34; *Jenkins v. Ballantyne*, 8 Utah, 245.

¹ *Leach v. Ellwood*, 3 Ill. App. 453; *Haller v. Sheridan*, 27 Ind. 494; *Hagerstown v. Witmer*, 86 Md. 293.

² *Haller v. Sheridan*, 27 Ind. 494; *Walker v. Towle*, 156 Ind. 639. See also *Commonwealth v. Chase*, 6 Cush. (Mass.) 248.

³ *Commonwealth v. Markham*, 7 Bush (Ky.), 486.

⁴ *Independence v. Moore*, 32 Mo. 392; *St. Louis v. Schoenbusch*, 95 Mo. 618.

⁵ *Com'rs of Ashville v. Means*, 7 Ire. (N. Car.) Law, 406; *Burnett, In re*, 30 Ala. 461; *post*, chapter on Taxation.

⁶ *Williams v. Augusta City Council*, 4 Ga. 509; *Frederick v. Augusta City Council*, 5 Ga. 561, where the charter of Augusta is more fully given.

In *California*, it has been held that, under such a power, a municipality may prohibit the carrying on of a laundry within the city limits in any building not constructed of brick or stone. *Matter of Yick Wo*, 68 Cal. 294 (see *Yick Wo v. Hopkins*, 118 U. S. 356); *Index, Laundry*. In *Missouri*, a city may, under the general welfare clause, prohibit *cruelty to animals*. *St. Louis v. Schoenbusch*, 95 Mo. 618.

itants, may prohibit the throwing of heavy or *dangerous articles* from the upper stories of buildings *into the streets* or open spaces near them, where persons are in the habit of passing; and *may*, where this is consistent with the general and special legislation applicable to the municipality, establish *fire limits*, and prevent erection therein of *wooden buildings*.¹ It has been held that a municipal corporation has inherent or implied power, independently of any express statutory authority, to enact ordinances for the protection of the property of the citizens against fire and to prescribe fire limits and prohibit the erection of wooden buildings therein,²

¹ McKibbin v. Fort Smith, 35 Ark. 352; *Ex parte Fiske*, 72 Cal. 125; *In re Newell*, 2 Cal. App. 767; *Ford v. Thralkill*, 84 Ga. 169; *King v. Davenport*, 98 Ill. 305; *Patterson v. Johnson*, 214 Ill. 481; *Chicago v. Gunning System*, 214 Ill. 628, citing text; *Kaufman v. Stein*, 138 Ind. 49; *Baumgartner v. Hasty*, 100 Ind. 575 (quoting text); *First Nat. Bank v. Sarlls*, 129 Ind. 201; *State v. O'Neil*, 49 Ia. An. 1171, citing text; *Wadleigh v. Gilman*, 12 Me. 403; *Salem v. Maynes*, 123 Mass. 372; *Brady v. N. W. Insurance Co.*, 11 Mich. 425; *Eichenlaub v. St. Joseph*, 113 Mo. 395; *Vanderbilt v. Adams*, 7 Cow. (N. Y.) 349, 352; *per Woodruff, J.*, *arguendo*; *Fire Dept. v. Gilmour*, 149 N. Y. 453; *Griffin v. Gloversville*, 67 N. Y. App. Div. 403; *State v. Johnson*, 114 N. Car. 846; *Douglass v. Commonwealth*, 2 Rawle (Pa.), 262; *Klingler v. Bickel*, 117 Pa. St. 326; *Charleston v. Elford*, 1 McMullan (S. Car.), Law, 234; *Knoxville v. Bird*, 12 Lea (Tenn.), 121; *Eureka City v. Wilson*, 15 Utah, 67; *Charleston v. Reed*, 27 W. Va. 681, quoting text.

An ordinance *establishing fire limits* is not in violation of the *Fourteenth Amendment* to the United States Constitution; nor is it oppressive, unreasonable, or special in its operation; it is not an unwarrantable delegation of power to municipal officers. *Ex parte Fiske*, 72 Cal. 125. See also *Eureka City v. Wilson*, 15 Utah, 67. An ordinance prohibiting the *erection of wooden buildings* within prescribed limits does not violate either the Constitution of Pennsylvania or the Fourteenth Amendment to the Constitution of the United States. *Klingler v. Bickel*, 117 Pa. St. 326. Cities may constitutionally be authorized to prevent the erection of *wooden buildings*

in certain portions thereof. *Respublica v. Duquet*, 2 Yeates (Pa.), 493.

In *Massachusetts*, it has been held that an ordinance establishing fire limits and prohibiting the erection of wooden buildings therein applies to and prohibits the erection of a building, *although, before the passage of the ordinance, work was begun on the cellar, a contract made for the erection, and the lumber bought and prepared*. *Salem v. Maynes*, 123 Mass. 372. A similar decision appears to have been made in *Tennessee*, where it was held that the exercise of the power to establish fire limits and prohibit the erection of wooden buildings therein does not impair the obligation of a contract even where the contract to build was made before the passage of the ordinance. *Knoxville v. Bird*, 12 Lea (Tenn.), 121. But in *New York*, where an ordinance prohibited the erection, without the permission of the common council, of a wooden building within the fire limits, and the common council had by resolution given defendant permission to erect a wooden building within these limits, and he entered into contracts therefor and began the work, and thereafter the common council passed a resolution rescinding the resolution permitting plaintiff to construct the building, it was held that when defendant entered upon the construction of the building pursuant to the permit, he acquired a *vested right* therein of which the council had no power to deprive him, and that an action to recover a penalty for a violation of the ordinance could not be maintained. *Buffalo v. Chadeayne*, 134 N. Y. 163.

² *Indiana*. In this State it has been said that, independently of any [express] statutory authority, muni-

other decisions *deny the existence* of any implied or inherent power.¹

The power to enact ordinances *prescribing fire limits* has been held to be conferred by statutes authorizing municipalities to make provision for the protection of the inhabitants against loss by fire.² Such ordinances have also been sustained under the *general welfare*

all corporations possess the inherent power to enact ordinances for the protection of the property of the citizen against fire and may for that purpose pass ordinances prescribing limits and prohibiting the erection of wooden buildings therein. *Crawdsville v. Braden*, 130 Ind. 149, 150; citing *Clark v. South Bend*, 85 Ind. 276; *Baumgartner v. Hasty*, 100 Ind. 575; *Hasty v. Huntington*, 105 Ind. 540; *Bluffton v. Studebaker*, 106 Ind. 129; *First National Bank v. Hils*, 129 Ind. 201.

In *Louisiana*, it has also been held that a municipal corporation has inherent or implied power independent of specific legislative grant to forbid erection within the densely built parts of a town and compel the removal therefrom of buildings formed of combustible materials. *Monroe v. Gilman*, 29 La. An. 651. But in the other case of *State v. Schuchardt*, 42

An. 49, the court seems to have been of the opinion that no such inherent or implied power existed and that it must be found in a grant of legislative authority. The question in this case arose under an attempt to *repair with shingles* the roof of a building, which was originally shingled, and it was held that legislative authority to prevent the reconstruction of buildings did not authorize the municipality to prohibit such repairs.

¹ *Des Moines v. Gilchrist*, 67 Iowa, 368. See also *Kneedler v. Norristown*, 1 Pa. 368.

In *Pye v. Peterson*, 45 Tex. 312, the conclusion was reached in view of the *legislation of the State*, that a general grant of power to a city "to ordain such ordinances, not inconsistent with the laws of the State, as shall be needful for the government, interests, welfare, and good order of the corporation," did not authorize the city to establish fire limits and to prevent the erection of wooden buildings within such limits. The text is referred to, and it is added that it is supported by *Wad-*

leigh v. Gilman, 12 Me. 403, and, on the other hand, *Hudson v. Thorne*, 7 Paige (N. Y.), 261, is considered as opposed to it.

Of course the question in each case must be decided in view of all the legislation of the State bearing upon it. The text in the fourth edition has been slightly modified, and is retained in the fifth edition. The prevention of fires in towns and cities is peculiarly a matter for local regulation, and is universally so regarded. *Ante*, §§ 301, 303. It belongs to the ordinary police powers of a city; and unless such a course is inconsistent with the legislation of the State touching the subject (as Mr. Justice *Gould* shows it to have been in *Texas*), it seems to us to be presumptively authorized by a general grant of power to provide for the safety and welfare of the inhabitants.

Instance of a *want of power* to restrict erection of wooden buildings. *Hudson v. Thorne*, 7 Paige (N. Y.), 261.

² *Ironside v. Vinita*, 6 Ind. Ter. 485; 98 S. W. Rep. 167 (power to guard against accidents by fire and to prohibit the erection of any building more than 10 feet in height unless the outer walls are constructed of brick or mortar, &c.); *Alexander v. Greenville*, 54 Miss. 659 (power to pass ordinances for the security of the town, to regulate the police, and to provide for the prevention and extinguishment of fires); *Charleston v. Reed*, 27 W. Va. 681 (power "to make regulations for guarding against damage or damages by fire"). When a statute conferring authority specifically *prescribes the manner* in which the power shall be exercised, the statutory method prescribed must be followed. *Des Moines v. Gilchrist*, 67 Iowa, 210. Under statutory authority to *enact reasonable regulations* to prevent fires, &c., a municipality cannot require the *consent* in writing of the adjoining owners to the erection of any frame building. *Tilford v. Belknap*, 126 Ky. 244; 103 S. W. Rep. 289.

clause,¹ and under power to declare *what shall constitute nuisances*, to abate and remove the same, and to regulate the police of the city.² But the power to establish fire limits and to regulate the manner of constructing buildings therein is in derogation of common right, and must be *strictly construed* in favor of the owners of buildings within its limits.³ It is also held that pursuant to ordinances fixing the

¹ *Ford v. Thralkill*, 84 Ga. 169. Under power to pass such ordinances as may be conducive to the promotion of the health, safety, and welfare of its inhabitants, a city may pass an ordinance regulating in a reasonable manner the handling of combustible oils in tank wagons or other vehicles upon the streets of the city. *Spiegler v. Chicago*, 216 Ill. 114.

² *Patterson v. Johnson*, 214 Ill. 481, 488.

Under the provision of the *California* Constitution authorizing municipal corporations to make all such local police, sanitary, and other regulations as are not in conflict with general laws, a city may prohibit the erection or maintenance of any tent or movable structure within the fire limits. *In re Newell*, 2 Cal. App. 767. Under the police powers of the city it has been held that the city may assign a fireman to theatres and may require the owner to pay for his services. Such a requirement is a valid exercise of the police power of the city for the protection of the public and is not unreasonable. *Tannenbaum v. Rehm*, 152 Ala. 494; 44 So. Rep. 532.

³ *Montgomery v. Louisville & N. R. Co.*, 84 Ala. 127; *Louisville v. Webster*, 108 Ill. 414; *State v. Schuchardt*, 49 La. An. 49; *Houlton v. Titcomb*, 102 Me. 273.

Under the authority to fix fire limits and to prohibit the erection or repair of wooden buildings therein, a city cannot absolutely prohibit all repairs to a wooden building irrespective of the material or the extent of the repairs. It is within its power to prohibit the practical reconstruction of the building, but it cannot prohibit minor repairs regardless of their effect upon the public, adjacent property, or the rights of others. *First National Bank v. Sarlls*, 129 Ind. 201. See also *Ex parte Fiske*, 72 Cal. 125; *State v. Schuchardt*, 42 La. An. 49. An ordinance which prohibited the erection of any wooden building, &c., within the fire limits and provided for a fine for

each day during which any violation shall continue, was held not to apply to the extension or enlargement of a brick depot building by an extension at one end, two stories high, constructed of wooden framework, resting on brick foundation, cased with corrugated iron, and covered with sheet-iron roofing. The building was considered not to come properly within the ordinance. *Montgomery v. Louisville & N. R. Co.*, 84 Ala. 127. An ordinance prohibiting the erection or enlargement of any building except with brick or stone; that no wooden building should be enlarged without a permit from the local authorities, was sustained. *McCloskey v. Kreling*, 76 Cal. 511.

In *Wadleigh v. Gilman*, 12 Me. 403, it was decided that the removal of a wooden building to the prohibited district, or even from one part of the district to another, was an "erection" within the meaning of the term "erection," as used in the ordinance. "The mischief," says *Weston*, C. J., "did not consist in the act of erecting, but in the continuance of the erection. The ordinance did not meddle with erections as they stood; this would have transcended their power." To the same effect *Kaufman v. Stein*, 138 Ind. 49; *Eureka City v. Wilson*, 15 Utah, 67.

Difference between "erecting" and "repairing." *Brady v. N. W. Ins. Co.*, 11 Mich. 425, 449, opinion of *Campbell*, J.; *Montgomery v. Louisville, &c. R. Co.*, 84 Ala. 127; *Carroll v. Lynchburg*, 84 Va. 803; *Brown v. Hunn*, 27 Conn. 332; *Booth v. State*, 4 Conn. 65; *Tuttle v. State*, *Id.* 68; *Stewart v. Commonwealth*, 10 Watts (Pa.) 307.

As to the meaning of the words "incombustible materials," when used in a statute or ordinance regulating the erection of buildings, see *Sylvania v. Hilton*, 123 Ga. 754; *Payne v. Wright*, L. R. 1 Q. B. D. 104; *Badley v. Cuckfield Union Rural Dist.*, 72 L. T. 775.

An ordinance framed in terms so indefinite that an expert surveyor

fire limits and prohibiting the erection of wooden buildings therein, the city may, summarily and without judicial proceedings, *remove any building* which has been erected in violation of the ordinance.¹

It has been held that the city may *enforce its ordinances by injunction* to restrain the erection of a building in violation thereof, when it is declared that such erection is a nuisance,² and an injunction by an *adjoining owner* against the erection of a building in violation of the ordinance has also been sustained when the plaintiff has shown

could not locate the boundaries of the fire limits held to be invalid. *Lamm v. Danville*, 221 Ill. 119. Ordinance prohibiting the erection or maintenance of any woodyard "within 150 feet of any inhabited portion of any residence district" without a permit held to be *void for uncertainty*. *St. Paul v. Schleh*, 101 Minn. 425.

¹ *McKibbin v. Ft. Smith*, 35 Ark. 352; *Hine v. New Haven*, 40 Conn. 478; *Baumgartner v. Haasty*, 100 Ind. 575; *Eichenlaub v. St. Joseph*, 113 Mo. 395, 406; *Klingler v. Bickel*, 117 Pa. St. 326. Under statutory authority to fix fire limits and to direct the manner of constructing buildings therein, a municipal corporation may by ordinance declare a building not constructed in terms of the ordinance *to be a nuisance* and authorize its *abatement* as such. *Micks v. Mason*, 145 Mich. 212.

² *Houlton v. Titcomb*, 102 Me. 273. See also Index, *Equity; Injunction; Nuisance*.

In *Massachusetts*, a city or town is held *entitled to maintain a bill in equity* to prevent the carrying on of trades or occupations therein which are intrinsically nuisances, contrary to the regulations which the town or city, by delegated authority from the legislature, is authorized to make. *Winthrop v. Farrar* (offensive trade), 11 Allen (Mass.), 398. So where a statute prohibited the use, in cities and towns of a specified size, of any building not then so in use, for carrying on the business of "slaughtering cattle," &c., without the permission of the municipal or town authorities, it was held that the act was constitutional as an exercise of the police power, and that the town or city might, in the *corporate name*, file a bill in equity to restrain the use of a building therein for the prohibited purpose, where the required consent of the local authorities had not been

obtained. *Watertown v. Mayo*, 109 Mass. 315.

No solid reason, in the author's judgment, exists why, in proper cases, a municipal corporation may not resort to a court of equity to aid it in enforcing its public duties to preserve the health and property of the inhabitants; and by proper cases is meant those which fall within some recognized head of equity jurisdiction. *Ante*, § 685, note. But in some cases a contrary view has been adopted. A court of equity *will not enjoin the erection of a wooden building* within the fire limits, although such erection is forbidden by ordinance. *St. Johns v. McFarlan*, 33 Mich. 72. *Marston, J.*, says: "A court of chancery has no jurisdiction to restrain the threatened violation of a village ordinance, unless the act threatened to be done, if carried out, will be a nuisance. . . . If a proper ordinance was framed with an appropriate penalty, we think the remedy at law would be found adequate." *Equity will not enjoin*, at the instance of the municipality itself, even where the ordinance directs such a suit to be brought against any person about to erect a wooden building contrary to its provisions. *Waupun v. Moore*, 34 Wis. 450. *Lyon, J.*, says, that "equity will not lend its aid to enforce by injunction the by-laws or ordinances of a municipal corporation, restraining an act, unless the act is shown to be a nuisance *per se*." *High on Injunc.* § 788; *Hudson v. Thorne*, 7 Paige (N. Y.), 261; *Phillips v. Allen*, 41 Pa. St. 481."

A municipality is under *no implied or common-law liability* in damages for a loss caused by a fire originating in a wooden building erected and maintained in known violation of an ordinance. *Hines v. Charlotte*, 72 Mich. 278; *post*, chapter on Liabilities and Actions.

irreparable injury.¹ On the other hand, when the city has attempted to remove a building for an alleged violation of the ordinance, it has been held that *the owner of the building is entitled to an injunction to restrain the city from wrongfully interfering with it.*²

§ 728 (406). **Public Safety; Hoistways.** — Under authority to make police regulations, or to pass by-laws for the good rule and government of the corporation, it has the *power to require hoistways inside of stores* (usually places of public resort) to be enclosed by a railing, and closed by a trap-door after business hours each day. It

¹ First Nat. Bank v. Sarlls, 129 Ind. 201.

Remedy against wrong-doer, by private action in favor of an adjoining owner specially injured by a violation of a statute in relation to the erection of wooden buildings. Aldrich v. Howard, 7 R. I. 87.

² Montgomery v. Louisville & N. R. Co., 84 Ala. 127; Ironside v. Vinita, 6 Ind. Ter. 485; 98 S. W. Rep. 167; McKibbin v. Ft. Smith, 35 Ark. 352. Compare Dunham v. New Britain, 55 Conn. 378.

In *Connecticut*, where the city charter authorized the common council of a city to make ordinances to protect a city from fire, and to establish districts within which it should not be lawful without a license to erect, enlarge, or place any wooden building, the council passed an ordinance establishing a fire district and forbidding the erection or placing of any wooden building therein, without license given by the board of aldermen, declaring that such building should be deemed a common nuisance, and making it the duty of certain officers after reasonable notice, to abate it; and it was held that the ordinance was fully authorized by the charter and was reasonable. Hine v. New Haven, 40 Conn. 478. In the case of a building erected without license within the fire limits of a city in violation of such an ordinance, it is not sufficient reason for the interference of a court of equity by injunction, at the instance of the owner, that he had obtained the consent individually of a majority of the aldermen, notice being given him that the board when in session might refuse its assent, as it afterwards did; nor that he had, after placing the building, covered it with a sheathing of iron

and tinned the roof, before proceedings were instituted against him, and had by further work upon it during the pendency of the proceedings made it substantially fireproof. The city authorities were considered by the court to be the proper judges as to how far these facts should affect their action. The court expressed the further view that the prompt enforcement of an ordinance establishing fire limits in a city is important to the public safety, and a court of equity ought not to interfere, in a case like that before the court, by injunction to prevent such enforcement, but leave the party aggrieved to his legal remedy, if he is entitled to any remedy. Nor was it a reason for the interference of chancery that the building erected in such fire limits had become real estate, since it had become so by the unlawful act of the owner, and was such only in the most technical sense, and the value of the building could be easily ascertained and proved. *Id.*

Where the ordinance passed under the authority above referred to provided that no person shall build or enlarge any building within the fire limits, without a license first issued by the fire marshal, for which a license fee of fifty cents was required to be paid, it was held that a license fee thus required was not a revenue tax, in any proper sense, but rather a reasonable sum collected of the party interested for the purpose of defraying in part the expense of issuing and recording the license, and that the power to require such a fee was conferred by the charter by intentment, as convenient, if not essential to full enjoyment of the powers expressly granted. Welch v. Hotchkiss, 39 Conn. 140.

usually regarded as a reasonable police regulation not unnecessarily interfering with private rights.¹

29 (407). **Preservation of Order.** — Power "to prevent disorders and disorderly assemblages, and maintain the good government of the city," authorizes it to take measures *to preserve the* and to protect the lives and property of the citizens, and the of the city in procuring a loan of arms and giving a bond for return are valid and binding upon it.² Authority to preserve peace and quiet of the place authorizes an ordinance forbidding *disorderly shouting, dancing, &c.*, in the streets and public places," though such conduct violates no existing State law.³

30. **Gaming and Gambling Houses.** — At common law a *common gaming house was a common nuisance* and was indictable as such. Gambling and the keeping of gaming houses are usually

mayor, &c. of New York v. Wil-
15 N. Y. 502. *Johnson, J.*,
as: "The danger is not confined
owner and ordinary occupants of
ilding. The ordinance, in that
stands on the same footing as a
ion prohibiting a well or cistern
in's yard unprotected by curb or
he reasonableness of which could
doubted. In case of fire, these
gs would tend directly and
ully to allow the fire to extend
h all parts of the building, and
uncovered, would also tend to
er those whom duty might
to enter to effect the extinguish-
f the fire." *Paige, J.*, considered
inance the same in principle as
rs, prescribing the height, thick-
walls, and materials of buildings
the city.
ate v. Buffalo, 2 Hill (N. Y.), 434;
reans v. Costello, 14 La. An. 37.
inance against *disorderly conduct*
reference to a simple trespass on
nt lot, though committed in an
t to assert an adverse right to
roperty. *Mobile v. Barton*, 47
1. A municipal legislative body,
ered by law to prohibit or sup-
practices against *good morals or*
decency, may, by ordinance,
the utterance of *profane lan-*
whether uttered frequently or
nce by the same person. The
n of the council that the use of
e language is against good morals
ot be judicially reviewed. *De-*
In re, 43 Cal. 478.

¹ *Washington v. Frank*, 1 Jones
(N. Car.) Law, 436; *State v. Debnam*,
98 N. Car. 712; *State v. Cainan*, 94
N. Car. 880; *Vicksburg v. Briggs*, 102
Mich. 551; *State v. Sherrard*, 117 N. Car.
716; *State v. Horne*, 115 N. Car. 739;
Glasgow v. Bazan, 96 Mo. App. 412;
construction of ordinance in respect to
disturbing public peace. — *Charivari*,
St. Charles v. Meyer, 58 Mo. 86. As to
what regulations of this kind are neces-
sary, "much," says the court, "must
be left to the judgment and discretion"
of the corporate authorities. *Washing-*
ton v. Frank, 1 Jones (N. Car.) Law,
436; *ante*, § 589; *State v. Bill*, 13 Ire.
(N. Car.) Law, 373; *post*, chap. xvii.
Ordinance prohibiting the visiting of
gambling houses held valid. *Lane*,
Ex parte, 76 Cal. 587. Under general
authority to make ordinances for the
good government of the city, the
preservation of peace and good order,
&c., a city may pass an ordinance
making it a misdemeanor to be in a
public place in a drunken condition.
Lebanon v. Gordon, 99 Mo. App. 277.
See also *Green City v. Holsinger*, 76
Mo. App. 567, 569; *Gallatin v. Tarwater*,
143 Mo. 40, 45. Ordinances against
cruelty to animals have been sustained
under the general welfare clause. *Porter*
v. Vinzant, 49 Fla. 213; *State v.*
Karstendiek, 49 La. An. 1621; *St. Louis*
v. Schoenbusch, 95 Mo. 618.

² *State v. Crummey*, 17 Minn. 72.
A house where persons are allowed to
gather to bet money on horse races is a
gaming house and a common nuisance

punishable by statute, but several courts have held (the decision, however, are not uniform), that the fact that the offence is punishable by statute does not prevent the enactment, under legislative authorization, of municipal ordinances upon the same subject and providing a penalty for the violation thereof.¹ The power to suppress gambling is frequently conferred upon municipalities by express statutory provision,² and it has been held th

and indictable as such. *Ehrlick v. Commonwealth*, 125 Ky. 742; 102 S. W. Rep. 289; *State v. Avers*, 49 Oreg. 61; 88 Pac. Rep. 653; *State v. Nease*, 46 Oreg. 433. "At common law keeping a gaming house was an offence before any sort of game was prohibited, and was punished when gaming was not even against public policy, when the courts recognized such contracts, and by solemn judgment made the loser pay his bet. But to maintain a place for the purpose of inducing men to gather and game was a common nuisance, because of its tendency to corrupt morals and ruin fortunes." *Per Lamar, J.*, in *Thrower v. State*, 117 Ga. 753, 755. See also *United States v. Dixon*, 4 Cranch C. C. 107.

¹ *Robbins v. People*, 95 Ill. 175; *Hankins v. People*, 106 Ill. 628; *Rice v. State*, 3 Kan. 141, 164; *Monroe v. Hardy*, 46 La. An. 1232; *Ex parte Kiburg*, 10 Mo. App. 442; *Plattsburg v. Trimble*, 46 Mo. App. 459; *Kansas City v. Hallett*, 59 Mo. App. 160; *Kansas City v. Zahner*, 73 Mo. App. 396; *Greenville v. Kemmis*, 58 S. Car. 427, 433; *Greenwood v. State*, 6 Baxt. (Tenn.) 567; *Ex parte Douglass*, 1 Utah, 108; *Seattle v. McDonald*, 47 Wash. 298; 91 Pac. Rep. 952; *State v. Newman*, 96 Wis. 258, 266. On the general subject of the concurrent prohibition of offences by statute and ordinance, see *ante*, §§ 630-633. In *Georgia*, when the offence is covered by statute, the municipality must have express authority to prohibit or suppress gaming to justify an ordinance on the subject. *Kahn v. Macon*, 95 Ga. 419; *Thrower v. Atlanta*, 124 Ga. 1. In *Texas*, it has been held that the city council cannot by ordinance provide for the punishment of keeping a gaming table and bank when it is by statute already an offence against the State punishable by fine and imprisonment. *Ex parte Fagg*, 38 Tex. Crim. Rep. 573. In *New Orleans v. Miller*, 7 La. An. 651, it was held that a city has no power to

impose a penalty for keeping a gaming house when the State law has already made the offence punishable. But *Monroe v. Hardy*, 46 La. An. 12 where the contrary doctrine seems to be adopted.

An ordinance fixed a penalty for having lottery tickets in the possession of any person at a fine of not less than \$250 or imprisonment for three months and not exceeding \$1,000 or imprisonment for six months. It was held that the ordinance was not in harmony with a statute punishing the offence by a maximum fine of \$500, or by imprisonment for six months without any minimum imprisonment, and was void in conflict with the general laws of the State. *Ex parte Solomon*, 91 Cal. 44. In *Blodgett v. McVey*, 131 Iowa, 55 it was declared by statute to be a misdemeanor to play any game for money or property. An ordinance made it unlawful to gamble and provided punishment for the offence. The municipality had express authority to restrain or prohibit gambling. It was held that the ordinance was valid, though the offence was already covered by the statute. A conviction under the ordinance is not a bar to a conviction under a statute. *Respass v. Commonwealth*, 107 Ky. 139; *Lucas v. Commonwealth*, 118 Ky. 818; *Ehrlick v. Commonwealth*, 125 Ky. 742; 102 S. W. Rep. 289. The fact that, by virtue of power to restrain gambling, a city has issued a license for keno tables or other gambling devices, is not available as a justification or defence upon indictment for a violation of a statute. *Schuster v. State*, 48 Ala. 199; *State v. Nease*, 46 Oreg. 433. An ordinance enacted pursuant to statutory authority does not supersede or repeal the rule of the common law making the keeping of a gaming house a nuisance and misdemeanor. *State v. Crumney*, Minn. 72.

² The provision of the *Louisiana* Constitution that "gambling is a v

when the crime of gaming is defined by law, statutory authority to a municipality to suppress gaming is confined to the offence defined by statute.¹ But express authority is not required to confer authority upon the municipality to suppress gaming and the keeping of gambling houses. Such authority has been implied from the general welfare clause,² from general power to pass police ordinances,³ from power to regulate and preserve the good order and peace of

and the legislature shall pass laws to suppress it" does not preclude the legislature from conferring authority upon cities and other municipalities to suppress it by ordinance. *Ruston v. Perkins*, 114 La. 851. See also *Lake Charles v. Roy*, 115 La. 939. Authority "to restrain, prohibit, and suppress . . . games and gambling houses and rooms . . . and to provide for the punishment of persons engaged in the same" authorized the passage of an ordinance prohibiting games of all kinds, including games like poker. *Ruston v. Perkins*, 114 La. 851. Power to prevent and suppress gaming and gambling houses confers authority to prohibit by ordinance the setting up or keeping of a house for the sale of lottery tickets. *Portland v. Yick*, 44 Oreg. 439. Statutory authority to make ordinances to suppress and punish all kinds of gambling authorizes a municipal ordinance imposing a penalty for keeping a place for carrying on the game of policy. *State v. Carpenter*, 60 Conn. 97; *State v. Flint*, 63 Conn. 248. But in *Kentucky*, it has been held that the power to create offences must be expressly conferred upon the municipality, and that power "to prohibit and suppress all gambling houses" does not include the power to pass an ordinance to punish gaming. *Owensboro v. Sparks*, 99 Ky. 351.

In *Iowa*, it was held that the power "to suppress" gambling did not authorize an ordinance declaring the setting up and keeping of any gambling device a misdemeanor and providing for its punishment. *Mount Pleasant v. Breeze*, 11 Iowa, 399. But *quære?* The strict construction involved in this decision was followed and applied in *New Hampton v. Conroy*, 56 Iowa, 498; *Nevada v. Hutchins*, 59 Iowa, 506. It was also followed, but with doubt, in *Chariton v. Barber*, 54 Iowa, 360. In *Centreville v. Miller*, 57 Iowa, 56, the court said that it was not disposed to extend the decision, adding, "We know

of no more effective way of preventing the commission of an offence than a provision providing for its punishment."

¹ *In re Lee Tong*, 18 Fed. Rep. 253. See also *Williams v. Warsaw*, 60 Ind. 457. Authority was conferred upon a city "to restrain, prohibit, and suppress gambling and gambling houses." It was held that playing cards for amusement only was not within the power conferred and could not be prohibited by ordinance. Nor could the city prohibit by ordinance the keeping of card tables or permitting card playing in any place of business. *Ex parte Sapp*, 79 Neb. 781, 113 N. W. Rep. 261.

² *Odell v. Atlanta*, 97 Ga. 670 (keeping establishment for betting on horse races). Under the general welfare clause, a city may pass an ordinance prohibiting gaming in any private house. *Greenville v. Kemmis*, 58 S. Car. 427.

³ *White v. Commonwealth*, 122 Ky. 408; 92 S. W. Rep. 285. Under the provision of the California Constitution, empowering municipality to make all such local police, sanitary, and other regulations as are not in conflict with general laws, an ordinance making it unlawful for any person to have in his possession a lottery ticket is a valid exercise of the authority conferred and criminal intent or knowledge is not necessary to a conviction. *Ex parte McClain*, 134 Cal. 110. But compare *In re Wong Hane*, 108 Cal. 680. Under this authority also a city may adopt an ordinance making it unlawful to expose to view in any barred or barricaded house or room when three or more persons are present any cards, dice, dominoes, fan-tan table, or lay out. The language of the ordinance was expressly applicable to places specially barred or barricaded against officers of the law, and it was held that so construed it is reasonable. *Matter of Ah Cheung*, 136 Cal. 678. See also *Ah Sin v. Wittman*, 198 U. S. 500.

the city,¹ and from power to provide for the punishment of disorderly conduct and all practices dangerous to public safety and to pass ordinances for the public morality, health, peace, and good order.² Under power to regulate establishments, they may be confined to prescribed limits.³ The act of setting up, keeping, and maintaining a gambling house is continuous in its nature in the absence of evidence of an interruption in the conduct of the house. Hence, for the maintenance of such a house only one penalty can be imposed, and separate penalties cannot be exacted for each day.⁴ The prohibition of the ordinance may be directed not only against the keeping of gaming houses, but also against inmates and visitors to them.⁵

¹ *Monroe v. Hardy*, 46 La. An. 1232.

² *Seattle v. Chin Let*, 19 Wash. 38 (maintaining lottery).

³ *Shreveport v. Schulsinger*, 113 La. 9. An ordinance prohibiting the selling of pools on horse races except in race-track enclosures is a valid police regulation, and is not void as a special privilege or benefit to those owning or controlling race tracks. *Ex parte Tuttle*, 91 Cal. 589. Construction of ordinance prohibiting any person from setting up "any gambling device" or playing "at any game whatever for money," &c. *Canton v. Dawson*, 71 Mo. App. 235.

⁴ *Lane v. Springfield*, 120 Ill. App. 5; *Dixon v. Washington*, 4 Cranch C. C. 114 (keeping faro table). See also *Cawein v. Commonwealth*, 110 Ky. 273; *Freeman v. State*, 119 Ind. 501. Under an ordinance prohibiting the keeping of a place to carry on the game of policy, it has been said that the offence may be complete, although it had never been resorted to for that purpose, and had not the reputation of being such a place, and the defendant did not reside in it. *State v. Flint*, 63 Conn. 218. As to sufficiency of evidence to establish the offence of "keeping a common gaming house," see *Robbins v. People*, 95 Ill. 175; that defendant was in charge of and set up game, see *St. Louis v. Wiley*, 8 Mo. App. 597.

⁵ *Lane v. Springfield*, 120 Ill. App. 5 (inmate); *Ex parte Lane*, 76 Cal. 587 (visitor); *In re Ah Kit*, 45 Fed. Rep. 793 (visitor). Sufficiency of evidence to establish that defendant was a player in a gaming house, see *St. Louis v. Sullivan*, 8 Mo. App. 455.

The offence of keeping and main-

taining a gambling house and the offence of being an inmate of such a house are separate and distinct and may be punished by separate ordinances. A person may keep a gambling house without being an inmate. Hence, he may be convicted of both offences in respect of the same house and for the same period. *Lane v. Springfield*, 120 Ill. App. 5. In *State v. Newman*, 96 Wis. 258, 267, it was held that a provision of an ordinance for the issuance of a search warrant on affidavit did not violate a constitutional provision against "unreasonable searches and seizures." In this case the city had no express power to provide for a search, but it had power to suppress gaming. But an ordinance authorizing the arrest and punishment of any person keeping a gaming establishment does not authorize the seizure, detention, or destruction of instruments used for gaming in the absence of an express provision therefor in the ordinance. *Ridgeway v. West*, 60 Ind. 371. As to power to seize and destroy gaming instruments under statutory authority therefor and the necessity of judicial procedure to declare a forfeiture, see *State v. Robbins*, 124 Ind. 308.

Power "to authorize the destruction of all instruments and devices used for the purpose of gaming" is not sufficient authority for an ordinance punishing a person for permitting gaming or engaging therein. *New Hampton v. Conroy*, 56 Iowa, 498. A statute of *Missouri* designed to suppress gambling in St. Louis authorized the police to seize gaming tables and gaming devices used for gambling and made it the duty of the president of police to cause the same to be destroyed. This

§ 731. **Billiard and Pool Tables; Bowling Alleys.** — Establishments where *billiard and pool tables* are kept are more properly to be regarded as places of amusement rather than gaming establishments,¹ although it has been held in one case that power to restrain gaming confers upon the municipality the right to license billiard tables.² But the keeping of public billiard or pool tables for hire is not a useful business or employment, and is frequently attended by effects injurious to the public. Hence, it is a proper and appropriate subject for regulation in the exercise of the police power under delegated authority to municipal corporations.³ Control over the use of billiard and pool tables for hire goes so far as to permit of entire prohibition.⁴ But authority merely to regulate pool tables does not authorize their suppression or prohibition.⁵

It has been said that a bowling alley for gain or hire is a public nuisance at common law, and it was accordingly held that under the power to pass by-laws relating to nuisances a city might prohibit the keeping of bowling alleys for hire.⁶ When power to sup-

could be done without notice to the owner or any semblance of judicial investigation. The statute was declared unconstitutional as depriving the owner of such gambling tables, &c., his property without due process of law. *Lowry v. Rainwater*, 70 Mo. 152. See also *Fisher v. McGirr*, 1 Gray (Mass.), 10; *Hibbard v. People*, 4 Mich. 126; *Lind v. Smith*, 27 Vt. 354.

¹ In *Breninger v. Belvidere*, 44 Ill. 350, it was held that under authority to suppress gambling houses and the general welfare clause, the municipality could not prohibit the keeping of billiard tables for hire. The court considered that playing billiards was not gambling. In *People v. Sergeant*, 8 Cow. (N. Y.) 139, it was decided that keeping a billiard table where the loser paid for the table was not gaming within a law which made gaming house a nuisance. See also *People v. Forbes*, 52 Hun (N. Y.), 30. But compare *People v. Cutler*, 28 Hun (N. Y.), 465. In *Williams v. Warsaw*, 106 N. W. Rep. 457, it was held that suffering a minor to play a game of billiards in a place where intoxicating liquor is sold for mere amusement and without a license, is not a violation of an ordinance prohibiting keepers of such places from allowing minors "to participate in any game of any kind whatever." The court considered that the term "game" must be construed in the statutory sense as something upon

the result of which something of value is staked to be lost or won. In *Stevens v. State*, 2 Ark. 291, it was held that the legislature had no power to interfere with the keeping of a private pool table for the owner's amusement.

² *In re Snell*, 58 Vt. 207.

³ *Goytino v. McAleer*, 4 Cal. App. 655; *Burlingame v. Thompson*, 74 Kan. 393; *Tarkio v. Cook*, 120 Mo. 1, 10; *Morgan v. State*, 64 Neb. 369.

⁴ In *Burlingame v. Thompson*, 74 Kan. 393, it was held that pool tables may be prohibited within the city, although they have hitherto been conducted in an orderly manner. A statute which authorizes cities to suppress billiard tables enacted at a time when that term was applied to tables substantially the same as the present pool tables, authorizes the suppression of pool tables. *Clearwater v. Bowman*, 72 Kan. 92. See also *Sikes v. State*, 67 Ala. 77. But compare *Squier v. State*, 66 Ind. 317.

⁵ *State v. McMonies*, 75 Neb. 443; 106 N. W. Rep. 454; *In re McMonies*, 75 Neb. 702; 106 N. W. Rep. 456. Power "to regulate and to levy and collect a license tax on billiard tables" authorizes the imposition of a penalty on the keeper for permitting minors to play without the consent of their parents. *Plattsburg v. Trimble*, 46 Mo. App. 459.

⁶ *Tanner v. Albion*, 5 Hill (N. Y.), 121. But in *State v. Hall*, 32 N. J. L.

press and restrain bowling or ten-pin alleys is conferred, the city may suppress or permit them to exist under such restraint as the common council may impose.¹

158, it was held that a ten-pin alley kept for gain and public use in a town is not *per se* a nuisance. The law on the subject is very fully examined in the opinion of *Beasley*, C. J., and the case of *Tanner v. Albion*, *supra*, reviewed and disapproved. See also to the effect that a bowling alley is not *per se* a nuisance, *Ex parte Patterson*, 42 Tex. Crim. Rep. 256. In *State v. Noyes*, 30 N. H. 292, it was held that a statute making bowling alleys nuisances when situated within twenty-five rods of a dwelling house, was constitutional.

¹ *Smith v. Madison*, 7 Ind. 86. Where a city has by its charter the power to determine whether bowling alleys should be allowed and if so under what restrictions, an ordinance requiring them to be closed at a certain hour is valid. *State v. Hay*, 29 Mo. 457; *State v. Freeman*, 38 N. H. 426. Power to license, regulate, tax, or suppress billiard tables or any other tables or instruments for gaming does not confer authority to impose a license fee on a ten-pin alley. *Goetler v. State*, 45 Ark. 454.

CHAPTER XVII

MUNICIPAL COURTS

	Section		Section
At Common Law	740	Municipal Judges, Jurors, and	
Jurisdiction; Parties; Jurors	741	Witnesses	748
Existing Borough Courts	742	Summary Procedure; Jury Trial	749
Introductory Observations	743	Magna Charta; The Fourteenth	
Creation, Jurisdiction, and		Amendment	750
Powers	744	Criminal Charges; Jury Trial	751-755
Summary Trials for Violations of		Where the Right of a Jury Trial	
Ordinances	745	is given by Appeal	756
How and in what Name prosecuted	746	Revisory Power of the Superior	
Constitutional Limitations on		Courts; Review of Proceedings	
Jurisdiction; Powers	747	by Superior Tribunals	757, 758

Municipal Courts in England and at Common Law

§ 740 (424). **At Common Law.** — A municipal corporation *may, at common law, enjoy the franchise of holding a court*; and corporation or municipal courts, which were local or inferior tribunals, were not uncommon.¹ They were treated as the tribunals of the corporation; but since courts of justice are for the public benefit, words in a charter permitting the corporation to hold a court are imperative.² Such public right cannot be lost by a non-user; and therefore the mere disuse, for two hundred years, of a court granted to a corporation by charter is no answer to a rule for a *mandamus* commanding them to hold it, though it was alleged that there were no sufficient funds for the purpose.³

§ 741 (425). **Jurisdiction; Parties; Jurors.** — The *common-law doctrine respecting municipal courts* was settled to be that the municipal corporation could bring no action therein against a stranger where the effect would be to benefit the corporation or increase its funds, for that would be to make the corporation itself both judge

¹ Inst. 114; 4 Inst. 78, 224; Cro. record," and it was held that these Jac. 313; Haddock's Case, Sir Thomas words, *though permissive in form, were* Raymond, 435. *imperative*, and that the corporation

² *Rex v. Mayor, &c. of Hastings*, 5 B. & Ald. 692, n. The language of the charter was "that the mayor *may* for the purpose hereafter have and hold and have power to hold a court of

³ *Rex v. Mayor, &c. of Wells*, 4 Dowl. P. C. 562.

and party, which an inflexible and fundamental maxim of the common law prohibited; and the same principle was considered to operate to disqualify corporators to sit as jurors in such cases; but this objection did not apply when both parties were corporators.¹

§ 742 (426). **Existing Borough Courts.** — The English Municipal Corporation Act of 1835 provides *for the establishment of borough courts*, defines their jurisdiction and powers, makes burgesses or citizens competent jurors, contains an express provision that no wit-ness or magistrate shall be incompetent or disqualified by reason of his being liable to contribute to the fund of the corporation, and regulates in general the proceedings therein for violation of by-laws or ordinances, and the collection and enforcement of penalties.²

It may, however, be observed that under the act the power to make by-laws is limited, and does not extend to acts criminal in their nature, and which are punishable by criminal statutes in force throughout the realm.

American Corporation Courts; Constitutional Provisions.

§ 743 (426 a). **Introductory Observations.** — Here, as elsewhere, *the composite type of the usual American municipality* in its local and private, as well as its general and public character, distinctly reveals itself. Although often material, it is not always easy to trace the line of demarcation. To ascertain and define it as applicable to this chapter we have to resort to the construction which well-known provisions of *Magna Charta* relating to personal rights and liberty have received in Great Britain and here, and to the legislative enactments and polity in both countries, and in this country to special constitutional provisions, State and Federal, relating thereto, and to the powers and jurisdiction of the judicial tribunals. The subject is obviously important. Statutory provisions concerning the constitution and powers of the municipal government and those of the local tribunals, especially provisions authorizing summary proceedings in municipal

¹ *Hesketh v. Braddock*, 3 Burr. 1847, 1856-1868; cited *infra*, § 748, and states the changes made by that act. Hist. Criminal Law, vol. i. chap. iv. p. 116 *et seq.* He also summarizes the legislation authorizing the infliction of summary penalties of different kinds upon a great variety of offenders, ending in the Summary Jurisdiction Act of 1879 (42 & 43 Vict. chap. 49). *Id.*, chap. iv. p. 122; *Ante*, § 609 *et seq.*

² 5 and 6 Wm. IV. chap. lxxxvi, §§ 90, 91, 118-134, 270-341. Mr. Justice Stephen traces the history of

ts without trial by jury and without the usual formulæ of an
 rsary proceeding in the superior judicial tribunals, have fre-
 tly been found to be in conflict with organic provisions to secure
 amental rights of property and the liberty of the citizen. Sum-
 powers, properly defined and limited, are essential to the
 being of local communities, and when thus limited and defined
 irectly consistent with the liberty of the citizen, that is, liberty
 ated by law, which is the only true liberty. These limits must
 ight largely in the polity, practice, and traditions, and in the
 ial judgments in England and in this country relating thereto,
 e light of which constitutional provisions must be construed.
 pains have therefore been taken to exhibit in the text the
 rial doctrines of our jurisprudence on these subjects, and in the
 to furnish the reader with the data for full research, critical
 deration, and the formation of his own conclusions.

'44 (427). **Creation, Jurisdiction, and Powers.** — In this coun-
 is usual to provide in the charter or organic act of a municipal
 ration *for a local or special tribunal*, called by different names,
 as the mayor's court, recorder's court, city court, and the like;
 which is invested with jurisdiction over complaints and prosecu-
 for the violation of the ordinances of the corporation, and often,
 ublic convenience, with special civil and limited criminal juris-
 n under the laws of the State. It is competent for the legisla-
 to provide for the establishment of these inferior courts, and to
 t them with such measure of power and jurisdiction as may be
 ed expedient, if no provision of the Constitution of the particu-
 late be infringed.¹ It may also abolish them.² Although *the*

late *v. Mayor of Charleston*, 12 Montross *v. State*, 61 Miss. 429. Full
 (S. Car.) Law, 702; *State v.* discussion of *legislative power to create*
 i, 2 Nott & McCord (S. Car.), *inferior courts*, and define jurisdiction.
infra, § 749, note; Callahan *v.* Callahan *v. New York*, 66 N. Y. 656;
 York, 66 N. Y. 656; People *v.* Gray *v. State*, 2 Harring. (Del.) 76.
 , 5 Col. 412. Mayor's court an *inferior* court within
stitutional provisions concerning meaning of State Constitution. *Ib.*;
ablishment and powers, local, civil, Eggleston *v. Charleston City Council*,
iminal, of inferior courts: The 1 Mill Const. (S. Car.) 45. As to official
 conferred on police magistrate character of city recorder. *Ib.*;
 e process against the body of an Schroder *v. City Council*, 2 Const. R.
 er is constitutional. Brown *v.* 726; s. c. 3 Brev. 533; *post*, § 747;
 e, 102 Ill. 371. The legislature Tesh *v. Commonwealth*, 4 Dana (Ky.),
 o power to confer upon local 522; Nugent *v. State*, 18 Ala. 521,
 ipal courts a jurisdiction which holding the city court of Mobile, which
 usive of that which, by the Con- is invested with criminal jurisdiction,
 on, is given to another court. and from whose judgment an appeal

oyd *v. Chambers*, 78 Ky. 140; *State v. Henshaw*, 76 Cal. 436.

powers and jurisdiction of municipal courts are usually created and defined by statutory enactment, the legislature may by statute au-

lies, to be constitutional, and defining meaning of *inferior court*. *Perkins v. Corbin*, 45 Ala. 103, holding that a city court is an inferior court within the meaning of the Constitution, which may be created and abolished at the pleasure of the legislature, and that the abolition of the court carries with it the office of the judge. *New Orleans v. Costello*, 14 La. An. 37; *Myers v. People*, 26 Ill. 173; *Davis v. Woolnough*, 9 Iowa, 104; *People v. Wilson*, 15 Ill. 389; *State v. Maynard*, 14 Ill. 419; *Beesman v. Peoria*, 16 Ill. 484; *Holmes v. Fiklenburg*, 54 Ill. 203; *Van Swartow v. Commonwealth*, 24 Pa. St. 131; *Tierney v. Dodge*, 9 Minn. 166; *St. Peter v. Bauer*, 19 Minn. 327; *infra*, § 749, note; *Burns v. La Grange*, 17 Texas, 415; *Slattery, In re*, 3 Ark. 484; *Ib.* 561; *Graham v. State*, 1 Ark. 171; *Floyd v. Eatonton Com'rs*, 14 Ga. 354; *Hill v. Dalton*, 72 Ga. 314; *State v. Guttierrez*, 15 La. An. 190; *Muscatine v. Steck*, 7 Iowa, 505; *Richmond Mayoralty Case*, 19 Gratt. (Va.) 673. The superior court of the city of San Francisco is constitutional. *Seale v. Mitchell*, 5 Cal. 403; *Vassault v. Austin*, 36 Cal. 691; *Hickman v. O'Neal*, 10 Cal. 294. The Constitution of *California* as amended in 1862 authorized the legislature to establish "recorder's or other inferior courts in any incorporated city or town;" and it was held, in view of the prior decisions in the State just cited, that the municipal criminal court of the city and county of San Francisco was an *inferior court*, and constitutional. *People v. Nyland*, 41 Cal. 129; *Stratman, In re*, 39 Cal. 517. An act "to provide for police courts in cities having 30,000 and under 100,000 inhabitants" sustained as against the constitutional objections that it was "a law of a general nature," and was "not uniform in its operation," and that its title was not sufficiently explicit and comprehensive. *People v. Henshaw*, 76 Cal. 436.

The *Hustings Court* of Richmond is constitutional. *Chahoon's Case*, 21 Gratt. (Va.) 822; *Richmond Mayoralty Case*, 19 Gratt. (Va.) 673. Judiciary article of State Constitution of New York as to the jurisdiction of certain city courts construed. *Landers v. Staten Island R. Co.*, 53 N. Y. 450.

Under a constitutional provision de-

claring that "the *judicial power shall be vested* in a Supreme Court, in district courts, and in justices of the peace," an act conferring judicial powers on the mayor of a city was considered void, and it was held that for violations of its ordinances the corporation should resort to the judicial tribunals organized under the Constitution. *Lafon v. Dufrocq*, 9 La. An. 350. But see *the State v. Young*, 3 Kan. 445, where a provision in an organic act that the judicial power shall be vested exclusively in a Supreme Court, district, probate, and justice courts, was held not to prohibit the legislature from establishing municipal courts for the enforcement of municipal regulations and ordinances. And this seems to be the correct view. *Shafer v. Mumma*, 17 Md. 331. In *Hutchings v. Scott*, 4 Halst. (N. J.) 218, the objection was made that the legislature could not constitutionally confer the powers of *justices of the peace on the mayor, recorder, or aldermen of a city, or borough*, the argument being that since the Constitution provided for the appointment of justices of the peace only, and not for corporate officers, officers exercising the authority and powers of a justice of the peace should be appointed as such; but the objection was not sustained.

In *Illinois*, mayors of cities cannot, it was held, be constitutionally invested with judicial power. *State v. Maynard*, 14 Ill. 419, 420; *Beesman v. Peoria*, 16 Ill. 484.

By the general law of *Indiana* of 1857, for the incorporation of cities, mayors, in addition to their duties proper, have, "within the limits of cities, the jurisdiction and powers of a justice of the peace in all matters, civil and criminal, arising under the laws of the State, and for crimes and misdemeanors a jurisdiction co-extensive with the county." The Constitution of the same State (Art. VII. § 16) declared that "no person elected to any *judicial office* shall, during the term, be eligible to any office of trust or profit under the State, other than a judicial office." One Wallace was elected mayor of Indianapolis, and within his term he resigned and received a majority of votes for sheriff of the county. It was held by the Supreme Court of

thorize the common council of the city to vest by ordinance in the courts of the city created by statute, authority to entertain suits

Indiana (Waldo v. Wallace, 12 Ind. 569; Gulick v. New, 14 Ind. 93) that Wallace was a "judicial officer," and therefore ineligible to the office of sheriff; that the voters of the county were chargeable with notice of his ineligibility; that votes cast for him were therefore ineffectual, and that his competitor, having received the greatest number of legal votes, though not a majority of the ballots, was duly elected. Notwithstanding the great consideration which these cases received, the author ventures with great deference to state that it is by no means clear to his mind that the mayor was a "judicial officer," within the meaning of the Constitution.

See, as bearing upon the above decision, and illustrative of the nature of the office of mayor, *Howard v. Shoemaker*, 35 Ind. 111; *Morrison v. McDonald*, 21 Me. 550; *State v. Maynard*, 14 Ill. 419; *Commonwealth v. Dallas*, 4 Dallas, 229; s. c. more fully, 3 Yeates (Pa.), 300; *State v. Wilmington*, 3 Harring. (Del.) 294. Authority of a mayor under a statute investing him with the powers of a justice of the peace. *State v. Perkins*, 24 N. J. L. 409; *Weeks v. Forman*, 16 N. J. L. 237; *Howe v. Plainfield*, 37 N. J. L. 145; *State v. Zeigler*, 32 N. J. L. 262; explained, *McConvill v. Jersey City*, 39 N. J. L. 38, 42; *Bain v. Mitchell*, 82 Ala. 304; *Robinson v. Benton County*, 49 Ark. 49. See *Baton Rouge v. Deering*, 15 La. An. 208. A constitutional provision as to eligibility "to the office of judge of any court of the State," &c., and requiring a two years' residence "in the division, circuit, or county," was considered to have no reference to the office of recorder of a city. *People v. Wilson*, 15 Ill. 389.

In *Michigan*, under constitutional provisions dividing the State into judicial circuits, and establishing circuit courts as the courts of general original jurisdiction, but authorizing the establishment, by the legislature, of municipal courts in cities, it was held that the original purpose of such municipal courts was not to destroy or materially change the jurisdiction of the circuits, but to relieve them of part of the increased litigation resulting from the growth of large cities. Such courts cannot have, in any class of cases, a jurisdiction territorially coexten-

sive with the limits of the county, much less of the entire State. They were designed to meet the wants of the cities wherein they are established. A statute which gives a municipal court jurisdiction, where original process is served within the city, though neither party is a resident, or where service is had anywhere in the county, if plaintiff resides in the city, is unconstitutional and void. *Grand Rapids, N. & L. S. R. Co. v. Gray*, 38 Mich. 461.

The Constitution of *Nevada* provided that "the legislature may also establish courts for municipal purposes only, in incorporated cities and towns," and it was held that an act authorizing the city recorder to exercise the duties of committing magistrates in respect to offences against the public laws of the State was in conflict with the Constitution. *Meagher v. Storey Co.*, 5 Nev. 244.

The Constitution of *Maryland* contains a provision that "the judicial power of the State shall be vested in a court of appeals, in circuit courts, in such courts for the city of Baltimore as may be hereafter prescribed, and in justices of the peace;" and it was held that the legislature might authorize municipal courts to try and punish disorderly persons and lewd women within the corporate limits, and generally to authorize the corporate authorities to exercise police powers, which were distinguished from the ordinary judiciary powers of the State. *Shafer v. Mumma*, 17 Md. 331. Further as to construction of Constitution of *Maryland* as to judicial powers of mayors. *Hagerstown v. Dechert*, 32 Md. 369.

Under the Constitution of *North Carolina* "special courts" are authorized "for the trial of misdemeanors in cities and towns where they may be necessary;" and it was held to be no objection to an act of the legislature that it did not authorize the officers of such court to try persons charged with misdemeanors, but only to bind them over. *State v. Pender*, 66 N. Car. 313. But under the Constitution the legislature cannot confer upon mayors the judicial powers of justices of the peace in civil actions. *Edenton v. Wool*, 65 N. Car. 379.

The amendment of the Constitution of *Massachusetts* of 1821 provided that "no judge of any court of this com-

for breaches of ordinances, and the recovery of penalties thereby imposed.¹

monwealth shall at the same time hold the office of governor, &c., or have a seat in the senate or house of representatives." A judge of a police court for the city of Lynn was elected a member of the house of representatives, and took his seat as such. Police courts were created after the adoption of the constitutional amendment in question, and were vested at first with the same civil and criminal jurisdiction as justices of the peace. The courts thus established were organized judicial tribunals, having attributes and exercising judicial functions independently of the magistrates designated to hold them, and were thus distinguished from justices of the peace, on whom personally certain judicial powers are conferred by law; and the judges of such courts must, by the Constitution, be appointed during good behavior instead of for seven years, as in the case of justices of the peace. It was held that a police court is a court of the commonwealth within the constitutional amendment, and that the judge thereof vacated his office as such judge by accepting another official trust incompatible therewith. *Commonwealth v. Hawkes (quo warranto)*, 123 Mass. 525. Mr. Chief Justice Gray's opinion is highly instructive.

In *Wisconsin*, says *Ryan*, C. J., in *State v. Lockwood*, 43 Wis. 403, the right of trial by jury upon information or indictment for crime is secured by the Constitution, and cannot be waived; and the trial of an information by a judge of a municipal court without a jury was held not to be a legal trial, and the judgment of the municipal magistrate was declared to be void. The chief justice says in substance that a plea of not guilty to an information or indictment for crime, whether felony or misdemeanor, puts the accused upon the country, and can be tried by a jury only. The rule is universal as to felonies; not quite so as to misdemeanors. But the current of authority appears to apply it to both classes of crime; and this court holds that to be safer and better alike in principle and practice. *Cooley's Const. Lim.* 319, 410, n.; *Proffatt's Jury Tr.* § 113; *Neales v. State*, 10 Mo. 498; *State v. Mansfield*, 41 Mo. 470; *Commonwealth v. Shaw*, 1 Pittsburg (Pa.), 492. In the

latter case will be found a collection of authorities bearing on the question of waiver of the right to a jury trial in criminal cases.

The Constitution of *Illinois* of 1870 provides that "the right of trial by jury, as heretofore enjoyed, shall remain inviolate." Under this provision the *vagrant act*, denying to persons arrested for vagrancy the right of trial by jury, was considered by *McAllister, J.*, in view of the previous legislation and constitutional provisions referred to by him, to be unconstitutional. *Scully and O'Leary, In re*, 11 *Chicago Legal News*, 27. See *ante*, § 722; *post*, § 750. Defendant may waive statute provision. *State v. Kaufman*, 51 Iowa, 578.

¹ *State v. Nohl*, 113 Wis. 15. In this case, the court referred to the question whether a municipality has inherent power, without express statutory authority, to confer jurisdiction upon its courts for the enforcement of ordinances, but did not decide the question.

In *Hesketh v. Braddock*, 3 Burrow, 1847, 1858, an ordinance of the corporation of Chester against strangers conducting certain retail business provided that its penalty might be recovered before the *portmote* court, which was in fact held by the mayor. The corporation alleged a custom by which it was empowered to confer such jurisdiction upon its own court. Lord *Mansfield* said: "In the regulation of their own members they may indeed make by-laws, and enforce the observance of them by prosecutions amongst themselves." The by-law was held not to support the action because suit was against a stranger, who thereby was subjected to a partial and interested court, contrary to the principles of *Magna Charta*. The case, however, seems to support the idea that by a custom, or its equivalent, a statute, the power to confer jurisdiction over the enforcement of ordinances may by statute be vested in the corporation.

In *Barter v. Commonwealth*, 3 Penn. & W. (Pa.) 253, the city of Lancaster enacted an ordinance prohibiting interference with public pumps, and denouncing a penalty, and authorizing the same to be enforced by judgment of the mayor, or any alderman, or justice of the peace. This latter

§ 745 (428). **Summary Trials for Violations of Ordinances.** — We have elsewhere shown that the courts have uniformly held that it was competent for the State legislatures to create municipal corporations with powers of local government, and to *authorize them to adopt ordinances or by-laws, with appropriate penalties for their violation.* The power to do this includes, by fair implication, the power to authorize *violations of ordinances* (where the acts are not criminal in their nature, or within the meaning of constitutional provisions requiring an indictment and securing the right to a jury trial) to be tried and determined in a summary manner by a local or corporation tribunal.¹

§ 746 (429). **How and in what Name prosecuted.** — The *distinction between statute law and municipal by-laws* has been pointed out, and the subject of concurrent prohibitions of the same act by the general law and by the local ordinances of a municipality treated in the chapter on Ordinances. The distinction is there drawn, and is to be observed, between acts not essentially criminal, relating to municipal police and regulation, and those intrinsically criminal, and which are made punishable as public offences by the general laws of the State. The pecuniary penalties which are annexed to violations of the former class the legislature may, we think, authorize *the corporation to enforce in its own name*, by civil action or by complaint, and provision need not necessarily be made that they shall be prosecuted in the name of the people or of the State.²

provision was held invalid because the charter created a mayor's court, which it vested with *exclusive* jurisdiction over such subjects. But this decision was made with an apparent recognition of the rule that "a corporation may provide by its inherent powers for the recovery of a penalty from its own members by an action of debt in its own court," as stated by Lord Mansfield in *Hesketh v. Braddock*, 3 Burrow, 1847, 1858, *supra*. In *Staats v. Washington*, 45 N. J. L. 318, 325, an ordinance denounced a penalty on conviction *before the mayor or any justice of the peace*. The statute expressly made penalties recoverable in an action before a justice of the peace. It was held that so much of the ordinance as authorized a recovery before the mayor was in conflict with the statute and void. The legislature cannot confer jurisdiction of municipal offences on a city court when the recovery or penalty which may be

had comes within the *exclusive* jurisdiction of other courts created or recognized by the Constitution. *Ex parte Fagg*, 38 Tex. Crim. Rep. 573.

¹ *Infra*, §§ 749 *et seq.*; *ante*, § 632.

² *Barter v. Commonwealth*, 3 Pa. 253; *Weeks v. Forman*, 16 N. J. L. 237; *Ewbanks v. Ashley*, 36 Ill. 177; *Williams v. Augusta*, 4 Ga. 509; *Floyd v. Eatonton Commissioners*, 14 Ga. 354; *Kip v. Paterson*, 26 N. J. L. 298; *Lewiston v. Proctor*, 23 Ill. 533; *State v. Jackson*, 8 Mich. 110. See *State v. Stearns*, 31 N. H. 106; *Goddard, Petitioner*, 16 Pick. (Mass.) 504; *Fink v. Milwaukee*, 17 Wis. 26; *Spokane v. Robinson*, 6 Wash. 547, quoting text; *ante*, §§ 637, 638, and cases; *post*, §§ 748 *et seq.*, and cases in notes. The legislature may enact that suits for the violation of municipal ordinances shall be prosecuted in the name of the people of the State. *Pillsbury v. Brown*, 47 Cal. 478.

The Constitution of the State of Iowa

§ 747 (430). **Constitutional Limitations on Jurisdiction; Power.**

— In *creating local tribunals, however, and in prescribing their jurisdiction*, the legislature should keep in view two cardinal considerations: *First*. That these inferior courts will have only such jurisdiction, and can exercise only such powers, as are *expressly* given or *necessarily* implied, and that fair doubts as to the extent of jurisdiction are resolved against the corporation; this is reason-

contains this provision: "The style of all process shall be 'The State of Iowa,' and all *prosecutions* shall be conducted in the name and by the authority of the same." Constitution of Iowa, art. v. § 8. The charter of the city of Davenport in terms authorized *prosecutions* for violations of municipal ordinances to be instituted in the name of the city, and it was contended that this portion of the charter was in conflict with the above quoted provision of the Constitution. But the Supreme Court, in the case of *Davenport v. Bird*, 34 Iowa, 524, held otherwise. It was a prosecution in the name of the city against the defendant for a violation of an ordinance of a police nature, but for which, under the charter, the city was authorized to punish by a limited fine and imprisonment. In giving the opinion of the court, *Miller, J.*, says: "Is it necessary, under the Constitution, that all prosecutions for violations of municipal police ordinances shall be conducted *in the name and by the authority of the State of Iowa*? Or, in other words, is that clause of the city charter of Davenport, which directs that 'all suits, actions, and prosecutions be instituted, commenced, and prosecuted *in the name of the city of Davenport*,' in conflict with the constitutional provision before referred to? We are of opinion that it is not. This clause of the Constitution occurs in art. v., which treats of the judicial department of the government. This article vests and defines the judicial power of the State, establishes the tenure of office of the judges, and defines the mode of their election; fixes their salary and limits the number of judicial districts; provides for the election of an attorney-general, and other matters pertaining to the judicial arm of the State, among which is the clause under consideration. From all this it seems manifest that the requirement 'that all *prosecutions* shall be conducted in the name of 'The State of Iowa,' contemplates such criminal *prosecutions* as shall be instituted and prosecuted before the tri-

bunals which are provided for in that article of the Constitution under the statutes of the State. It is fitting and appropriate that prosecutions for violations of the criminal laws of the State should be carried on in the name of the government. But there is no fitness or propriety in requiring the State to be a party to every petty prosecution under the police regulations of a municipal corporation. Such a construction of this article of the Constitution seems to us to be unwarranted, and not intended by the framers of the Constitution. It was held by the Supreme Court of *Pennsylvania* that the word '*process*,' in the 12th section of the 5th article of the Constitution of the State, which provides that 'the style of all process shall be the *Commonwealth of Pennsylvania*,' was intended to refer to such writs only as should become necessary to be issued in the course of the exercise of that *judicial power* which is established and provided for in the article of the Constitution, and forms exclusively the subject matter of it. On the same principle, we are of opinion that the word '*prosecutions*,' in the 8th section of Art. V. of our Constitution, was intended to refer only to such criminal prosecutions under State laws as should be cognizable by the *judicial power*, which is established and provided for in that article, and that it was not intended to include prosecutions under ordinances of municipal corporations cognizable before local police magistrates." And the same view is held by the Court of Appeals of *Kentucky*. *Williamson v. Commonwealth*, 4 B. Mon. (Ky.) 146. But in *Nebraska* the Constitution provides that "all process and other proceedings shall run in the name of the State," and this was held to include prosecutions under municipal ordinances, where the penalty was fine and imprisonment; but *quære*. *Brownville v. Cook*, 4 Neb. 101. As to mode of enforcement of ordinances and requisites of complaints, *vide* chapter on Ordinances, §§ 634-638, and notes.

ble and to this effect are all the authorities. *Second.* Regard must also be had to *constitutional* provisions intended to secure the liberty and to protect the rights of the citizen. The State Constitutions contain the substance of the clauses of *Magna Charta* to the effect that no citizen shall be deprived of life, liberty, or property but by the judgment of his peers or by the law of the land, and also provisions, more or less extensive, securing the right of trial by jury. Such also in effect is the Fourteenth Amendment to the Federal Constitution. These and other requirements of the fundamental law cannot be isolated in acts of the legislature establishing and fixing the jurisdiction of the corporation court or tribunal.¹

Citizens competent to be Local Judges, Jurors, and Witnesses.

§ 748 (431). **Municipal Judges, Jurors, and Witnesses.**—The maxim of the common law above adverted to, *that no one shall be a judge in his own case,*² has no just application to legislation creating municipal courts, and investing them with jurisdiction to try complaints for breaches of municipal ordinances. The mayor, though a citizen of the corporation, may be clothed with judicial powers of his character, and the inhabitants, though interested in a minute degree in the recovery, are, or at least may be declared, competent witnesses. In this respect the common-law rules have not been adopted and applied by the American courts to our municipal corporations;³ or the courts have considered the common-law doctrine

¹ *Zylstra v. Charleston*, 1 Bay (S. Car.) 382; *Slaughter v. People*, 2 Doug. Mich.) 334; *ante*, § 744, note and cases; *post*, § 749. A municipal court cannot sit outside the limits of the city. *Iershoff v. Beverly*, 43 N. J. L. 139.

² *Supra*, § 741.

³ *Thomas v. Mount Vernon*, 9 Ohio, 90; *Commonwealth v. Read*, 1 Gray Mass.), 475; *Lexington v. Long*, 31 Mo. 369; *Commonwealth v. Ryan*, 5 Mass. 90; *Cooley Const. Lim.* 410, 412; *Wheeling v. Black*, 25 W. Va. 266.

In *Charleston v. Pepper*, 1 Rich. S. Car.) Law, 364, the defendant, a non-resident of the city, was prosecuted in the city court, established by act of the legislature, for violation of a city ordinance. The defendant made the point that, as the judge of that court, the sheriff and jurors were corporators, and therefore interested in the penalty, they were incompetent to try the cause. In holding this objection unsound, the

Court of Appeals, after alluding to *Hesketh v. Braddock*, 3 Burr. 1847, cited *ante*, § 741, relied on by the defendant, remarks: "The statutory authority given to the city court to try all offenders against city ordinances impliedly declares that, notwithstanding the common-law objection, it was right and proper to give it the power to enforce the city laws against all offenders. The interest is too minute, too slight to excite prejudice against a defendant; for the judge, sheriff, and jurors are members of a corporation of many thousand members. What interest of value have they in a fine of twenty dollars? It would put a most eminent calculator to great trouble to ascertain the very minute grain of interest which each of these gentlemen might have. To remove so shadowy and slight an objection, the legislature thought proper to clothe the city court, consisting of its judge, clerk, sheriff, and jurors, with

as to the disqualifying effect of interest upon jurors and witnesses as expressly or impliedly abrogated by the usual legislative or charter provisions for the constitution of municipal courts, and conferring upon them jurisdiction to hear and try certain actions and proceedings by and against the municipality. But a distinction has been well drawn between corporation courts proper and the general courts of record; and in respect of ordinary actions in the latter class of courts, a taxpayer of a municipality is incompetent to serve as a juror where the municipality is a party, unless made competent by legislative provision, expressly or by implication.¹

authority to try the defendant, and he cannot now object to it." *Per O'Neill, J., Charleston v. Pepper*, 1 Rich. (S. Car.) Law, 364; *Charleston v. King*, 4 McCord (S. Car.), 487; *Corwein v. Hames*, 11 Johns. (N. Y.) 76. The mayor is not disqualified from presiding in the mayor's court, before which the proceedings are held, by the fact that he is the owner of a lot on the street sought to be widened. *Lexington v. Long*, 31 Mo. 369. The mayor and council having jurisdiction to declare what is a nuisance, the fact that they have employed an attorney to prosecute a case does not disqualify them, nor does the interest which they have in common with other citizens. *Montezuma v. Minor*, 73 Ga. 484.

¹ *Diveny v. Elmira*, 51 N. Y. 506. This was action of tort in the Supreme Court of the State against the city of Elmira for damages to the plaintiff caused by a defective sidewalk, which the city was bound to repair. The question was whether a taxpayer of the city was a competent juror. It was held by the Commission of Appeals that at common law the interest of such a juror would be a sufficient objection unless removed by statute, and that as respects the defendant city it had not been thus removed. Mr. Commissioner Earl, in delivering the judgment of the court, said: "The charter of Elmira provides for the election of justices of the peace, clothed with authority to hear and try actions in the same manner as justices of towns, and the city may sue before such justices to recover penalties and forfeitures, and such suits must be tried like civil actions before justices of towns. The defendants in such action may, of course, demand jury trials, and jurors must be summoned from the city, and cannot be summoned elsewhere. Hence, it may

be well that in such actions before justices of the peace the incompetency of juries on account of interest is, by implication, removed, for otherwise the justices would be practically deprived of jurisdiction to try the causes which are authorized to be commenced before them. *Commonwealth v. Ryan*, 5 Mass. 90. But there is no such practical difficulty in courts of record held in the city; and hence there is no reason for holding that in actions tried in them, in which the city is interested, the incompetency of jurors on account of interest has been removed. I therefore conclude that the common-law rule of incompetency on account of interest applied to these jurors, and that they were properly challenged and excluded. Whatever inconvenience may flow from such a holding may be remedied by the legislature. We must administer the law as we find it." 51 N. Y. 512.

And it has also been elsewhere decided that in an action to recover damages against a municipality, a resident taxpayer is not competent to sit as a juror if challenged for cause. *Fulweiler v. St. Louis*, 61 Mo. 479; *Rose v. St. Charles*, 49 Mo. 509; *Johnson v. Americus*, 46 Ga. 80; but under the code of *Georgia* this rule does not obtain. *Cartersville v. Lyon*, 69 Ga. 577. See *Omaha v. Olmstead*, 5 Neb. 446. One who is specially interested in having a street laid out held not disqualified to act as a juror in proceedings for the taking of private property for the purposes of the street. *Kundinger v. Saginaw*, 59 Mich. 355. See *Kemper v. Louisville*, 14 Bush (Ky.), 87.

By statute of *Massachusetts* an inhabitant of the city of Boston is competent as a juror in such cases, but this provision does not make a member of the common council of that city competent. *Boston v. Baldwin*, 139 Mass.

Summary Proceedings may, in Certain Cases, be authorized. — Jury Trial.

§ 749 (432). **Summary Procedure; Jury Trial.** — Proceedings for the violation of municipal ordinances are frequently summary in their character, and it has been made a question how far statutes or charters authorizing such proceedings are valid, especially where no provision is made for trial by jury. This must depend upon the nature of the act or omission, and upon the Constitution of the State and the extent to which the power of the legislature is therein restricted. Offences against ordinances properly made in virtue of the implied or incidental power of the corporation, or in the exercise of its legitimate police authority for the preservation of the peace, good order, safety, and health of the place, and which relate to minor acts and matters not embraced in the public criminal statutes of the State, are not usually or properly regarded as *criminal*,¹ and hence need not necessarily be prosecuted by indictment or tried by a jury.² An act of the legislature authorizing the arrest

115. The inhabitants of a town are not disqualified from serving as grand jurors in presenting an indictment for forgery with intent to defraud the town, — the interest is too remote and is different from a direct financial interest. *Commonwealth v. Brown*, 147 Mass. 185. *Knowlton*, J., reviews the cases and considers the question with care. Juror not disqualified to sit on a trial for a violation of the ordinance of his own city. *State v. Wells*, 46 Iowa, 662.

¹ *Ex parte Hollwedell*, 74 Mo. 395; *Ex parte Fagg*, 38 Tex. Crim. R. 573, 589, citing text.

² *Williams v. Augusta*, 4 Ga. 509; *approved*, *Floyd v. Eatonton*, 14 Ga. 354, 358; *Vason v. Augusta*, 38 Ga. 542; *ante*, § 637, and notes; *State v. Gutierrez*, 15 La. An. 190; *Tierney v. Dodge*, 9 Minn. 166, 169; see *St. Peter v. Bauer*, 19 Minn. 327, 332, where the text is cited and the subject considered by *Ripley*, C. J.; *Byers v. Commonwealth*, 42 Pa. St. 89; 1 Bish. Cr. Pr. 758; *State v. Conlin*, 27 Vt. 318. Thus, in *New Jersey*, it is held that legislative authority to municipal courts to punish violations of ordinances by a limited fine and imprisonment, *without providing for a trial by jury*, is not in conflict with the constitutional provision that "the right of trial by jury shall remain inviolate." *McGear v.*

Bridgeton Treas., 33 N. J. L. 213; *Johnson v. Barclay*, 16 N. J. L. 1; s. p. *Howe v. Plainfield*, 37 N. J. L. 145; *ante*, §§ 630, 638, 639, 744 *et seq.*; *State v. Lee*, 29 Minn. 445; *Mankato v. Arnold*, 36 Minn. 62; *Ex parte Schmidt*, 24 S. Car. 363 (quoting text); *Moundsville v. Fountain*, 27 W. Va. 182, 204; *Hill v. Dalton*, 72 Ga. 314; *Dively v. Cedar Falls*, 21 Iowa, 565; *Davenport G. L. & C. Co. v. Davenport*, 13 Iowa, 229; *State v. Topeka*, 36 Kan. 76; *Monroe v. Meuer*, 35 La. An. 1192. See also *Hollenbeck v. Marshalltown*, 62 Iowa, 21.

Treating of this subject, Mr. Sedgwick says: "Extensive and summary police powers are constantly exercised in all the States of the Union for the repression of breaches of the peace and petty offences; and these statutes are not supposed to conflict with the constitutional provisions securing to the citizens a trial by jury." *Stat. and Const. Law*, 548, 549; *Cooley*, *Const. Lim.* 596. What offences may be proceeded against in England in a summary manner are determined by acts of Parliament, and the later acts include some cases of serious crime. 1 Stephen, *Hist. Cr. Law*, chap. iv, pp. 122-126.

In *Williams v. Augusta*, 4 Ga. 509, *supra*, proceedings before a city council

of professional thieves and burglars frequenting any railroad depot, &c., in the city of Philadelphia, and their commitment by the mayor, without a trial by jury, is not in conflict with the provision of the Constitution of the State which guarantees "that trial by jury shall be as heretofore, and the right thereof remain inviolate."¹

§ 750 (433). **Magna Charta; the Fourteenth Amendment.**—The *Fourteenth Amendment to the Constitution of the United States* con-

for violations of its ordinances, although punishable by fine, were considered not to be "*criminal cases*" within the meaning of the Constitution of *Georgia*, vesting the jurisdiction of all *criminal cases* in tribunals other than corporation courts, the court being of opinion that the term "*criminal cases*," as used in the Constitution, had reference to such acts and omissions as are in violation of the *public laws* of the State, and not to violations of local ordinances made for the internal police and government of the city. In this State the settled rule is that the same act cannot be twice punished,—once by the municipality and once by the State,—and the rule is adopted that the municipal power ends where the right to indict under State authority exists, as any other rule would deprive the accused of the right to a jury trial. *Jenkins v. Thomasville*, 35 Ga. 145; *Vason v. Augusta*, 38 Ga. 542, *supra*; *Savannah v. Hussey*, 21 Ga. 80; *ante*, § 586, note. So in *Michigan*: *Slaughter v. People*, 2 Doug. (Mich.) 334. Otherwise in *Kentucky*: *Williamson v. Commonwealth*, 4 B. Mon. (Ky.) 146. Where a charter vested in a municipal officer "all the power and jurisdiction given to trial justices" in the State, it was held that persons charged with violations of ordinances were entitled to a trial by jury and to an appeal. *Beaufort v. Ohlandt*, 24 S. Car. 158; *Lexington v. Wise*, *ib.* 363; *ante*, §§ 586, 630, 637, 745 *et seq.*

¹ *Byers v. Commonwealth*, 42 Pa. St. 59. In this case the extent of the right of trial by jury at common law is thoroughly examined in a valuable opinion by *Strong, J.*, afterwards one of the justices of the Supreme Court of the United States, and the validity of summary convictions sustained. See chapter on Ordinances, *ante*, §§ 630, 634, 637. The doctrine may be considered as settled in *Pennsylvania* that mu-

nicipal corporations are not within the constitutional guaranty of jury trial, and that the right to a trial by jury may be withheld by the legislature from *new offences*, and from *new jurisdictions* created by statute without common-law powers, and from proceedings *out of the course of the common law*. *Rhines v. Clark*, 51 Pa. St. 96, *per Woodward, C. J.*; *Dunmore's Appeal*, 52 Pa. St. 374; *Ewing v. Filley*, 43 Pa. St. 384; *Van Swartow v. Commonwealth*, 24 Pa. St. 131. See *Barter v. Commonwealth*, 3 Pa. 253; *post*, § 755, and note.

Such a constitutional provision does not apply in *New York* to *petty offences made triable by statute* before a court of special sessions. *People v. Justices*, 74 N. Y. 406. A different view is, to some extent, taken by the Supreme Court of *Vermont* under the Constitution of that State, whose language is, that "when an issue of fact *proper for cognizance* of a jury shall be joined in a court of law, the parties *have a right to trial by jury* which ought to be held sacred." In the opinion of the court, a public corporation, although the liability on the corporation be created by statute, is entitled to a jury trial, and therefore a statute providing for a compulsory and final reference of a case in its nature one at common law, is void; and the Constitution applies to all controversies fit to be tried by a jury, although the particular right was created by statute enacted after the adoption of the Constitution. *Plimpton v. Somerset*, 33 Vt. 283. It would, perhaps, be going too far to say that municipal corporations are not in any case within the constitutional guaranty of a trial by jury, and yet it would not follow that provision might not be made for the trial in a summary way, before municipal courts, of petty or police offences. *People v. Justices*, 74 N. Y. 406; *ante*, chap. iv.; *supra*, §§ 630–632, 637, 638; *infra*, §§ 751–755.

tains a provision similar to that found in most of the State Constitutions, "that no *State* shall deprive any person of life, liberty, &c., without due process of law."¹ Thus the principles of *Magna Charta*, memorable in their assertion, historic in their associations, and luminous with the light of liberty, are part of the fundamental law of this country, and they cannot be contravened in the powers granted to municipalities, or in the jurisdiction with which municipal courts are invested, or in the proceedings therein authorized.² One of the questions which most frequently arises is whether the *defendant is entitled to a trial by jury*, and the cases on this subject cannot all be reconciled.³ The general principles applicable to its solution, however, are plain. Violations of municipal by-laws proper, such as fall within the description of municipal police regulations, as for example those concerning markets, streets, waterworks, city officers, &c., and which relate to acts and omissions that are not embraced in the general criminal legislation of the State, the legislature may authorize to be prosecuted in a summary manner by and in the name of the corporation, and need not provide for a trial by jury. Such acts and omissions are not crimes or misdemeanors to which the constitutional right of trial by jury extends.⁴

¹ Construed *Portland v. Bangor* (varants), 65 Me. 120; *ante*, § 722.

² The words referred to in the text, in substance the same as Article 39 of *Magna Charta*, are the "essential clauses," being those that "protect the personal liberty and property of all freemen by giving security from arbitrary imprisonment and arbitrary spoliation." Hallam, *Mid. Ages*, II. 324. "These three words [*nullus liber homo*] are worth," says Lord Chatham, "all the classics." In time they came to embrace every person in the realm. The eloquent eulogium of Sir James Mackintosh upon *Magna Charta* is well known. He justly says that whoever appreciates it "is sacredly bound to speak with reverential gratitude of the authors of the Great Charter. To have produced it, to have preserved it, to have matured it, constitute the immortal claim of England upon the esteem of mankind."

In enumerating its advantages and its blessings, it seems to the author that Sir James has omitted to notice its crowning glory, and that is its assertion of the principle of such priceless value to mankind which *Magna Charta* alike in its origin and in its general and spe-

cific provisions declares and illustrates, and which is the foundation principle of English and American liberty, viz.: that the Law as distinguished from arbitrary power or discretionary authority is supreme over all; that all persons from those in the highest station to the humblest individual are equally entitled to its protection and are equally bound to render it obedience; that all men are governed by the general law of the land and by that alone, and are amenable only to that law as administered in the judicial courts; that the entire structure of our polity, Constitutions, and laws rests upon the right of the individual to the security and enjoyment of his freedom and his property; that the individual is everything and the government nothing except so far as it is an institution that protects his liberties and his rights.

³ *Ante*, §§ 630-632, and cases in note; §§ 634-640, and notes; §§ 744, 745-749.

⁴ Text quoted by the Supreme Court of the United States in *Callan v. Wilson*, 127 U. S. 540; where, however, the crime in question — conspiracy — was held not to be included in the class referred to in the text. See also *State*

In England violations of municipal by-laws where the penalty is a fine, or by authority of Parliament a fine and imprisonment, have always been prosecuted in a summary manner, although *Magna Charta* secures the right of trial by jury. Summary prosecutions, however, have always been, it is believed, in virtue of Acts of Parliament.¹ The distinction there is between offences known as *pleas of the crown*, where the trial must be by jury, and *petty offences* punishable by fine or amercement in the inferior jurisdictions.² And a by-law with appropriate penalties is not necessarily invalid, because the party may also be indicted for the same act.³ So here where the act or omission sought to be punished by imprisonment under a municipal ordinance is in its nature not peculiarly an offence against the municipality but rather against the public at large, and where it falls within the legal or common-law notion of a crime or misdemeanor, and especially where, being of such a nature, it is embraced in the criminal code of the State, then the constitutional guarantees intended to secure the liberty of the citizen and the right to a trial by jury cannot be evaded by the nature of the powers vested in the municipal corporation or the nature of the jurisdiction conferred upon the municipal courts.⁴ If no imprisonment for the violation of the municipal regulation is authorized, it is

v. Powell, 97 N. Car. 417, and *post*, § 756.

The following cases hold that in a prosecution for violating a city ordinance proper there is no constitutional right to a trial by jury, although imprisonment be part of the penalty. *Callan v. Wilson*, 127 U. S. 540, 553, quoting § 750; *Natal v. Louisiana*, 139 U. S. 621, 624; *Bray v. State*, 140 Ala. 172, 183; *Greeley v. Hamman*, 12 Colo. 94, 98, citing § 749; *McInerney v. Denver*, 17 Colo. 302; *Williams v. Augusta*, 4 Ga. 509; *Floyd v. Eatonton*, 14 Ga. 354; *Hill v. Dalton*, 72 Ga. 314, 319; *Littlejohn v. Stells*, 123 Ga. 427; *Little v. Fort Valley*, 123 Ga. 503; *Pearson v. Wimbish*, 124 Ga. 701, 705; *Duren v. Thomasville*, 125 Ga. 1; *Emporia v. Volmer*, 12 Kan. 622; *State v. Topeka*, 36 Kan. 76; *Louisville v. Wehmhoff*, 116 Ky. 812, 826; *Monroe v. Meuer*, 35 La. An. 1192; *State v. Fourcade*, 45 La. An. 717; *Amite City v. Holly*, 50 La. An. 627; *In re Cox*, 129 Mich. 635; *Mankato v. Arnold*, 36 Minn. 62; *State v. Harris*, 50 Minn. 128; *State v. Grimes*, 83 Minn. 460; *State v. Marciniak*, 97 Minn. 355; 105 N. W. Rep. 965; *Delaney v. Kansas City Police Court*, 167 Mo. 667, 678; *Liberman v. State*, 26 Neb. 464, 466; *McGear v. Bridgeton Treas.*, 33 N. J. L. 213; *Howe v. Plainfield*, 37 N. J. L. 145; *Combs v. Lakewood*, 68 N. J. L. 582, 584; *Buffalo v. Preston*, 81 N. Y. App. Div. 480, 492; *Cranor v. Albany*, 43 Oreg. 144; *Byers v. Commonwealth*, 42 Pa. St. 89; *Anderson v. O'Donnell*, 29 S. Car. 355, 366; *Ogden v. Madison*, 111 Wis. 413. A constitutional provision prohibiting imprisonment for non-payment of a fine imposed for a violation of a city ordinance. *Bray v. State*, 140 Ala. 172, 183.

¹ 1 Stephen, *Hist. Crim. Law*, chap. iv. p. 122.

² *Ante*, § 632, and authorities cited in note.

³ *Grant on Corp.* 82; *ante*, § 632, note.

⁴ *In re Rolfs*, 30 Kan. 758, quoting text, and holding that maintaining a nuisance — as keeping a hog-pen — being at common law a criminal offence for which fine and imprisonment may be imposed, one accused thereof is entitled to a jury, in a trial before a police-judge under an ordinance of the city. *Stebbins v. Mayer*, 38 Kan. 573.

clear that the prosecution is not criminal, and there is no constitutional right to a trial by jury. But if a limited imprisonment on default of paying a fine, or even as part of the punishment, is authorized by the legislature, this does not necessarily make the case, if it be for a violation of a mere municipal regulation, one to which the right of a trial by jury extends. The question depends rather, we think, upon the intrinsic nature of the offence.¹ It is very generally agreed in this country that certain minor or petty offences may be summarily prosecuted and tried without indictment or a jury, but there is a class of cases so near the boundary line that the courts have differed as to which side of it they belong.² On the principles here laid down those which most commonly present themselves may be satisfactorily determined.

¹ *In re Cox*, 129 Mich. 635, 637, quoting text.

² *Ante*, §§ 630, 632, and note, 634 *et seq.*, 640, 744, 745. In *England*, under various Acts of Parliament from an early period, certain magistrates have been authorized "to inflict in a summary way penalties of different kinds upon a great variety of offenders. These penalties have consisted in the infliction of fines of greater or less amount, and sometimes in imprisonment, and occasionally in setting the offender in the stocks. Most offences created by legislation of this sort have consisted in the violation of rules laid down for some administrative purpose, and so belong rather to administrative law than to criminal law as usually understood." 1 Stephen Hist. Cr. Law, chap. iv, p. 122. In the later acts in England the summary powers of magistrates "in cases of serious crimes have been considerably enlarged." *Ib.* The following reference to some additional authorities, English and Canadian, respecting the question, *What is a crime?* is taken from Chief Justice Harrison's Municipal Manual for the Province of Ontario (5th ed., 1878), p. 312:

"If imprisonment may in the first instance follow the conviction, the proceeding is in general looked upon as a criminal one. *Per Platt, B.*, Attorney-General *v. Radloff*, 10 Exch. 84. There are many crimes, properly so called, which are liable to be punished on summary conviction. 1 Stephen, Hist. Cr. Law, chap. iv, p. 122. But there are a vast number of acts, which in no

sense are crimes, which are also punishable; such, for instance, as keeping open house after certain hours, and a variety of breaches of police regulations which will readily occur to the mind of any one. *Per Baron Martin*, s. c. 96. Where the proceeding is conducted with a view and for the purpose of obtaining redress for the violation of a private right only, the proceeding is a civil one; but, on the other hand, where the proceeding is directed for the punishment of an offence which militates against the general interest of the community, and for the punishment of the infraction of some public duty, such proceeding is a criminal proceeding. *Per Sir Alexander Cockburn*, in arguing same case, p. 86. It is not an easy matter to draw a line, and so be able to decide on which side of it each case should be placed. Reference may be made to the following cases: Attorney-General *v. Bowman*, 2 B. & P. 532, n.; Attorney-General *v. Siddon*, 1 C. & J. 220; *Huntley v. Luscombe*, 2 B. & P. 530; *Rackham v. Bluck*, 9 Q. B. 691; *Cobbett v. Slowman*, 9 Exchq. 633; *Eggington, In re*, 2 E. & B. 717; *Sweeney v. Spooner*, 3 B. & S. 329; *Reeve v. Wood*, 5 B. & S. 364; Attorney-General *v. Sullivan*, 32 L. J. Exch. 92; *Easton's Case*, 12 A. & E. 645; *Cattel v. Ireson*, E., B. & E. 91; *Morden v. Porter*, 7 C. B. n. s. 641; *Herne v. Garton*, 2 E. & E. 66; *Parker v. Green*, 2 B. & S. 299; *Lucas & McGlashan, In re*, 29 Upper Can. Q. B. 81; *Queen v. Boardman*, 30 Upper Can. Q. B. 553; *Queen v. Roddy*, 41 Upper Can. Q. B. 291."

§ 751 (434). **Criminal Charges; Jury Trial.** — Where the legislature undertakes to confer upon the courts of the corporation, or where the corporation seeks to give to its court *summary jurisdiction to try persons for acts which are indictable, or are criminal offences*, it not unfrequently happens that some provision of the Constitution, designed to protect the rights or liberty of the citizen, is violated. Thus, under a Constitution declaring "that no freeman shall be put to answer any criminal charge but by indictment," &c., and "that no freeman shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court, as heretofore used," an act of the legislature which gives to an officer of an incorporated town the power of *trying assaults and batteries, or other crimes*, is, in the opinion of the Supreme Court of North Carolina, void, because it violates both of these provisions of the Constitution.¹

§ 752 (435). **Same Subject.** — A similar view was taken in the State of Arkansas, the Constitution of which provided that "no man shall be put to answer any criminal charge but by presentment, indictment, or impeachment;" and it was held that the legislature could not confer upon the corporation courts of a city the power to punish an assault and battery — this being a criminal charge — without presentment or indictment; and it was consequently decided that the judgment of conviction of such a court for an assault and battery is *coram non iudice*, and constitutes no bar to a prosecution by indictment in the courts of the State for the same offence.²

§ 753 (436). **Same Subject.** — The same doctrine was declared in Michigan. The Constitution of the State contained a provision

¹ State v. Moss, 2 Jones (N. Car.) Law, 66. See Tierney v. Dodge, 9 Minn. 166. The Constitution of Louisiana (art. 103) requires that "prosecutions shall be by indictment or information. The accused shall have a speedy trial by an impartial jury of the vicinage." Another article (124) provides that "the mayors, recorders, &c., may be commissioned, and the legislature may vest in them such criminal jurisdiction as may be necessary for the punishment of minor crimes and offences, as the police and good order of the city of New Orleans may require." It was held that art. 103 laid down the general rule, to which art. 124 was an exception, and that under the latter article it was competent for the legislature to provide for the prosecution of minor offences, without indictment or jury trial, in the Recorder's Court. State v. Gutierrez, 15 La. An. 190. See Index, Criminal Offences.

² Rector v. State, 6 Ark. 187; Douc v. Howard, 6 Ark. 461; Lewis v. State, 21 Ark. 211. It is held in the same State that a corporation court may punish a person for using obscene language in the streets, because such an offence is not declared criminal by any statute of the State. Slattery, 10 Ark. 484. See Index, Criminal Offences.

at "no person shall be held to answer for a *criminal offence* unless the presentment of a grand jury, except cases cognizable by justices of the peace," &c.; and by the statutes of the State, the *keeping of a bawdy-house* was declared to be an offence punishable by fine and imprisonment. Under this state of the law the city of Detroit was empowered by the legislature "to make all such by-laws and ordinances as may be deemed expedient by the common council for effectually preventing and suppressing houses of ill-fame within the limits of the city." It was held that the term "criminal offence" in the Constitution included both felonies and misdemeanors, and embraced the offence (which was such both at common law and by the statute of the State) of keeping a house of ill-fame; and therefore an ordinance of the common council prescribing the punishment for keeping such a house within the city and providing for the trial and conviction of the offenders in the municipal court *without indictment*, was unconstitutional, the judgment of the court resting upon the principle that, under the constitutional provision quoted, there could be no summary conviction under an ordinance for *that* which is a criminal offence by the general laws of the State.¹

§ 754 (437). *Same Subject*. — So, by the Constitution of Texas, it is provided that "in all cases in which justices of the peace or superior tribunals shall have jurisdiction of causes where the penalty is fine and imprisonment (except in cases of contempt), the accused shall have the right of trial by jury," and under this it was held that the mayor's court could not constitutionally be invested with power to try summarily, and without a jury, *a person for assault*

People v. Slaughter, 2 Doug. (Cal.) 334, note; and see *Welch v. People*, *Id.* 332. Under the Constitution of California an ordinance prohibiting persons from visiting, for purposes of prostitution, houses of ill-fame, was sustained, the same "not being in conflict with the general laws" of the State. *Re Johnson*, 73 Cal. 228. As to ordinance to suppress tippling-houses. *Re Campbell*, 74 Cal. 20. So as to ordinance making it unlawful to keep a place for the practice of gambling. *Lane, Ex parte*, 76 Cal. 587. But otherwise as to an ordinance against sumptuousness, as precisely the same acts were made punishable by the Penal Code. *Sie*, 73 Cal. 142. In *Kentucky*, the constitution of which provides that "no person shall, for any indictable offence, be proceeded against criminally by information," and that "all prosecutions shall be carried on in the name and by the authority of the commonwealth," the legislature may authorize a city corporation to proceed in its name against offenders for violating its ordinances, and punish them by fine, although the offence, as in the case before the court (an assault and battery), is indictable under the laws of the State. The court regarded the proceeding in the name of the corporation as of a *quasi* civil or penal nature, and not as criminal. *Williamson v. Commonwealth*, 4 B. Mon. (Ky.) 146; *ante*, §§ 236, 637, 746; *supra*, § 749, note. Index, *Criminal Offences*.

and battery, in violation of the ordinances of the corporation, where the mayor was authorized to impose a fine.¹

§ 755 (438). **Same Subject.** — In *Zylstra v. The Corporation of Charleston*, it appeared that the organic act of the city gave to the common council power to affix and levy fines for all offences against their by-laws, and there was no limitation of the *amount* of the fines. In this respect the charter was silent. The "Court of Wardens" (the corporation tribunal) had the power expressly given to it to commit for fines and penalties. Under these circumstances the corporation of Charleston passed *an ordinance prohibiting the exercise of the trade of candle and soap making within the limits of the city, under a penalty of £100*. Zylstra was prosecuted in the Court of Wardens — composed of members of the city council — for a violation of this by-law, and fined by this court £100. On his motion to obtain a *prohibition* it was held, under the Constitution of that State, that the proceedings of the Court of Wardens were void, not being according to the *lex terræ* recognized by *Magna Charta*, and expressly adopted by the State Constitution. And the judges who expressed themselves on that point were of opinion, under the State Constitution, that that tribunal could not be invested with a jurisdiction greater than that exercised by justices of the peace, unless there was provision for securing a trial by jury, which in the instance before the court had not been made.²

§ 756 (439). **Where the Right of a Jury Trial is given by Appeal.** — It has, however, been decided in the courts of several of the States that although the charge or matter in the municipal or local courts be one in respect of which the party is by the Constitution entitled to a trial by jury, *yet if by an appeal, clogged with no unreasonable restrictions*, he can have such a trial as a matter of right in the appellate court, this is sufficient, and his constitutional right to a jury trial is not invaded by the summary proceeding in the

¹ *Burns v. La Grange*, 17 Tex. 415; *s. p. Smith v. San Antonio*, 17 Tex. 643.

² *Zylstra v. Charleston*, 1 Bay (S. Car.), 382.

In holding that the charter of the city of Lancaster did not confer upon the councils the right to vest in the mayor and aldermen jurisdiction to convict summarily, and imprison in default of payment of the penalty affixed to an ordinance, *Gibson, C. J.*, remarked: "Now, if the charter even purported to confer a power to imprison on summary conviction (for a misdemeanor) and without appeal to a jury, it would be so far unconstitutional and void." *Barter v. Commonwealth*, 3 Pa. 253.

A statute providing for summary conviction for a new offence before inferior jurisdictions, without a jury, does not violate the provision of the Constitution that "trial by jury shall

at instance.¹ The Supreme Court of the United States has, however, emphatically disapproved of this doctrine, in a case where the charge against the defendant was criminal in its nature, affecting the public at large, and was not one of the class of petty offences which, at the common law, may be proceeded against summarily, without a jury.² The question came before the court upon an application for the writ of *habeas corpus* in favor of one who had been convicted in the Police Court of the District of Columbia, of the offence of *conspiracy*, without a jury which he had duly demanded.³

as heretofore, and the right thereof is inviolate." *Van Swartow v. Commonwealth*, 24 Pa. St. 131. *Ante*, 49, note; *Rhines v. Clark*, 51 Pa. 96. See also *Boring v. Williams*, Ala. 510; *Times v. State*, 26 Ala. 1; *Powers, In re*, 25 Vt. 261; *Murphy People*, 2 Cow. (N. Y.) 815; *Shirley Lunenburg*, 11 Mass. 379.

As to the right, under particular constitutional and statutory provisions, to a jury trial, for violations of municipal by-laws. *Thomas v. Ashford*, 12 Ohio St. 124; *Work v. State*, Ohio St. 296; *Gray v. State*, 2 Har. & (Del.) 76; *Low v. Commissioners Pilotage*, R. M. Charl. (Ga.) 302; *Ben v. Savannah*, *ib.* 368, 371; *State v. Gutierrez*, 15 La. An. 190; *Triggally Memphis*, 6 Coldw. (Tenn.) 382; *Id.*, §§ 744, 749.

Jurisdiction of mayor's, recorder's, and police courts under statutes or special charters. *Commonwealth v. Pindar*, 11 St. (Mass.) 539; *Commonwealth v. Mark*, 8 Cush. (Mass.) 210; *Same v. nery*, 11 Cush. (Mass.) 406; *Elder Dwight Manufacturing Co.*, 4 Gray (Mass.), 201; *State v. Ricker*, 32 N. H. 9; *Myers v. People*, 26 Ill. 173; *Rice State*, 3 Kan. 141; *State v. Young*, Kan. 445; *Malone v. Murphy*, 2 Kan. 40; *Gray v. State*, 2 Harring. (Del.) 1; *Hutchings v. Scott*, 4 Halst. (N. J.) 8; *Cincinnati v. Gwynne*, 10 Ohio, 12; 14 Ohio, 250, 403; *Markle v. Kron*, 14 Ohio, 586; *Weeks v. Foran*, 16 N. J. L. 237; *Truchelut v. Charleston*, 1 Nott & McC. (S. Car.) 27; *Thornton v. Smith*, 1 Wash. (Va.) 106; *McMullan v. Charleston*, 1 Bay (S. Car.), 46; *Zylstra v. Charleston*, 1 382; *Willis v. Booneville*, 28 Mo. 43; *Fayette v. Shafroth*, 25 Mo. 445; *Ill v. Corning*, 15 N. Y. 297; *Landers Staten Island Railroad Co.*, 53 N. Y. 50; *Goodrich v. Brown*, 30 Ia. 291; *Pennsylvania Hall, In re*, 5 Pa. St.

204; *Alexander v. Bennett*, 60 N. Y. 204.

Extent of jurisdiction territorially. *State v. Clegg*, 27 Conn. 593; *Covill v. Phy*, 26 Ill. 432; *State v. McArthur*, 13 Wis. 383; *Hoag v. Lamont*, 60 N. Y. 96.

¹ *Stewart v. Baltimore*, 7 Md. 500; *Morford v. Barnes*, 8 Yerger (Tenn.), 444; *McDonald v. Schell*, 6 Serg. & Rawle (Pa.), 240; *Beers v. Beers*, 4 Conn. 535; *Jones v. Robbins*, 8 Gray (Mass.), 329; *Dorgan v. Boston*, 12 Allen (Mass.), 223; *Sedg. St. and Const. Law*, 549; *Cooley, Const. Lim.* 410. Text cited and followed. *Emporia v. Volmer*, 12 Kan. 622, 631; *post*, § 1413; *Gaston v. Babcock*, 6 Wis. 503; *Ogden v. Madison*, 111 Wis. 413, 530, citing text; *In re Rolfs*, 30 Kan. 758; *In re Jahn*, 55 Kan. 694, 698, citing text; *In re Kinsel*, 64 Kan. 1; *Topeka v. Kersch*, 70 Kan. 840, 648. Correctness of views expressed in the text, questioned. *McInerney v. Denver*, 17 Colo. 302, 309.

² *Callan v. Wilson*, 127 U. S. 540.

³ *Callan v. Wilson*, 127 U. S. 540; *supra*. Mr. Justice Harlan, delivering in this case the opinion of the court, said: "It [conspiracy] is an offence of a grave character, affecting the public at large, and we are unable to hold that a person charged with having committed it in this District is not entitled to a jury, when put upon his trial. The jurisdiction of the Police Court, as defined by existing statutes, does not extend to the trial of infamous crimes or offences punishable by imprisonment in the penitentiary. But the argument made in behalf of the government implies that if Congress should provide the Police Court with a grand jury, and authorize that court to try, without a petit jury, all persons indicted, — even for crimes punishable by confinement in the peniten-

The distinction is sharply drawn by the Supreme Court in the case cited, *between offences essentially criminal*, affecting the public at large, and *petty offences* which at the common law may be proceeded against in a summary manner, which latter would include violations of municipal ordinances concerning local affairs in respect of matters non-criminal in their nature. This distinction would appear to be sound, and the doctrine of the Supreme Court is consonant with the established and traditional regard of our jurisprudence for the rights of the citizen and for the trial by jury in criminal cases. To this extent only is the doctrine of the Supreme Court in necessary conflict with the judgments of the State courts referred to in the text.¹

§ 757 (440). **Revisory Power of the Superior Courts; Review of Proceedings by Superior Tribunals.** — With respect to *inferior jurisdictions*, the right to review their proceedings by the superior tribunals will not be taken away unless the intention of the legislature to this effect is expressed with unequivocal clearness. The authorities cited in the note will show the great length to which the courts go in preserving the right to review the proceedings of subordinate tribunals, administered frequently by men without professional or judicial knowledge or experience. A declaration by the statute concerning an inferior tribunal, that its proceedings "shall be *final and conclusive*," or "*without appeal*," &c., will not deprive a party

tiary, — such legislation would not be an invasion of the constitutional right of trial by jury, provided the accused, after being tried and sentenced in the Police Court, is given an unobstructed right of appeal to, and trial by jury in, another court to which the case may be taken. We cannot assent to that interpretation of the Constitution. Except in that class or grade of offences called petty offences, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority, of the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court he is put on trial for the offence charged. In such cases a judgment of conviction, not based upon a verdict of guilty by a jury, is void. To accord to the accused a right to be tried by a jury, in an appellate court, after he has been once fully tried otherwise than by a jury, in the court of original jurisdiction, and sentenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirements of the Constitution. When, therefore, the appellant was brought before the Supreme Court of the District, and the fact was disclosed that he had been adjudged guilty of the crime of conspiracy charged in the information in this case, without ever having been tried by a jury, he should have been restored to his liberty." The Supreme Court of the District had previously expressed its doubt upon the question. *In re Fry*, 3 Mackey (D. C.), 135. See also *In re Dana*, 7 Benedict, 1.

¹ It is certainly very difficult to define in view of the English legislation what are such petty offences. Stephen, *Hist. Cr. Law*, chap. iv. p. 122, where the history and character of such legislation are given.

he right of review by *certiorari*, error, or the proper proceeding.¹ But where it is declared with respect to a court of general and prior jurisdiction, as of the Supreme Court of New York, that action (for example, in confirming appraisements for opening

Rex v. Commissioners of Fens, 2 Ale. 43; *Rex v. Moreley*, 2 Burr. ; *Lawton v. Cambridge*, 2 Caines Y.), 179, 181; *Starr v. Rochester* tees, 6 Wend. (N. Y.) 564; *Peo- v. New York*, 2 Hill (N. Y.), 9; *Key v. Dodge*, 9 Minn. 166; *Heath*, 3 Hill (N. Y.), 42, 52, and cases and reviewed by *Cowen*, J.; *den v. Block*, 65 Ala. 236.

kindred subject is treated in the ter on Municipal Officers: "Special unal to determine Election Con- for Municipal Offices," *ante*, § and it is there shown that the ary constitutional provision that judicial power shall be vested in un courts does not disable the lature from providing that the cil of municipal corporations may ly determine the validity of the ion of corporation officers. *New ans v. Morgan*, 7 Martin (La.), 1; *State v. Fitzgerald*, 44 Mo. 425; *ng v. Filley*, 43 Pa. St. 384; *State Johnson*, 17 Ark. 407. But the rvisory jurisdiction of the superior ts will not be held to be taken y by mere negative words. *Grier v. ckelford*, Const. Rep. 642; *State v. gerald*, *supra*; *Commonwealth v. loskey*, 2 Rawle (Pa.), 369; *Strahl*, e, 16 Iowa, 369; *State v. Funck*, 17 a, 365; *Bateman v. Megowan*, 1 (Ky.) 533; *Wammack v. Hollo-* 2 Ala. 31; *Hummer v. Hummer*, 3 reene (Iowa), 42; *State v. Marlow*, Ohio St. 114; *Attorney-General v. oration of Poole*, 4 Mylne & Cr. Attorney-General v. Aspinall, 2 ne & Cr. 613; *Parr v. Attorney-* ral, 8 Cl. & F. 409; *Taylor v. ricus*, 39 Ga. 59; *State v. Kempf*, Wis. 470; *post*, chaps. xxix., xxx., ; *post*, § 1592.

The Supreme Court of Michigan, viewing, on *certiorari*, the legality conviction of a defendant in the rder's court on a complaint for ting a municipal ordinance, speak- of the extent of the revisory power e superior tribunals, and the nature purposes of the municipal tribunals, t: "The power of reviewing upon orari judicial proceedings of in-

ferior tribunals and bodies not ac- cording to the course of the common law has been long exercised in Eng- land, as well as in this country. The power has been jealously maintained, and has been deemed necessary to prevent oppression. There are certain classes of questions which, by common understanding, from time immemorial, belong to the course of the judicial inquiry under the laws of the land. The common law and the various charters and bills of rights recognized and assured the right to such an inquiry; and the Constitution, in ap- portioning the judicial power, as well as in affirming the immunity of life, liberty, and property, has always been understood to guarantee to each citizen the right to have his title to property, and other legal privileges, determined by the general tribunals of the State. These municipal courts, so far as they act under city by-laws, are not de- signed to decide between man and man, or to administer general laws. They are ordained to prevent disorder in matters of local convenience, and to regulate the use of public and *quasi* public easements, so as to prevent con- fusion. If in exercising this power they can incidentally decide upon the rights of private property so as to determine its enjoyment without re- view, there would seem to be a prac- tical annihilation of the right to resort to the general tribunals and the com- mon law." *Per Campbell, J.*, *Jackson v. People*, 9 Mich. 111, 117. Further see chap. xxxi., *post*, § 1591 *et seq.*

An appeal from inferior tribunals does not exist unless plainly given. *People v. Police Justice*, 7 Mich. 456; *Conboy v. Iowa City*, 2 Iowa, 90; *Mus- catine v. Steck*, 7 Iowa, 505; *Dubuque v. Rebman*, 1 Iowa, 444; *McGarty v. Deming*, 51 Conn. 422, where, however, the charter denied the right of an appeal. *Certiorari*, on the other hand, will lie unless plainly denied, or other specific remedy be given. *Cunning- ham v. Squires*, 2 West Va. 422; *post*, § 1047, and chap. xxxi., on Remedies against Illegal Corporate Acts, *post*. Index — *Certiorari*; *Remedy*.

streets, or under a railroad act) "shall be *final and conclusive* upon the parties interested and upon all other persons," the right of appeal, which would otherwise exist, from the decision of such court to a still higher tribunal, as to the Court of Appeals, is destroyed.¹ A charter provision to the effect that appeals and writs of error from judgments of the mayor, in cases arising under the charter, should only be allowed in cases where the fine was over five dollars, was considered as evincing the legislative intention that in cases where the fine was under that sum the judgment should be final, and hence a writ of prohibition will not lie to restrain its collection, nor can it be reviewed on *certiorari*.²

§ 758 (441). **Same Subject.** — In Virginia it is decided that in a proceeding before the mayor or a justice to impose a penalty on a party for obstructing a street, the mayor or justice cannot, if the defendant *bona fide* sets up title to the land claimed as a street, inquire into the validity of the claim, the court holding that by the principles of the common law (which are not changed by the statutes), a *bona fide* assertion of title to property or to an incorporeal hereditament or real franchise ousted the jurisdiction of these inferior magistrates or tribunals.³

¹ Canal and Walker Streets, *In re*, Iowa, 505; Buck v. Dansenbacher, 12 N. Y. 406; New York Central R. Co. v. Marvin, 11 N. Y. 276. 37 N. J. L. 359; St. Peter v. Bauer, 19 Minn. 327; Goldthwaite v. Montgomery, 50 Ala. 486. See chap. xxi, *post*.

² Wertheimer v. Boonville, 29 Mo. 254.

³ Warwick v. Mayo, 15 Gratt. (Va.) 528. To the same effect, see Jackson v. People, 9 Mich. 111; Grand Rapids v. Hughes, 15 Mich. 54. See chapter on Streets. What record of conviction before corporation officers or courts should show. Keeler v. Milledge, 24 N. J. L. 142; Muscatine v. Steck, 7 353. A town officer who holds in custody a person committed by a verbal order of a police magistrate for non-payment of a fine imposed for the breach of a town ordinance, acts not only without authority, but in violation of law. Odell Trustees v. Schroeder, 58 Ill. 353.

CHAPTER XVIII

CONTRACTS

	Section		Section
outlined	770	tionality of Statute; Ohio	
Power to make Con-		Cases	800
and how conferred	771	Letting to the Lowest Bidder	801
with Municipal Officers;		When Competition is Impossible	
ry Relations	772	or Unavailing	802
ject; Disqualifying In-		Patented Inventions	803
Resulting Invalidity	773	Proprietary Articles; Monopo-	
to influence the Delib-		lies	804, 805
and Determinations of		Lowest Bidder; Exclusive Right	806
bodies and Officers	774	Necessity for and Sufficiency of	
f Public Agents and		Specifications	807
to make Contracts	775	Stipulations as to Hours of Labor,	
in Respect of Drainage		Wages, and the Employment of	
nd Incidental Powers;	776	Union Labor	808
Powers; All Persons		Necessity and Sufficiency of	
o take Notice of Ex-		Advertisement	809
Corporate Powers	777	Opening Bids; Awarding the	
he Making of the Con-		Contract	810
	778	Acceptance and Rejection of Bids	811
taking Advantage of		When Contract completed	812
ce or Carelessness of		Extra Work	813
al Officers	779	Contracts of Suretyship	814
Mistake, Misrepresen-		Authorized Contracts; Rights	
by Municipal Officers	780	and Liabilities	815
ons among Bidders	781	Power to contract illustrated	816, 817
ower to contract	782		818, 819
exercising the Power	783	Modification of Contracts	820
Necessary; How con-		Settlement of Disputed Claims,	
	784	&c.	821
made by Agents; Mode		Power to arbitrate Claims	822
tion	785	Performance of Work to Satisfac-	
ect; Illustrations	786, 787	tion of Engineer	823
st be Corporate, not		Contracts with Attorneys	824
ial	788	Contracts for Local Improve-	
Contracts	789	ments	825
Requirement of a Pre-		Consent of Property-owners	826
appropriation	790	Liability of City if Contract Price	
in Excess of Corporate		is payable from Assessment	827
Ultra Vires as a Defence	791	Corporate Control by Stipulation	828
Ultra Vires or Invalid	792	Stipulations by Contractor to	
ontracts	793, 794, 795	maintain Pavements in Repair	829
Ultra Vires; As-		Bonds of Contractor — Statutory	
	796	and Common Law	830
on of Unauthorized Con-		Claims of Subcontractors, La-	
	797	borers, and Materialmen —	
d Ratification	798, 799	Statutory Liens	831
to plead Unconstitu-		Assignment of Contract	832

(442). Subject outlined. — In treating of the subject of contracts of municipal corporations, particular regard will be

had at this place to the *rights and liabilities of the municipality as concerns itself and the party with whom it contracts* rather than in other respects. It is of course impossible to lay down a rigid boundary line, and incidentally it will be necessary to discuss to some extent the rights and remedies of the citizens and taxpayers in connection therewith; but in this chapter it is not intended to examine in detail any branches of the law other than the power of a municipality to contract, the effect of transcending it, the method in which the contract is made, the performance of the contract, the rights and liabilities of the contracting parties, sub-contractors, laborers, and materialmen, and such matters as are properly incident to these topics. We have already discussed the legislative power over and in respect of contracts made by municipal corporations,¹ and also the restrictions upon and qualifications of the power to contract resulting from constitutional provisions limiting and restricting the power to incur debt.² The mode of enforcing the contracts of municipal corporations will be considered hereafter.³ In this chapter, also, it is not intended to discuss those contractual obligations of a municipality which are in the nature of securities, viz., municipal bonds, warrants, and certificates of indebtedness. These obligations will be considered in separate chapters.⁴ It has also been found expedient to discuss separately contracts by the municipality for a supply of water or light, which are usually made either in connection with and as a part of a grant of the franchise or privilege to use the streets of the city for pipes, mains, and electric light poles and wires, or with the recipients of such grants from the city or from the State.⁵

§ 771 (443). **Extent of Power to make Contracts; and how conferred.** — In determining *the extent of the power* of a municipal corporation to make contracts generally, and to make the particular contract under consideration, and in ascertaining *the mode in which* the power is to be exercised, the importance of a careful study of the charter or incorporating act, and of the general legislation of the State on the subject, if there be any, cannot be too strongly urged. Where there are express provisions on the subject, these will, of course, measure, as far as they extend, the authority of the corporation. The power to make contracts, and to sue and be sued thereon, is usually conferred, in general terms, in the incorporation

¹ See *ante*, chapters iv. and viii.

² See *ante*, chapter vi.

³ See *post*, chapters xxix., xxxi., xxxii.

⁴ See *post*, chapter xix. on War-

rants, and chapter xx. on Municipal Bonds.

⁵ See *post*, chapter on Public Utilities.

ct. But where the power is conferred in this manner it is not to be construed as authorizing the making of contracts of all descriptions, but only such as are necessary and usual, fit and proper, to enable the corporation to secure or to carry into effect the purposes for which it was created; and the extent of the power will depend upon the other provisions of the charter or statute prescribing the matters in respect of which the corporation is authorized to act. To the extent necessary to execute the special powers and functions with which it is endowed by its charter there is, indeed, an *implied* or *incidental authority* to contract obligations, and to sue and be sued in the corporate name.¹

¹ 1 Kyd, 69, 70; 2 Kent Com. 224; *Angell & Ames*, §§ 110, 271; *Galena v. Corwith*, 48 Ill. 423; *Straus v. Eagle Ins. Co.*, 5 Ohio St. 59; *Chaffee v. Ranger*, 6 Mich. 51; *Douglass v. Virginia City*, 5 Nev. 147; *Goodrich v. Detroit*, 12 Mich. 279; *Bank of Columbia v. Patterson*, 7 Cranch, 299; *Siebrecht v. New Orleans*, 12 La. An. 496; *Lateman v. Ashton-under-Lyne*, 3 L. & M. 322; *Nowell v. Worcester*, 9 Exch. 457. *Indianapolis v. Indianapolis Gas Co.*, 66 Ind. 396, approving text; *Montgomery County v. Barber*, 15 Ala. 237; *Smith v. Stephan*, 66 Md. 381; *Galveston v. Loonie*, 54 Tex. 517. Concerning certain *special powers*, see *ante*, chap. viii.

Under general authority to make all contracts necessary for its welfare, a city may contract for *water-works*. *Cabot v. Rome*, 28 Ga. 50; see *Wells v. Atlanta*, 43 Ga. 67. A contract granting the *exclusive right to furnish water* to a city, made under a power "to provide a supply of water," sustained, and the city was enjoined from granting the right to lay pipes to another company, on the ground that its power was exhausted. *Atlantic City Water-Works*

Atlantic City, 39 N. J. Eq. 367. See Index, *Monopolies*; *Water and Water-Works*. Duty and power of municipality as owner of *water-works*. *Knight v. New Orleans*, 24 La. An. 2; *Grant v. Davenport*, 36 Iowa, 6; *Hale v. Houghton*, 8 Mich. 458. City contract for *lighting streets*, &c., *Indianapolis v. Indianapolis Gas Co.*, Ind. 396. For *grading streets*. *Murtevant v. Alton*, 3 McLean, 393. *Build sidewalks*. *Wyandotte v. City*, 21 Kan. 649; *Lawrence v. Killam*, 1 Kan. 499, approving text. For "breakwater" to protect streets of a

city on the lake. *Miller v. Milwaukee*, 14 Wis. 642; approved, *arguendo*, by *Cole, J.*, in *Clason v. Milwaukee*, 30 Wis. 316, 321. *Supra*, § 503, note. *Legislative power over municipal contracts*, *ante*, chap. iv.; *Grant v. Davenport*, 36 Iowa, 396.

The city of Richmond possessed, under its charter, all the usual powers of municipal corporations, including the power "to contract and be contracted with," and its council was specially empowered "to pass all by-laws which they shall deem necessary for the peace, comfort, convenience, good order, good morals, health, or safety of the city, or of the people or property therein." In April, 1865, in anticipation of the evacuation of the city by the confederate army and the entry of the national forces, the city council ordered the *destruction of all the liquor in the city*, and pledged the faith of the city for the payment of its value. It was decided by the Court of Appeals that under the provision of the charter above mentioned the council had authority to make the order and pledge, and hence the city was responsible for the value of liquor destroyed under the order of the council. *Jones v. Richmond*, 18 Gratt. (Va.) 517. The same question upon the same resolutions of the city council was presented to the United States Supreme Court in *Richmond v. Smith*, 15 Wall. (U. S.), 429; and it followed, without examination into its correctness, the exposition of the charter given by the State court in *Jones v. Richmond*, *supra*. Upon the general principles of construction, the author doubts whether the order for the destruction of the liquors was within the scope of the corporate powers of the city. *Ante*, §§ 237, 238, 239,

§ 772 (444). **Contracts with Municipal Officers; Fiduciary Relations.** — It is a well-established and salutary doctrine that he who is intrusted with the business of others cannot be allowed to make such business an object of *pecuniary profit* to himself. This rule does not depend on reasoning technical in its character, and is not local in its application. It is based upon principles of reason, of morality, and of public policy. It has its foundation in the very constitution of our nature, for it has authoritatively been declared that a man cannot serve two masters, and is recognized and enforced wherever a well-regulated system of jurisprudence prevails.¹ The law will in no case permit persons who have undertaken a fiduciary character or a charge to change or invert that character by leaving it and acting for themselves in a business in which their character

and notes. Contract made by a city, under government therein set up by the United States military authority, held valid. *Prather v. New Orleans*, 24 La. An. 41. Special prohibition in a city charter construed to extend to all contracts of sale to the city. *Gregory v. Jersey City*, 34 N. J. L. 390. Where an executory contract with a municipal corporation is not in its nature necessarily personal, as, for example, a contract for cleaning streets, it may, certainly with the assent, express or implied, of the city, be assigned, if there be no restriction on the right, and the city retains the personal obligation of the original contractor and of his sureties. *Devlin v. New York*, 63 N. Y. 8.

No corporation can make a valid contract not to exercise part of the franchise committed to it by the State for public purposes. *St. Louis v. St. Louis Gas-light Co.*, 5 Mo. App. 484, 529. See opinion of the Supreme Court of *Missouri* on Appeal, in the case last cited; and see *ante*, §§ 244, 245, 661, and *post*, § 1236; see also Index — *Delegation of Public Powers*.

In *The Maggie P.*, 25 Fed. Rep. 202, it appeared that the city of St. Louis, which, by its charter, had general control over the harbor and improvements therein, including power "to keep the wharf and the river along the shore free from wrecks and other improper obstructions," entered into a contract with the owner of a steamboat which had sunk, to use the city's harbor boat in pumping out the wreck, for a consideration; and the question was presented whether the city could be held liable for damages caused by its failure

to carry out the contract. *Brewer, J.*, said: "I suppose a city can make no contract for the discharge of a purely public duty, — such a contract as in case of performance it can enforce compensation for, or for non-performance expose itself to liability. It cannot use public funds in any such direction. . . . At the same time, when it has in its possession instrumentalities, and hires employees for the purpose of discharging some public duty, I see no reason why, when the exigencies of public duties do not require the use of those instrumentalities and employees, it may not make a valid contract to use them in some private service. . . . And, generally speaking, when public duty does not interfere with private service, a city may make a valid contract for the use of its instrumentalities in the latter. . . . The testimony shows that the city, through its officers, has been in the habit of making these contracts and receiving compensation therefor; and having made that a business, so to speak, having received gain from such contracts, it does not lie in its mouth to say now that there was no officer authorized by ordinance to make this kind of contract."

¹ *Toronto v. Bowes*, 4 Grant (Canada), 489, where the subject is fully considered. The general principles of law and equity as to transactions and contracts by and with persons sustaining fiduciary relations apply to municipal officers, and to those principles as expounded in treatises on such subjects the reader is further referred.

nds them to act for others. The application of the rule may in some instances appear to bear hard upon individuals who have committed no moral wrong; but it is essential to the keeping of all parties filling a fiduciary character to their duty, to preserve the rule in its integrity, and to apply it to every case which justly falls within its principle.¹ The principle generally applicable to all officers and directors of a corporation is that they cannot enter into contracts with such corporation to do any work for it, nor can they subsequently derive any benefit personally from such contract.² To deny

¹ *Port v. Russell*, 36 Ind. 60; *Tippeloe County Com'rs v. Reynolds*, 44 Ind. 509; *Macon v. Huff*, 60 Ga. 221; *Ark Buildings Co. v. Mackenzie*, 8 Iowa P. C. 42; *Liquidators, &c. v. Leaman*, L. R. 6 E. & I. App. Cas. 189; *Verdeen R. Co. v. Blaikie*, 1 Macq. App. Cases, 461. See full review of authorities in *Gardner v. Ogden*, 22 N. Y. 327; *Butts v. Wood*, 37 N. Y. 7, and cases cited; *McGregor v. Logansport*, 79 Ind. 166; *Fort Wayne v. Rosenthal*, 75 Ind. 156; *Emigrant Co. v. Wright Co.*, 97 U. S. 339. In this case the Supreme Court of the United States, by Mr. Justice Miller, in declaring a contract void, says: "It appears that for some time before this contract was made the county had been regarding her claim to swamp lands before the department at Washington, through Mr. S., who acted as her agent. A short time before this contract was made Mr. S. informed the authorities of the county that their claim had been rejected, and that this rejection was accompanied by the announcement of a rule which gave but little to hope for on the part of the county. Very shortly after this Mr. S., as the agent of the emigrant company, made his appearance in Wright County and procured the contract we have mentioned. As soon as this was done, Mr. S., as the agent of the emigrant company, by the assistance of, as he says, of able lawyers, and in the cases of other counties with whom the company had similar contracts, inaugurated proceedings to procure the reversal of the rule announced by the department. Succeeded in this, he presented the renewed claim of Wright County, and secured an allowance of several hundred acres of land unsold in the county, and money was scrip for six thousand acres to be located elsewhere in lieu of swamp lands sold by the government. It is not a

violent presumption, under all the circumstances of this case, that when, just after Mr. S. had made the impression on the supervisors of Wright County that their case was hopeless, Mr. C. appeared in Wright County, he had some information of a different character on which he acted, and which was not communicated to the supervisors. We are not convinced that any false representations were made by the agents or officers of the emigrant company. But the impression made upon us by the whole testimony is that the officers and citizens of the county were in gross ignorance of the nature and value of what they were selling; that the emigrant company, on the other hand, were well informed in regard to both, and withheld this information unfairly from the officers of the county. *That the sudden change of the relationship of Mr. S. from an unsuccessful agent of the county to a successful agent of the company requires an explanation which has not been satisfactorily given. That the fact that all parties knew they were dealing with a trust fund devoted by the donor to a specific purpose demanded the utmost good faith on the part of the purchaser. That so far from this there is a provision for a diversion of the fund to other purposes, a gross inadequacy of consideration, and a successful speculation at the expense of the rights of the public.*"

² Cases, *supra*, note 1. But to this general principle the United States Supreme Court has recognized that there may be exceptions. A director, for example, may be the only person who will advance money to the corporation to save it from bankruptcy or great damage, and his action in so doing may be valid, and even commendable, and the contract is not necessarily invalid. *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, and especially

the application of the rule to municipal bodies would, in the opinion of the Canadian chancery court, whose views we adopt and approve, be to deprive the rule of much of its value; for the well working of the municipal system, through which a large portion of the affairs of the country are administered, must depend very much upon the freedom from abuse with which they are conducted. Nothing can more tend to correct the tendency to abuse than to make abuses unprofitable to those who engage in them, and to have them stamped as abuses in courts of justice. The tendency to abuse may indeed be in part corrected by public opinion; but public opinion itself is acted upon by the mode in which courts deal with such abuses as are brought within their cognizance.¹ It is contrary to good morals and public policy to permit a municipal officer to enter into contractual relations with the municipality of which he is an officer.²

The principles of the common law and of equity are generally supplemented and made more emphatic by statutory enactments prohibiting any municipal officer from being interested directly or indirectly in any municipal contract or in the rendition of services to the municipality outside of those required from him by virtue of his office. The statutes usually make a violation of their provisions a criminal offence entailing a forfeiture of office as well as punishment by fine or imprisonment, and they frequently declare that all contracts entered into in violation of their provisions shall be void. Such statutes are declaratory of and in aid of the principles of the

pp. 588-591. In such and similar cases it is often at the bottom more a question of good faith, honest purposes, and beneficial consequences than of mere nominal relation of the parties.

¹ *Toronto v. Bowes*, 4 Grant (Canada), 489; aff'd on appeal, 6 Grant, 1, and by the privy council, 11 Moore P. C. C. 463, also cited *infra*. See Biggar's Mun. Manual (Canada, 1900), 47, 114, 115.

² *Beebe v. Supervisors of Sullivan County*, 64 Hun (N. Y.), 377, aff'd on opinion below, 142 N. Y. 631; *Bay v. Davidson*, 133 Iowa, 688. It is the duty of the court to take cognizance of the illegality of any such contract of its own motion. *Northport v. Northport Town Site Co.*, 27 Wash. 543.

³ In *Indiana*, such a statute was strictly enforced. *Case v. Johnson*, 91 Ind. 477; approved *Benton v. Hamilton*, 110 Ind. 294. But as such a statute is highly penal, it must be

strictly construed, and cannot be extended by implication beyond its terms. Hence, when the statute merely prohibits public officers from being interested "in any contract for the sale or furnishing of materials and supplies," it does not include within its operation a contract to sell lands. *Trainer v. Wolfe*, 140 Pa. 279. An election commissioner within a city, appointed by the governor to an office created by the legislature whose functions apply to all elections, is not a city officer within such a statute. *State v. Meier*, 96 Mo. App. 160. A stockholder and secretary of a corporation supplying light to a city is within the prohibition, and is disqualified to hold office, although he was elected a member of the council after the contract was made. *Commonwealth v. DeCamp*, 177 Pa. 112. The surety of a city treasurer held to be disqualified to hold office. *Commonwealth v. Allen*, 70 Pa. St. 465.

mon law,¹ though, as we shall see, some difference in the results-consequences of the illegality appears in the decisions.²

773. Same Subject; Disqualifying Interest; Resulting Invalidity.

At common law and generally under statutory enactment, it is now established beyond question that a *contract made by an officer of a municipality with himself*, or in which he is interested, is contrary to public policy and tainted with illegality; and this rule applies whether such officer acts alone or on behalf of the municipality, as a member of a board of council.³ Neither the fact that a ma-

¹ *Nunemacher v. Louisville*, 98 Ky. 334; *Jacques v. Louisville (Ky.)*, 106 V. Rep. 308. The New York Commission of Enquiry regarded an act of the legislature making it unlawful for a member of a common council to become a contractor under any contract authorized by the council, and declaring such contract to be void at the instance of the council as but declaratory of the common law which on grounds of public policy prohibits a trustee from contracting with himself. Accordingly where the plaintiff, a member of the council, voted for a resolution to appropriate money to purchase the Fourth of July, under a resolution a committee of the council employed the plaintiff to hire horses and carriages for the celebration, it was held (assuming the appropriation of money for this purpose to be valid under the charter) that the plaintiff's employment was against public policy and void, and that he could not recover against the city for the value of the use of the horses and carriages furnished by him. *Smith v. City of New York*, 61 N. Y. 444. A municipal officer not a member of a council may recover for services outside the scope of his official employment when they are rendered by him pursuant to a valid contract with the city, although an ordinance prohibits municipal officers from being interested in any city contract or from receiving from the city any compensation other than his salary. When the officer makes an express contract with the city the operation of the prohibitory ordinance is suspended so far as that action is concerned. *Klemn v. City of New York*, 61 N. J. L. 112. *Santa Ana Water Co. v. San Juan*, 65 Fed. Rep. 323; *Day v. Perts*, 66 Fed. Rep. 427; *West v. Berry*, 98 Ga. 402; *Moore v. Toledo Independent District*, 55 Iowa, 654; *Weitz v. Des Moines Independent District*, 87 Iowa, 81; *Nunemacher v. Louisville*, 98 Ky. 334; *O'Neil v. Flannagan*, 98 Me. 426; *Goodrich v. Waterville*, 88 Maine, 39; *Gaw v. Ashley*, 195 Mass. 173; *Stone v. Bevans*, 88 Minn. 127; *Noxubee County Hardware Co. v. Macon*, 90 Miss. 636; 43 So. Rep. 304; *McElhinney v. Superior*, 32 Neb. 744; *Harrison v. Elizabeth*, 70 N. J. L. 591; *Stroud v. Consumers Water Co.*, 56 N. J. L. 422; *Brown v. Woodbridge Lighting Dist.*, 71 N. J. L. 79; *Matter of Plattsburgh*, 27 N. Y. App. Div. 353; *Heughes v. Board of Education*, 37 N. Y. App. Div. 180; *Snipes v. Winston*, 126 N. Car. 374; *Northport v. Northport Town Site Co.*, 27 Wash. 543; *Pickett v. School Dist.*, 25 Wis. 551. A contract made by a mayor, while in office, with the city council, to lease a city park for five years, and for an annual sum paid him to keep the park in repair, held to be against public policy and illegal. *Macon v. Huff*, 60 Ga. 221. The employment of a member of the board of supervisors as an attorney to take proceedings on behalf of the county to recover moneys not accounted for by the county treasurer is contrary to public policy and void. *Beebe v. Supervisors of Sullivan County*, 64 Hun (N. Y.), 377, aff'd 142 N. Y. 631. A poundmaster appointed and employed by a city cannot recover from the city on an implied contract for use and occupation of premises furnished by him for a public pound. *Macy v. Duluth*, 68 Minn. 452. A member of the council or board of aldermen cannot be employed by that board to superintend the streets for a stipulated compensation. *Snipes v. Winston*, 126 N. Car. 374. But the fact that the city

majority of the votes of a council or board in favor of the contract are cast by disinterested officers,¹ nor the fact that the officer interested

council has contracted with one of its members to construct a street improvement will *not defeat an assessment* levied for the purpose of paying for the improvement. *Roberts v. First Nat'l Bank*, 8 N. D. 504. See also *Lawrence v. Killam*, 11 Kans. 499. *Contra*, *Capron v. Hitchcock*, 98 Cal. 427; *McManus v. Scheele*, 116 La. 72. If a municipal officer only orders an article by authority of the city and *advances money* to pay for it, he is not within the prohibition of a statute forbidding contracts with a city officer to furnish articles. *Anna v. O'Callahan*, 3 Ill. App. 176. A member of a council who has participated in passing an ordinance for a public improvement *may resign*, and after his resignation has been accepted, may bid for the contract without violating any principle of law. *White v. Alton*, 149 Ill. 626. But if gas is furnished to a city, *not under any express contract*, but under the duty of the gas company by *operation of law* to furnish it to the city upon demand, the city is liable for the reasonable value thereof, although the mayor of the city is a stockholder in and president of the gas company, and although the city charter may prohibit its officers from being interested in any contracts or sales to the city involving the payment of money from its treasury. This result follows from the fact that the duty to furnish gas to the city devolved upon the company, not by virtue of any contract, but by operation of law, and hence the laws governing ordinary contracts resting in the volition of the parties thereto has no application. *Capital Gas Co. v. Young*, 109 Cal. 140.

¹ *West Jersey Traction Co. v. Board of Works*, 56 N. J. L. 431; *Drake v. Elizabeth*, 69 N. J. L. 190; *People v. Overysse*, 11 Mich. 222. Although there seems to be respectable authority in opposition to the statement of the text, the author believes that the text correctly states the general rule of the law, and that the cases apparently conflicting therewith rest upon special circumstances which make them exceptions to the general rule as not being within its purpose or policy. In *Pennsylvania*, after it had been held that a contract was void where the votes of the interested officers were

necessary to the making of the contract (*Commonwealth v. Allen*, 70 Pa. St. 465; *Milford v. Milford Water Co.*, 124 Pa. 610; *Commonwealth v. DeCamp* 177 Pa. 112), the Supreme Court, held in opposition to the text that the fact that one member of the council voting for an ordinance authorizing or approving a contract, is disqualified by interest in the contracting party, does not necessarily render the ordinance and contract void, if the contract is otherwise legitimate and valid and a majority of the council without reckoning the interested votes voted for the ordinance and authorized and approved the contract. *Marshall v. Ellwood City*, 189 Pa. 348. This decision was rendered under the principle of the common law that, in the absence of a statutory provision declaring the contract to be void, such contract is only voidable, and not void.

In *London Electric Lighting Co. v. Mayor, &c. of London*, 82 Law Times (N. S.), 530, it was held where a commissioner of sewers or a member of the board of aldermen or of the common council of the city of London is interested in a contract made by the commissioners of sewers with a corporation by being a stockholder therein, the contract is not invalidated thereby. Great weight was attached by the court to the fact that it had not been proved that any commissioner, alderman, or common councilman who was a stockholder in the contracting corporations took part in the negotiations for or settlement of any of the contracts or conveyances, and to the further fact that the commissioners of sewers and common councilmen were very numerous, there being 91 of the former and 200 of the latter, and it could not be inferred that ownership of stock by any one or more specific individuals affected the deliberations or proceedings of these bodies.

In *California*, the rule seems to be adopted that if a contract can be sustained by the votes of a disinterested majority, the fact that one of the members of the board is interested therein and voted for it will not avoid it. *Reclamation Dist. v. Turner*, 104 Cal. 334; *Wickersham v. Crittenden*, 93 Cal. 17; *San Diego v. San Diego &*

not participate in the proceedings, necessarily relieves the contract from its vice.¹ The fact that the interest of the offending officer in an invalid contract is indirect and is very small is immaterial.² A statutory prohibition is frequently so wide in its terms as to prohibit any officer from contracting with the municipality whether or not he takes part in the making of the contract or not.³ It is impossible to lay down any general rule defining the nature of the interest of a municipal officer which comes within the opera-

R. Co., 44 Cal. 106; *Lower Kings Reclamation Dist. v. McCullah*, Cal. 175, 8 S. P. Twin-Lick Oil Marbury, 91 U. S. 587. In *Itt v. Athens* (Tenn. Ch. App.), 10 W. Rep. 667, a firm of attorneys employed to render services for a city by a resolution which required the firm to employ one of the partners who was also a partner in the firm to constitute a majority of the firm in favor. The court held the employment illegal, because the partner was not employed in the employment, but was only a partner in the firm. It was held that it did not mean to say that the partner could not make a contract with the firm if he did not participate in it. In *Junkins v. City Falls Union School Dist.*, 39 W. Rep. 20, it was held that a majority of the board of trustees appointed by a school district to purchase a site and erect a schoolhouse might employ one of the members of the committee to erect the schoolhouse. In this case the decision was made upon the ground that the acting member contracted as an individual and was at liberty to do so. *Nunemacher v. Louisville*, 98 Ky.

In *Beebe v. Supervisors of Otsego County*, 64 Hun (N. Y.), 377 (on opinion below, 142 N. Y. 631), the employment of a member of a board of supervisors as attorney was held illegal. *Herrick, J.*, said: "It is in the case before us that the supervisor who was employed did not vote on the question of his own employment on the audit of his bill; that does not cure the evil; the influence upon the other members is the same; his constituents are entitled to his judgment in making contracts, to his opinion in passing upon accounts, and to his unbiased and disinterested efforts in the discharge of his duties; and he cannot make the means of doing his duties the means of doing his constituents the means of doing an otherwise illegal act; he is not put on and off the garb of a

public official, and discharge or refuse to discharge the duties of his trust at will, and as best subserve his private interests. He is a part of the board of supervisors; it is his act, and he cannot, as a supervisor, make a contract with himself as a private citizen."

² *Foster v. Cape May*, 60 N. J. L. 78.

³ See *Capron v. Hitchcock*, 98 Cal. 427; *Case v. Johnson*, 91 Ind. 477, 489; *Greenfield v. Black*, 42 Ind. App. 645; 82 N. E. Rep. 797. The appointment or employment of a chief clerk of a bureau of city revenue in the finance department of a city as an instructor in the evening high school, his duty being to lecture three evenings in each week of the school term, renders him directly interested in the delivery of the lectures in the evening high school, and is therefore within a provision of the charter which declares that no clerk of any department or officer of the corporation shall be or become directly or indirectly interested in, or in the performance of, any contract, work, or business the expense price or consideration of which is payable from the city treasury. *McAdam v. Mayor, &c. of New York*, 36 Hun (N. Y.), 340. An examiner in lunacy, under an appointment made by the departments of charities and corrections, who is entitled to receive a monthly compensation as an officer of the department in which he has been appointed, is within a statute such as that above referred to, and if he is appointed to a second office in another department, such appointment is not only in violation of a provision of the charter that no person shall hold two city or county offices, except as expressly provided by the act, but also renders him directly interested in the performance of work the expenses of which are payable from the city treasury. *Fitch v. Mayor, &c. of New York*, 40 Hun (N. Y.), 512.

tion of these principles. Any direct or indirect interest in the subject matter is sufficient to taint the contract with illegality, if the interest be such as to affect the judgment and conduct of the officer either in the making of the contract or in its performance. In general the disqualifying interest must be of a pecuniary or proprietary nature.¹ Contracts *with firms* in which a member of the council or other municipal officer is a partner fall within the principle, and the interest of the officer therein will taint any such contract with illegality.² A

¹ Where a statute speaks of "interest" or being "interested," it in general, but not always, means a pecuniary or proprietary interest by which a person will gain or lose something, in contradistinction to general sympathy, feeling, or bias. *Northampton v. Smith*, 11 Metc. (Mass.) 390; *McGrath v. People*, 100 Ill. 464; *Evans v. Eaton*, 7 Wheat. 356; *State v. Sutton*, 74 Vt. 12; *Foreman v. Marianna*, 43 Ark. 324; *Taylor v. Normal Com. of Highways*, 88 Ill. 526; *Chicago, B. & Q. R. Co. v. Kellogg*, 54 Neb. 138; *Sauls v. Freeman*, 24 Fla. 209; *Bowman's Case*, 67 Mo. 146. See *Burton v. United States*, 202 U. S. 344, and cases cited, in dissenting opinion of Mr. Justice *Brewer*. See generally as to the nature of the disqualifying interest, *Harrison v. Elizabeth*, 70 N. J. L. 591. An agreement by a member of the council to indemnify the contractor's surety against loss on the contract is sufficient to establish the interest of such member in the contract. *O'Neil v. Flannagan*, 98 Me. 426. A member of a council who lends money to the contractor to enable him to perform the contract and takes an assignment of the contract as security, is interested therein within a statutory prohibition. *Hunnings v. Williamson*, 11 Q. B. D. 533. A surety is a person who is indirectly interested in a contract within the meaning of a statute prohibiting municipal officers from being directly or indirectly interested in any municipal contract. *Matter of Clamp*, 33 N. Y. Misc. 250. See also *O'Neil v. Flannagan*, 98 Me. 426. A councilman is interested in a contract when he is a stockholder and business manager of a lumber company, and as such manager sold to the contractor the material to construct the improvements under an agreement to receive improvement warrants in payment thereof. *Northport v. Northport Town Site Co.*, 27 Wash. 543. Mere relationship to the contractor does not *per se*

affect its validity. Hence, the fact that a village trustee was the father of the contractor did not disqualify him from acting on the proposed contract. *Lewick v. Glazier*, 116 Mich. 493. The fact that the city engineer is related to a contractor for street improvements does not render the contract invalid where it does not appear that the engineer is interested in the contract either directly or indirectly. *Cason v. Lebanon*, 153 Ind. 567. The fact that a brother of the mayor has a personal interest in a contract with the city does not raise any presumption that the contract is tainted with illegality. *Devlin v. Mayor, &c. of New York*, 4 Misc. (N. Y.) 106. See also *Southard v. Boyd*, 51 N. Y. 177.

² *McManus v. Scheele*, 116 La. 72. An action at law on a contract for the sale of goods by a trading partnership of which a partner is also a member of the municipal council may, where the contract is not executed, be resisted on the ground of the interest of such member. *Brown v. Lindsay*, 35 Upper Canada Q. B. 509. An interest acquired by a councilman after the contract has been awarded by becoming a partner of the contractor is within the prohibition. *McManus v. Scheele*, 116 La. 72.

A member of the board of aldermen is interested in a contract with the city where, being a partner in a firm which previously to his election had contracted to supply the city with coal, the other partner of that firm refrained from making a bid to continue to supply the city with coal upon an agreement with the successful contractor that if he got the contract the firm would receive half the profit. *Bell v. Quin*, 2 Sandf. (N. Y.) 146. If a newspaper which is partly owned by a city officer, e. g., one of the health commissioners of the city, is designated as one of the newspapers to publish a digest of proceedings of the common

of the city council or other municipal officer is interested in a contract so as to taint it with illegality when the contract is made with a corporation of which he is an officer and under some circumstance with a corporation of which he is a stockholder.' A con-

no recovery can be had for cost of the contract. *Mullally v. Mayor, &c.* 3 Hun, 661, aff'd 62 N. Y. 186. If an alderman is a partner in a firm which has supplied furniture for the city departments, such a partner cannot recover for the value of the furniture so supplied. *People v. &c.* of New York, 3 Misc. 131. No action can be maintained against a city to recover for services rendered by a firm to the city, when one of the partners is a member of the city council. *Goodrich v. City of New York*, 88 Me. 39. The employment of a firm of attorneys to render legal services for a city is illegal when one of the partners of the firm is a member of the city board of aldermen, and his vote is required to constitute a majority of the resolution for employing the firm. *Burkett v. Athens* (Tenn.), 59 S. W. Rep. 667. But a contract with a municipality is not precluded from enforcement on the ground that the business partner is a member of the municipal board which awards the contract if the contract is not a public contract but is the individual contract of the contractor. *Moreland v. City of New York*, 63 N. J. L. 208. A councilman who is interested in a contract within a statutory prohibition is not precluded from making the contract if the contract is made with his private business. *Commonwealth v. &c.*, 217 Pa. 411. See also *Meay v. Superior*, 32 Neb. 744. *San Ana Water Co. v. San Buenaventura*, 65 Fed. Rep. 323; *San Diego & L. A. R. Co.*, 44 Cal. 106; *Riverside & A. R. Co.*, 87 Cal. 106; *Hardy v. Gainsville*, 121 Ga. 327; *Overysse*, 11 Mich. 222, 227; *School Dist.*, 35 Minn. 163; *Standard Gas Co. v. West*, 28 Neb. 106; *Drake v. Elizabeth*, 69 N. J. L. 190; *Consumers Water Co. v. City of New York*, 121 N. Y. 106; *West Jersey Traction Co. v. Board of Works*, 56 N. J. L. 431; *Cape May*, 60 N. J. L. 78; *Woodbridge Lighting Dist. v. City of New York*, 121 N. J. L. 79; *Commonwealth v. &c.*, 217 Pa. 411; *Milford Water Co.*, 124 Pa. 610; *Trainer v. Wolf*, 140 Pa. 279; *Commonwealth v. DeCamp*, 177 Pa. St. 112; *Duncan v. Charleston*, 60 S. Car. 532; *Northport v. Northport Town Site Co.*, 27 Wash. 543. The interest of a councilman or other officer as a stockholder has been held sufficient to invalidate a contract under the common law as well as under a statute prohibiting municipal officers from being interested directly or indirectly in any contract, &c. *Drake v. Elizabeth*, 69 N. J. L. 190; *West Jersey Traction Co. v. Board of Works*, 56 N. J. L. 431; *Duncan v. Charleston*, 60 S. Car. 532. In *San Diego v. San Diego & L. A. R. Co.*, 44 Cal. 106, the court discussing the question of the disqualifying interest of a municipal officer who is a stockholder in a contracting corporation said: "While it is true that a corporation holds the legal title of the corporate property, it is equally true that it holds it for the benefit of its stockholders. In them is the beneficial interest. If it makes, it is their gain; and if it loses, they bear the loss. At common law, though not parties to the record, they could not be witnesses for the corporation, for in all matters in which it was concerned they were considered to have a direct, certain, and vested interest (Greenleaf on Ev., §333). Men may, and often do, feel as deep a concern for the success of a corporation in which they are interested as for their own private affairs. To hold, therefore, that one intrusted with property in a fiduciary capacity may rightfully bargain in reference to it with a corporation in which he holds stock, would be to ignore all the evils which the rule in question was intended to prevent." An award of public printing to a corporation in which a councilman or his wife is a stockholder held to render the contract illegal. *Drake v. Elizabeth*, 69 N. J. L. 190. A member of a city council who held as collateral surety a share of stock of an electric light company was held to be disqualified to vote for a contract with such corporation though the value of the stock was slight. *Foster v. Cape May*, 60 N. J. L.

tract made by an officer with the municipality *contrary to an express statutory prohibition* which declares the act to be a criminal offence, is void *ab initio*, although the statute does not pronounce it void.¹ It cannot be given validity by any subsequent ratification short of a new contract made under circumstances absolutely avoiding the statutory prohibition.² When the contract is void because made

78. A contract was made with a corporation for printing and supplies. It appeared that the *contracting corporation was subsidiary* to and controlled by another corporation in which a municipal officer was a stockholder. Held that the contract with the subsidiary company was an attempted evasion of the statutory prohibition and was void. *Jacques v. Louisville (Ky.)*, 106 S. W. Rep. 308.

An act ratifying and confirming in general terms an ordinance authorizing a contract will not be deemed to cure the undisclosed fraud inherent in the fact that the officers of the municipality are stockholders of and interested in the contracting corporation in the absence of evidence that the fraud was disclosed to and considered by the legislature. *Santa Ana Water Co. v. San Buenaventura*, 65 Fed. Rep. 323. A contract with a private corporation in which one of the members of the city council is a stockholder, is not rendered legal and valid by the subsequent sale of the stock which the interested member owned at the time when the contract was made. *Hardy v. Gainesville*, 121 Ga. 327. A contract by a city to sell certain lands to a railroad company, of which a councilman is a director, is ratified and rendered valid by a resolution directing the delivery of a deed made after the director had ceased to be a member of the council. *Fort Wayne v. Lake Shore & M. S. R. Co.*, 132 Ind. 558. But the fact that previously to the time of making the contract the mayor and a member of a council had subscribed to the stock of the contracting corporation and might be liable for an unpaid subscription in the event of the corporation becoming insolvent does not invalidate a contract between the city and the corporation, although they participated in making it, if they were not stockholders when the contract was made. *Broken Bow v. Broken Bow Water Works Co.*, 57 Neb. 548; but *quære?*

¹ *Berka v. Woodward*, 125 Cal. 119;

Case v. Johnson, 91 Ind. 477, 480; *Nelson v. Harrison County*, 126 Iowa, 436, 445; *Nunemacher v. Louisville*, 98 Ky. 334; *Harrison v. Elizabeth*, 70 N. J. L. 591; *Wiesenthal v. Atlantic City*, 73 N. J. L. 245; *Milford v. Milford Water Co.*, 124 Pa. 610; *Trainer v. Wolfe*, 140 Pa. 279. See also *Sturr v. Elmer*, 75 N. J. L. 443; 67 Atl. Rep. 1059. But it has been suggested that there may be *extreme cases* where an exception to the general rule stated in the text may be recognized, as where an officer of the city renders services at its request and for its benefit in an *extreme emergency*. But this exception will only be recognized when the emergency is imperious and when absurd or manifestly unjust consequences would result, and the right of recovery, even under an emergency, is not to be extended beyond the necessities of the actual exigency. *Greenfield v. Black*, 42 Ind. App. 645; 82 N. E. Rep. 797. See also *Warren County v. Osburn*, 4 Ind. App. 590; *Perry County v. Lomax*, 5 Ind. App. 567; *Adams County v. Cole*, 9 Ind. App. 474; *Morgan County v. Seaton*, 90 Ind. 158; *Washburn v. Shelby County*, 104 Ind. 321; *Eastman v. State*, 109 Ind. 278, 283. Emergency as a ground or reason for excepting a contract from statutory provisions requiring contracts to be let by competition, see *post*, § 802.

² *Milford v. Milford Water Co.*, 124 Pa. 610. Even at common law, the ratification itself must be under such conditions that it is free from the taint of illegality. *Trainer v. Wolfe*, 140 Pa. 279; *Macon v. Huff*, 60 Ga. 221. Where a superintendent of city gas works was, unknown to the city council, the agent of certain manufacturers, and purchased from the manufacturers, with the approval of the board, certain appliances for use in the gas works upon which he was entitled to receive a commission, it was held that a distinction must be made between the bargain for a commission between the manufacturers and the agent of the city and

ary to the express prohibition of the statute, no recovery can ad against the municipality.¹ If payments have been made under, the money received by the officer may, in the absence quitable estoppel or other defence, be recovered back by the icipality or in a suit by a taxpayer on its behalf.² But if the ract is not within a statutory prohibition, and its illegality de- ls upon the principles of the common law or of equity, the ht of authority seems to hold that it is not absolutely void, but rely voidable;³ and under the principle that *he who would have y must do equity* it has been held that a contracting officer is ed, as a condition of the annulment of the contract, to be re- rsed for moneys actually expended by him and of which the as received the benefit.⁴ It has also been held that where the

contract between the two prin- that the first was clearly illegal capable of enforcement; that ter on its surface was within the cting power of the parties, was rom any immorality, and was ate; and that as the city had t to make the contract with the al, it might ratify it by retaining using the appliances ordered. y v. Pertz, 66 Fed. Rep. 427. erka v. Woodward, 125 Cal. 119; v. Berry, 98 Ga. 402; Dwight v. r, 74 Ill. 295; Sloan v. Peoria, 106 pp. 151, 155; Fort Wayne v. thal, 75 Ind. 156; McGregor v. sport, 79 Ind. 166; Waymire v. l, 105 Ind. 328, 332; Winchester izer, 19 Ky. Law Rep. 1366; 43 . Rep. 453; Goodrich v. Water- 88 Me. 39; Macy v. Duluth, 68 . 452; Beebe v. Supervisors of an County, 64 Hun (N. Y.), 377, 142 N. Y. 631; Matter of aburgh, 27 N. Y. App. Div. 353; h v. Albany, 61 N. Y. 444; Snipes inston, 126 N. Car. 374; Milford v. rd Water Co., 124 Pa. 610; ner v. Wolfe, 140 Pa. 279; Burkett thens (Tenn. Ch. App.), 59 S. W. . 667. See also O'Neil v. Flan- n, 98 Me. 426. Stone v. Bevans, 88 Minn. 127; ght v. Palmer, 74 Ill. 295. Trainer v. Wolfe, 140 Pa. 279; re v. Durgin, 68 Me. 148; Spear- v. Texarkana, 58 Ark. 348. a Currie v. School Dist., 35 Minn. the action was brought to recover rarrants issued to pay for services red by a school director in erecting a l, and the court held that although

the services had been performed, there could be no recovery, remarking that the contract was voidable by the district at its option, and it might resist the enforcement thereof. In *People v. Overysel*, 11 Mich. 222, where a contract to erect a bridge had been made with members of the board charged with the duty of erecting it, the court declared that the rule is that the contract is void, without reference to the question of fraud in fact, unless affirmed by the opposite party. Some cases seem to hold that such a contract is void, and not merely voidable, at common law. See *Snipes v. Winston*, 126 N. Car. 374. It has been pointed out that instances are numerous where, both in statutes and decisions, the words "void" and "voidable" are used indifferently; the word "void" being often employed where it is plain that "voidable" would convey more accurately the signification intended. *Moore v. Durgin*, 68 Me. 148, 150.

⁴ In *Macon v. Huff*, 60 Ga. 221, the mayor was *ex officio* president of the city council, and whilst in office contracted with the council to lease the city park for five years and for an annual sum paid him to fence, trim, and keep the same in repair for that period. The court held that the contract was illegal and against public policy, but that the mayor was *entitled to be reimbursed moneys* which he had expended for the advantage, improvement, and ornamentation of the property of the city in so far as such expenditures were properly and not recklessly made. Where a city purchased certain requisites for a public improvement from

official has rendered services of a beneficial nature which the city has accepted he may recover therefor upon a *quantum meruit*.¹ If the prohibited or void contract has been executed, the officer interested therein becomes a trustee for the municipality and is bound to account for any profits which he derived from the transaction.² If either of the parties to a contract which is illegal by reason of the interest of a public officer therein seeks to obtain a division of the resulting profits, or to otherwise enforce the contract, the courts will refuse all relief and will leave the parties as it finds them.³

§ 774. **Contracts to influence the Deliberations and Determinations of Public Bodies and Officers.**—It is the tendency of judicial decision to discountenance all attempts to *influence the deliberations and determinations of public bodies and officers other than by arguments, which being openly made, bear directly upon the*

a member of its council for a fair price, and paid for them, it cannot recover from the seller the amount of his profits and at the same time retain the articles, the seller apparently acting in good faith and it not appearing that he could be placed in *statu quo*, or that it was the intention of the city to attempt to do so. *Frick v. Brinkley*, 61 Ark. 397.

¹ *Spearman v. Texarkana*, 58 Ark. 348 (medical services rendered by member of board of health); *Kagy v. West Des Moines Ind. Dist.*, 117 Iowa, 694, 698; *Concordia v. Hagaman*, 1 Kan. App. 35 (compiling and publishing city ordinances); *Niles v. Muzzy*, 33 Mich. 61 (legal services rendered by mayor); *Grand Island Gas Co. v. West*, 28 Neb. 852 (gas light furnished in the past under a contract held to be illegal so far as executory); *Call Pub. Co. v. Lincoln*, 29 Neb. 149 (public printing); *Albright v. Chester*, 9 Rich. Law (S. Car.) 399; *Pickett v. School Dist.*, 25 Wis. 551. See also *Tacoma v. Lillis*, 4 Wash. 797. But see *contra*, *Waymire v. Powell*, 105 Ind. 328, 332; *Bay v. Davidson*, 133 Iowa, 688. In *Berka v. Woodward*, 125 Cal. 119, it is said that in *California*, when a recovery is permitted, it is not for the reasonable or market value, which naturally includes within it the contemplation of a profit, but where possible the recovery is limited to the actual cost. Citing *Fox v. H. & N. S. Mining Co.*, 108 Cal. 369. When the legislature has, by statute, expressly authorized a suit to recover back the consideration received by the city,

the fact that the city has received and enjoyed the benefits of the illegal contract is no defence. *McCarthy v. Bloomington*, 127 Ill. App. 215.

² Where the mayor of a city secretly contracted to purchase at a discount a large amount of debentures of the city which were expected to be issued under a future by-law of the city council and was himself afterwards an active party in procuring and giving effect to the by-law which was subsequently passed, the court held him to be a trustee for the city of the profit which he derived from the transaction. *Toronto v. Bowes*, 4 Grant (Canada), 489; *aff'd* 6 Grant, 1, and 11 Moore P. C. C. 463.

³ *Cummings v. Saux*, 30 La. Ann. 207; *Doll v. State*, 45 Ohio St. 445; *Collins v. Swindle*, 6 Grant (Canada), 282. See also *Case v. Johnson*, 91 Ind. 477, 490. Where a member of a municipal corporation agreed with another party to take a contract from the corporation for the execution of certain works in his own name, the profits whereof were to be divided between the parties, it was held that such a contract was in contravention of law and the court of chancery refused to enforce the agreement for partnership. *Collins v. Swindle*, 6 Grant (Canada), 282. A note of a contractor to a city officer who is interested with him in a contract with the municipality made for a share of the resulting profits is void. *Bell v. Quin*, 2 Sandf. (N. Y.) 146.

the legislature or a committee of that body, in regard to matters of legislative cognizance, is legal and valid.¹ Within these principles, a contract by which the plaintiff agrees to render services in "*soliciting, advocating, and procuring*" from a municipal corporation a franchise for lighting the city streets is contrary to public policy and void.² But a contract whereby one person employs another to openly and publicly present a claim to a board of public officials and to press the same before that board, which does not contemplate the use of personal influence with such officials, is not against public policy and is valid.³ Similarly, an agreement made by a person to compensate another for effecting a sale of property to the government does not violate any rule of law so long as the services called for by the contract are the ordinary services of offering the materials or supplies, explaining their merits, and negotiating as to their price.⁴ The fact that a person who is so employed is related to one of the government agents to whom the duty of purchasing the material or supplies is confided, does not in itself render the agreement illegal.⁵

¹ Sedgwick v. Stanton, 14 N. Y. 289; Jenkins v. Hooker, 19 Barb. (N. Y.) 435; Brown v. Brown, 34 Barb. (N. Y.) 533.

² Wilbur v. New York Electric Construction Co., 12 N. Y. Supp. 456.

Sufficiency of allegations of lobbying to procure a contract for a street improvement, see Barber Asphalt Pav. Co. v. Field, 188 Mo. 182, 203. Contract for brick paving with a certain kind of property held void, because petition of property owners therefor procured by hiring and paying resident owners to sign same. Atkin v. Wyandotte Coal & L. Co., 73 Kan. 768. See also National Surety Co. v. Wyandotte Coal & L. Co., 76 Kan. 914; 92 Pac. Rep. 1111. See further as to special inducements to abutters in connection with street improvement contracts, Kurtz v. Knapp, 127 Mo. App. 608; 106 S. W. Rep. 537.

³ Sedgwick v. Stanton, 14 N. Y. 289; Jenkins v. Hooker, 19 Barb. (N. Y.) 435.

⁴ Southard v. Boyd, 51 N. Y. 177; Lyon v. Mitchell, 36 N. Y. 235; Cummins v. Barkalow, 4 Keyes (N. Y.), 514.

⁵ Southard v. Boyd, 51 N. Y. 177. See also Devlin v. Mayor, &c. of New York, 4 N. Y. Misc. 106, 115.

It has been held, that a contract by which the defendant acknowledged the receipt from the plaintiff of \$5000, which he agreed to return to the plaintiff in case a certain resolution set

forth therein, authorizing a contract for lighting the city streets was not passed by the common council of a city, was not upon its face within the condemnation of the law as against public policy, when it did not appear that the plaintiff was a member of the common council, or a city official, and no evidence was given by the plaintiff outside of the instrument itself. It was also held that, under such an instrument and the circumstances of the case, the plaintiff was entitled to recover the money deposited on failure to pass the resolution. Milbank v. Jones, 127 N. Y. 370, s. c. 141 N. Y. 340. If it appears that a member of the legislature has rendered services under an unlawful agreement to procure the passage of an act authorizing the allowance of additional compensation to a contractor with the State, and such member, or a person in privity with him, has received from the State a certificate or obligation for the payment of a sum of money, which is not negotiable in its character, payment of such certificate from the State may properly be refused by the officers of the State, and upon presentation of a claim founded thereon to the board of audit (now the court of claims) a determination of that body refusing to direct payment by the officers of the State, is proper. Bank of Monroe v. State, 26 Hun (N. Y.), 581.

§ 775 (445). **Powers of Public Agents and Officers to make Contracts.** — Public corporations may by their officers and duly authorized agents make contracts within the scope of their legislative powers the same as individuals and other corporations, in matters that appertain to the corporation; being artificial persons, they cannot contract in any other way.¹ Public officers or agents are held more strictly within their prescribed powers than private general agents; and a contract made by a public agent within the apparent scope of his powers does not, if there be no estoppel, bind his principal in the absence of actual authority.² A distinction has been held to exist in certain cases at least between the acts of an officer or agent of a public municipal corporation and those of an agent for a private individual. In cases of public agents the public corporation, it is said, is not bound unless it manifestly appears that the agent is acting within the scope of his real and lawful authority, or he is held out by the authorized and proper officials or body of the municipality as having authority to do the act, or is employed in his capacity as a public agent to make the declaration or representation for the government.³

§ 776 (446). **Contracts in Respect of Drainage.** — Although the general doctrine is that a municipal corporation *cannot usually exercise its powers beyond its corporate limits*, yet this right may be given either expressly or by implication; and a city with *express authority to provide drainage* was held, in the absence of any restriction, to possess the implied power, in order to find an outlet for sewage

¹ Louisville City R. Co. v. Louisville, 8 Bush (Ky.), 415.

² Parsel v. Barnes, 25 Ark. 261, holding void county warrants issued by the county clerk without the order of the county court; Williams v. Peyton's Lessee, 4 Wheat. (U. S.) 77; Wiloughby v. Florence, 51 S. Car. 462; Wormstead v. Lynn, 184 Mass. 425; Woodward v. Grangeville, 13 Idaho, 652. See also State v. Michigan City, 138 Ind. 455; *infra*, §§ 777, 791. Index, *Ultra Vires*. The power to create, refund, or compromise debts of a city being by statute conferred upon the council, the mayor, in the execution of city contracts, can only act by authority of the council, and the delegation of such authority can only be shown by the minutes of the meetings of the council; and the mayor of a city cannot bind the city by executing a re-

newal of a note given by it, the authorization of the council being as necessary to the validity of the renewal as to that of the original note. Tyler v. Adams (Tex. Civ. App.), 62 S. W. Rep. 119.

³ Mayor, &c. of Baltimore v. Musgrave, 48 Md. 272; *infra*, § 784, note; Baltimore v. Eschback, 18 Md. 276; Baltimore v. Reynolds, 20 Md. 1; Horn v. Baltimore, 30 Md. 218. In Baltimore v. Musgrave, 48 Md. 272, *supra*, the court says (p. 283): "It is very clearly settled that one who contracts or deals with the officers or agents of a municipal corporation must at his peril take notice of the limits of their powers," that is, their powers as contained in the charter or other legislative acts and ordinances of the corporation. *Infra*, § 777.

beyond its limits, to make a contract with an adjoining landowner giving it such an outlet.¹

§ 777 (447). **Implied and Incidental Powers; Market Powers; All Persons bound to take Notice of Extent of Corporate Powers.**—If a municipal corporation *is authorized to erect markets*, it may contract to buy, or may receive a grant of, land on which to place market buildings, and it may make contracts for the erection of market-houses. As it is the general practice, in granting municipal charters and in general acts for the incorporation of towns and cities, to enumerate their powers and define their duties, it will suffice in this place to remark generally that the authority to enter into contracts necessary and proper to carry into effect such powers and discharge such duties *is impliedly given* to such corporations. But this implied authority is only co-extensive with the prescribed or lawful powers and duties of the corporation; and if any greater authority is claimed, it must be sought for like all other powers in an express or special grant from the legislature. It is scarcely necessary to observe that no contract can be made by a corporation which is *prohibited* by its charter or by the statute law of the State.² And it is a general and fundamental principle of law that *all* persons contracting with a municipal corporation must *at their peril inquire into the statutory power* of the corporation or of its officers to make the contract; and a contract beyond the scope of the corporate power granted or conferred by the legislature expressly, or by fair implication, is void, although it be under the seal of the corporation.³ This

¹ *Coldwater v. Tucker*, 36 Mich. 474; and cases cited; *infra*, §§ 791, 826-*ante*, §§ 627, 628, 629, as to extent of corporate jurisdiction; *ante*, chap. x. on Boundaries.

² *Jackson v. Bowman*, 39 Miss. 671; *Indianapolis v. Indianapolis Gas Co.*, 66 Ind. 396, citing text. Contracts to violate the charter, or to bargain away or restrict the free exercise of legislative discretion, vested in a municipality or its officers, in reference to public trusts, are void. *Ib.*; *Thomas v. Richmond*, 12 Wall. 349, in which *notes issued by the city to circulate as money* in contravention of law were adjudged void, and the city held not to be liable either in special or general assumpsit; *Morgan v. Menzies*, 60 Cal. 341. In this case the statute having exempted cities, &c., from giving bond in civil actions, a bond in attachment proceedings given by a city was held void. *Ante*, §§ 237-240, and cases there cited; *post*, § 856, and cases cited; *infra*, §§ 791, 826-828. Index, *Ultra Vires*.

³ *Marsh v. Fulton County*, 10 Wall. (U. S.) 676; *ante*, § 89; *infra*, § 791; *Leavenworth v. Rankin*, 2 Kan. 357; *Wyandotte v. Zeitz*, 21 Kan. 649; *Horn v. Baltimore*, 30 Md. 218; *Bridgeport v. Housatonic R. Co.*, 15 Conn. 475, 493; *Haynes v. Covington*, 21 Miss. 408; *Taft v. Pittsford*, 28 Vt. 286; *Montgomery v. Montgomery & W. P. R. Co.*, 31 Ala. 76; *Pa., D. & M. Steam Nav. Co. v. Dandridge*, 8 Gill & J. (Md.) 248, 319; *Hodges v. Buffalo*, 2 Denio (N. Y.), 110; *Baltimore v. Eschbach*, 18 Md. 276, 282; *Baltimore v. Reynolds*, 20 Md. 1; *Dill v. Wareham*, 7 Met. (Mass.) 438; *Branham v. San Jose*, 24 Cal. 585, 602; *McCoy v. Briant*, 53 Cal. 247, approving text; *Sturtevant v. Alton*, 3 McLean, 393; *Wallace v. San Jose*, 29 Cal. 180; *State v. Kirkley*, 29 Md. 85, 111; *Bateman v. Ashton*, 3

principle is more strictly applied, and properly so, than in the law of private corporations. So, also, those *dealing with the agent of a municipal corporation* are likewise bound to ascertain the nature and extent of his authority. This is certainly so in all cases where this authority is special and of record, or conferred by statute. The fact that in such a case the agent made false representations in relation to his authority and what he had already done, will not aid those who trusted to such representations, to establish a liability on the part of his corporate principal.¹

Hurl. & Nor. 322; *State v. Haskell*, 20 Iowa, 276; *Baltimore v. Musgrave*, 48 Md. 472; *People v. Baraga*, 39 Mich. 554; *Neely v. Yorkville*, 10 S. Car. 141, approving text; *Bryan v. Page*, 51 Tex. 532; *Baby v. Baby*, 5 Upper Can. Q. B. 510; *Richmond v. Municipality*, 8 Upper Can. Q. B. 567; *Campbell v. Elma*, 13 Upper Can. C. P. 296; *Standly v. Perry*, 23 Grant (U. C.), 507; *Craycraft v. Selva*, 10 Bush (Ky.), 696; *Freadway v. Schnauber*, 1 Dak. Ter. 236; *Ouachita Parish Pol. Jury v. Monroe*, 37 La. An. 641; *Laycock v. Baton Rouge*, 35 La. An. 475; *Keating v. Kansas*, 84 Mo. 415; *Stone v. Bank of Commerce*, 174 U. S. 412, 424; *Sheridan v. New York City*, 145 Fed. Rep. 835; *Chicago v. Williams*, 182 Ill. 135, quoting text; *State v. Michigan City*, 138 Ind. 455, quoting text; *Cedar Rapids Water Co. v. Cedar Rapids*, 117 Iowa, 250; *Bennett v. Mt. Vernon*, 124 Iowa, 537, 540; *Citizens Bank v. Spencer*, 126 Iowa, 101; *Osgood v. Boston*, 165 Mass. 281; *Wormstead v. Lynn*, 184 Mass. 425; *Boston Electric Light Co. v. Cambridge*, 163 Mass. 64; *Black v. Detroit*, 119 Mich. 571; *State v. Minn. Transfer R. Co.*, 80 Minn. 108; *Jewell Belting Co. v. Bertha*, 91 Minn. 9; *Keating v. Kansas City*, 84 Mo. 415, citing text; *Wheeler v. Poplar Bluff*, 149 Mo. 36; *Pryor v. Kansas City*, 153 Mo. 135; *McQuiddy v. Brannock*, 70 Mo. App. 535, quoting text; *Gutta Percha & Rubber Mfg. Co. v. Ogalalla*, 40 Neb. 775; *Lincoln & Dawson County Irr. Dist. v. McNeal*, 60 Neb. 613; *Schumn v. Seymour*, 24 N. J. Eq. 143; *Raton Water Works Co. v. Raton*, 9 New Mex. 70; *Keane v. New York*, 88 N. Y. App. Div. 542; *Roberts v. Fargo*, 10 N. Dak. 230; *Kerr v. Bellefontaine*, 59 Ohio St. 446; *Wellston v. Morgan*, 65 Ohio St. 219; *Austin v. Coggeshall*, 12 R. I. 329; *McAlee v. Angell*, 19 R. I. 668; *Winchester v. Redmond*, 93 Va. 711, quoting text; *Bardsley v. Sternberg*, 17 Wash. 243.

Within the scope of its power a corporation may contract to do an act *at any place* other than the one where it is located. *Bank of Utica v. Smedes*, 3 Cow. (N. Y.) 662; *Maddox v. Graham*, 2 Met. (Ky.) 56. Or *prospectively* in its terms. *Davenport v. Hallowell*, 10 Me. 317. As to *corporate seal*, *ante*, § 361.

Where a public corporation, transcending its legal power, assumes to direct its officers — for example, commissioners of highways — to bring an action in their own names, or in their name of office, against third persons for trespasses upon the highways, and the action is accordingly brought and the officers are defeated, they cannot sustain an action against the corporation to be reimbursed their costs and expenses; and the reason is, that the action of a corporation directing *such a suit* to be brought, being in excess of its lawful power, is void, and cannot be the foundation of any contract, express or implied. *Cornell v. Guilford*, 1 Denio (N. Y.), 510; *ante*, § 307.

A person obtaining a grant from the corporation for which there is no legal authority or power obtains no right which is enforceable in court. *Cedar Rapids Water Co. v. Cedar Rapids*, 117 Iowa, 250. The city is not estopped by any representations of statutory power on the part of the city officials, nor can the person with whom the contract is made recover unless in exceptional cases against the city, even upon *quantum meruit*. *Citizens Bank v. Spencer*, 126 Iowa, 101. But see on this point *Index, Assumpsit; Estoppel; Municipal Bonds; Ultra Vires; infra*, §§ 826-828.

¹ *Baltimore v. Eschbach*, 18 Md. 276, 282; *Baltimore v. Reynolds*, 20 Md. 1; *Delafield v. Illinois*, 2 Hill (N. Y.), 159, 174; 26 Wend. (N. Y.) 192; *aff'g*

§ 778. **Fraud in the Making of the Contract.** — The principles applicable to the fiduciary relation do not apply when the question as to the *bona fides* of a contract arises between a *municipality and the contractor*. The municipality and the contractor deal at arm's length. There is no trust or relation between them which places the one under a duty to conserve the rights and interests of the other and to disclose and reveal any facts to the prejudice of the other. Hence, when the question arises between a city and the contractor the fact that the latter has taken advantage of the inadvertence, ignorance, carelessness, or error of a city officer, and, by his own superior knowledge of the requirements of the situation, the amount and character of the work, and the cost thereof, has been enabled without any misrepresentation or deceptive conduct on his part to obtain a contract which is advantageous to him, but detrimental to the city, is not sufficient in itself to vitiate the contract for fraud.¹ If, however, the question arises between the

s. c., 8 Paige, 531, restraining unauthorized sale of bonds. *Hodges v. Buffalo*, 2 Denio (N. Y.), 110; 3 N. Y. 430; 2 Barb. 104; *Rensselaer Supervisors v. Bates*, 17 N. Y. 242. This case also determines how far, in such a case, the sureties of such an agent or officer are liable for his acts. And see cases cited *ib.* p. 245. *Chemung Canal Bank v. Chemung Co. Sup.*, 5 Denio (N. Y.) 517; *Overseers, &c. of Norwich v. Overseers, &c. of Pharsalia*, 15 N. Y. 341; *Albany v. Cunniff*, 2 N. Y. 165, 178, *per Strong, J.*; *Marsh v. Fulton Co.*, 10 Wall. (U. S.) 676; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; *Swift v. Williamsburg*, 24 Barb. (N. Y.) 427, cited elsewhere and commented on, *infra*, § 780, note; *Hague v. Philadelphia*, 48 Pa. St. 527; *State v. Kirkley*, 29 Md. 85, 111; *Horn v. Baltimore*, 30 Md. 218; *Thomas v. Richmond*, 12 Wall. (U. S.) 349, *per Bradley, J.*; *Ford v. Mayor, &c. of New York*, 63 N. Y. 640; *Stoneburgh v. Brighton*, 5 Upper Can. L. J. 38; *Belleview v. Hohn*, 82 Ky. 1; *Farnsworth v. Pawtucket*, 13 R. I. 82; *Madison v. Newsome*, 39 Fla. 149; *State v. Michigan City*, 138 Ind. 455, quoting text; *McQuiddy v. Brannock*, 70 Mo. App. 535, quoting text; *Lincoln & Dawson Irr. Dist. v. McNeal*, 60 Neb. 613; *Dube v. Peck*, 22 R. I. 443; *Hunt v. Wimbeldon Local Board*, 4 C. P. Div. 48, 55, *per Bramwell, B.*

Special and limited authority to borrow money conferred upon the town treas-

urer, when exercised, is exhausted, and the town is not liable for money he subsequently borrows and converts to his own use, although he assumed to act, and was, by the lender, supposed to be acting, under the authority conferred upon him. *Savings Bank v. Winchester*, 8 Allen (Mass.), 109; *ante*, § 278.

So in Upper Canada it is held that an individual dealing with a corporation through its council, or the members of the governing body, is bound to notice the objects and limits of their powers, and the manner in which those powers are to be exercised, since their acts, when beyond the scope of their authority or done in a manner unauthorized, are in general nugatory and not binding on the corporation. *Ramsay v. Western District Council*, 4 Upper Can. Q. B. 374; *Silsby v. Dunville*, 31 Upper Can. C. P. 301; *Wentworth County v. Hamilton*, 34 Upper Can. Q. B. 585, 601; *Potts v. Dunnville*, 3 Upper Can. Q. B. 96; *Waterous Engine Co. v. Palmerston*, 20 Ont. Rep. 411; 19 Ont. App. 47; *Canadian Pacific R. Co. v. Chatham*, 25 Ont. Rep. 455; 22 Ont. App. 330; *Wigle v. Kingville*, 28 Ont. Rep. 378; *Biggar's Manual* (Canada, 1900), 41.

¹ *Reilly v. Mayor, &c. of New York*, 111 N. Y. 473, rev'g 22 J. & S. 463. See s. c. cited in next section. *Mayor, &c. of New York v. Brady*, 115 N. Y. 599; *Chicago Sanitary Dist. v. Ricker*, 91 Fed. Rep. 833, rev'g 89 Fed. Rep.

municipality and a property owner whose property has been assessed the cost of the improvement, entirely different considerations. The city in making the improvement acts in some sense as agent or representative of the owners who are to defray the cost. It must, in the discharge of the duties of this agency, exercise reasonable care and diligence in connection with the work; if, by its own clear negligence on its part, or the fraud of its officers, the cost has been largely and unnecessarily increased, the consequences of the wrong should not be visited upon the owners of the property. A property owner who is assessed has a right to complain if the total sum which is the basis of the assessment is by any such negligence or fraud made to exceed the fair and reasonable cost of the improvement.¹ It is apparent, therefore, that in a question with a property owner *the validity of the contract may be assailed* on a ground of corporate negligence and fraud in letting it in. The evidence required to sustain the fraud may be much less than that which is required to show fraud, as in a question between the city and the contractor. At this place we will consider *fraud* in the contract. *The question may arise between the city and the contractor.* It is true that the legislative department of the State is sovereign, but that in general the mere motives aside from acts that induce a contract cannot be the subject of judicial investigation,² that the

contracts of municipal corporations are generally on the same footing as the contracts of natural persons, and depend upon substantially the same circumstances as to validity and enforceability. *Argenti v. San Francisco*, 16 Cal. 40; *Baird v. Mayor, &c. of New York*, 13 N. Y. 567; *Tacoma v. Tacoma Water Co.*, 16 Wash. 288. For the right of recovery of money paid under a mistake of fact, see *McDonnell v. Tacoma Light & Water Co.*, 16 Wash. 288, where the city sued for damages for fraudulent misstatements in the sale to it of a gas and light plant, the court said in reference to the duties of an officer of a municipal corporation has a duty to rely on the good faith and honesty of its officers; that such officers in their municipalities the utmost of good faith, and that it is their duty at all times to use their best judgment in protecting the interests of the municipalities whose officers they are, and a person dealing with such officers is conclusively presumed to know the extent of the power and

authority which the law has conferred upon the officer with whom he deals, and is also presumed to know that the law exacts and requires of such officer the utmost good faith and loyalty to such municipality."

¹ *Lake v. Trustees of Williamsburgh*, 4 Denio (N. Y.), 520; *Ashton v. Rochester*, 133 N. Y. 187; *Matter of Anderson*, 109 N. Y. 554; *Matter of Livingston*, 121 N. Y. 94.

² To the general proposition, that the validity of an act of the legislature cannot be assailed on the ground that it was enacted from motives of any hostility to the public good or general policy of the State, or was procured by fraud or misrepresentation or by bribery of the members of the legislature voting for it, see the following cases: *New Orleans v. Warner*, 175 U. S. 120; *Baxter v. Tripp*, 12 R. I. 310; *People v. Shepard*, 36 N. Y. 285; *Jersey City & B. R. Co. v. Jersey City & H. H. Co.*, 20 N. J. Eq. 61; *Jewel v. Weed*, 18 Minn. 272; *Judah v. Trustees of Vincennes University*, 16 Ind. 56; *United States v. Old Settlers*, 148 U. S. 427, and cases cited; *Ex parte Mc-*

council of a city in passing ordinances for some purposes, *e. g.*, police regulations, exercises delegated legislative authority, and such ordinances have the force of law and cannot be attacked because of the motives inducing them, yet when the subject matter before the court is a contract relating to the property or affairs of a city, although it may have been entered into by ordinance, the council of the city, in making it, exercises discretionary rather than legislative power, and the motives and inducements of the votes for the passage of the ordinance making or authorizing the contract, and whether they are honest or corrupt, that is, fraudulent in fact and in effect, may be the subject of judicial investigation.¹ Hence, the action of a municipal council in making or authorizing a contract may be attacked for actual *fraud or corruption, including bribery* and other corrupt and unlawful inducements.² But to authorize the avoidance of a contract on the ground of fraud the fraud must be clearly proved. While it may be established by circumstantial evidence, the proof must be such as is fairly irreconcilable with any theory other than the guilt of the officer accused of the fraud.³

Cardle, 7 Wall. (U. S.) 506; Cooley, Const. Lim. (5th ed.) 222; United States v. Des Moines Navigation & R. Co., 142 U. S. 510; Doyle v. Continental Ins. Co., 94 U. S. 535; Soon Hing v. Crowley, 113 U. S. 703.

¹ Weston v. Syracuse, 158 N. Y. 274. On this point see further, chaps. on Municipal Ordinances and By-Laws, and chap. on Remedies.

² Weston v. Syracuse, 158 N. Y. 274; Hermann v. Oconto, 100 Wis. 391; s. c. 110 Wis. 660. See chapter on Corporate Remedies, *post*, as to *fraudulent grants and alienations of property* by municipal councils and officers. Sufficiency of *allegations of fraud and corruption*, see Seltzer v. Metropolitan Elect. Co., 199 Pa. 100; Nagel v. Lindell R. Co., 167 Mo. 89; Barber Asphalt Pav. Co. v. Field, 188 Mo. 182, 203.

³ Baird v. Mayor, &c. of New York, 96 N. Y. 567; Tacoma v. Tacoma Light & Water Co., 16 Wash. 288. See also Kingsley v. Brooklyn, 78 N. Y. 200. For instance of case where the *evidence was held to be insufficient* to establish the fraud of the municipal officers, see Tacoma v. Tacoma Light & Water Co., 16 Wash. 288. Where there is no requirement of the law that bids shall be advertised for or the contract *let to the lowest bidder*, the mere fact that the contract is not let to the lowest bidder is not sufficient to establish fraud, —

at all events, when the difference in the price is not so great as to raise any fraudulent presumption. Santa Rosa Lighting Co. v. Woodward, 119 Cal. 30. An allegation that the price paid by a city for gas is about three times what is paid by private consumers is not sufficient to charge fraud. Seward v. Town of Liberty, 142 Ind. 551. See also Potts v. Philadelphia, 195 Pa. 619. Preliminary estimate held not to be so much less than amount bid as to warrant the conclusion that it was fraudulent. Booth v. Bayonne, 56 N. J. L. 268. Payment by the contractor of the expenses of a commission appointed to contract for the construction of a jail held not to establish fraud or collusion when it appeared that the expenses were incurred in examining a modern jail exhibited by the contractor at another place. Byers v. Manley Mfg. Co. (Tenn. Ch. App.), 46 S. W. Rep. 547. Acceptance of a higher bid for alleged technical defects held to show fraud when the charter required that bids should be submitted, and that the *lowest proposal should be accepted*. Times Printing Co. v. Seattle, 25 Wash. 149. The lack of fidelity on the part of a municipal officer in other transactions does not justify a city in refusing to perform a contract. Hence, *testimony as to frauds committed by that officer in other transactions not*

But it is not necessary that the fraud should be *proved by direct evidence*, nor is it essential to show precisely how or when the fraud was concocted or what particular city officers were implicated. It is sufficient to show that the contract with whomsoever made must have been the result of fraud.¹ A letting of the contract to one who is apparently the lowest bidder upon proposals made after advertisement does not prevent the contract from being attacked on the ground of fraud. Fraudulent collusion between the contractor and the city officers by which the contract was intentionally *let to one who was actually, although not apparently, the highest bidder*, is available as a defence to an action by the contractor on the contract.²

forming a part of the fraudulent scheme of the transaction before the court, cannot be received. *Baird v. Mayor, &c. of New York*, 96 N. Y. 567. But when an action is brought upon a contract which has been let to the person apparently, but not in fact, the lowest bidder, *evidence* that payments were made to the contractor from time to time largely in excess of the amount earned and that the contractor offered to sell similar materials to others at prices lower than those quoted in his bid, may be received for the purpose of establishing that the contract was procured by fraud and collusion between the contractor and the city officers. *Nelson v. Mayor, &c. of New York*, 5 N. Y. Supp. 688, *aff'd* 131 N. Y. 4.

¹ *Nelson v. Mayor, &c. of New York*, 131 N. Y. 4.

² *Nelson v. Mayor, &c. of New York*, 131 N. Y. 4; *aff'g* 5 N. Y. Supp. 688; *Hermann v. Oconto*, 100 Wis. 391; s. c. 110 Wis. 660. *Text illustrated.* A contractor sued to recover a balance on a contract for furnishing drain and sewer pipe and invert blocks to the city of New York. The advertisement for proposals specified forty-three different kinds of pipe required, with the estimated quantities of each, and the right was reserved to the commissioner of public works to increase or diminish not only the gross quantity, but also the quantity of each kind to an amount not exceeding thirty per cent of the gross amount of the contract. It was stipulated that the contractor should commence the delivery of the pipe, &c. at such time and in such manner and proportion as should be designated in the contract, and complete the same within ninety days next thereafter. There were two bidders for the con-

tract, — the plaintiff and one McMann. Plaintiff's bid as a whole, taking the estimated quantities, was lower than McMann's, and the contract was awarded him. Of twenty-six kinds of material for which plaintiff's bid was the lower, none were required or furnished, and the aggregate price of the materials furnished was far greater than under the bid of McMann. The quantity of invert blocks called for by the advertisement was 2000. Plaintiff's bid was \$3.50 each, and he was offering to sell them in other places for \$2.34. McMann's bid for them was \$0.60. The number required and actually delivered was over 20,000. That much more than 2000 invert blocks were actually required and should have been called for by the specifications was shown by the fact that proposals for the construction of sewers requiring over 11,000 blocks were advertised for and contracts for them were let at the same time as the contract was awarded to plaintiff. For the first payment to the plaintiff on the contract, the city officials gave him an estimate largely exceeding the quantity of materials delivered, and the time for delivering the materials was greatly extended. Plaintiff was not sworn as a witness on the trial and offered no evidence to explain the overestimate. It was held that the evidence justified a finding of fraud and collusion; that the contract was not in any proper sense let to the lowest bidder and imposed no obligation on the city; and that the acceptance of the materials delivered under the contract was not a waiver of the fraud or a ratification of the contract. It was also held that, as it appeared that the plaintiff had been paid more than the fair value of the materials

The obligation of a *municipality to disaffirm a contract* which has been induced through fraud is the same as the obligation of an individual. If a city has been induced to enter into a contract through fraud, it is its duty, if it desires to avail itself of that objection, to act upon the first opportunity after discovery of the fraud and rescind the contract by repudiating its obligation and restore whatever has been received under it immediately upon discovering the alleged fraud. If it delays acting and retains property delivered under the contract beyond a reasonable time after such discovery, it will be held to have ratified and adopted the contract and waived its objections thereto. A contract induced by fraud is not void, but requires affirmative action on the part of the party defrauded to relieve himself from its obligation.¹ But when the statute requires that the municipality shall advertise for proposals and *shall award the contract to the lowest bidder, no agent or officer* of the municipality *has the right or power to waive a fraud* by which the contract, whilst awarded to the apparent lowest bidder, is in reality awarded in violation of the statute to one who is not in fact the lowest bidder. The only way an agent or officer of the city can make the contract binding upon the city is by awarding the contract in the form prescribed by law, *i. e.*, by advertisement and an award upon an honest bid. And in order to create an estoppel, or a waiver of fraud under any circumstances, it is essential that the proper officials should have known of the fraud at the time of the alleged acts which are set up as an estoppel or waiver.² The *audit and payment of a claim* for a portion of work does not necessarily prevent the city from alleging the fraud as a defence to further claims under the same contract.³

§ 779. **Fraud — Taking Advantage of Ignorance or Carelessness of Municipal Officers.** — The practice of paying for the grading and regulating of streets and other improvements of a similar character, particularly where excavating and filling is required, at a price which is determined by the quantity of work done, *e. g.*, the

delivered, he was not entitled to recover any further sum on the ground that the city had the benefit of such materials. *Nelson v. Mayor, &c. of New York*, 131 N. Y. 4; *aff'd* 5 N. Y. Supp. 688.

¹ *Baird v. Mayor, &c. of New York*, 96 N. Y. 567, 598. See also *Devlin v. Mayor, &c., of New York*, 4 N. Y. Misc. 106.

² *Nelson v. Mayor, &c. of New York*, 131 N. Y. 4, 14.

³ *Weston v. Syracuse*, 158 N. Y. 274. A statute ratifying a municipal ordinance authorizing a contract to be made does not waive an inherent fraud which was not disclosed to the legislature at the time when the act was enacted. *Santa Ana Water Co. v. San Buenaventura*, 65 Fed. Rep. 323.

⁴ *Nelson v. Mayor, &c. of New York*, 131 N. Y. 4.

number of cubic yards of earth or rock excavated or the number of cubic yards of filling required, has given many opportunities to contractors to take advantage of the ignorance and carelessness of municipal officers. The method in which this has been effected has been *by the making of unbalanced bids*, which name an exorbitant price for some classes of work and a greatly inadequate compensation for others, *e. g.*, if a contractor should make a bid of \$1.62 per yard for earth excavation, and \$.02 per yard for rock excavation.¹ When a bid of this character is made, it should be apparent to any person that advantage is being taken of the city somewhere, for it indicates that the contractor knows that he can make such an exorbitant profit on some classes of work that he does not need to care whether he makes a profit or not on the others. Neither figure is correct. The bid is a mere juggling with prices and quantities to pretend that the contractor may obtain the contract. Such bids should not be considered in private transactions, and there is no reason why they are tolerated in public contracts. That an unbalanced bid of this character is the lowest is a plain warning to municipal officers that something is wrong, and should induce them to reject all bids, make new surveys and estimates, and advertise anew. Yet the courts hold that every unbalanced bid is *per se* fraudulent or evidence of substantial error. An unbalanced bid which does not materially enhance the cost of the work cannot be complained of. If there is no deception or mistake in the quantities, and if the requirements of the law have been complied with, and the quantity and quality of the work has been estimated as nearly as practicable, there is no ground for alleging substantial error or fraud merely because of an unbalanced bid in which the contract was let.² If in making the preliminary estimates the city engineer or surveyor has erred and there is no fraud and collusion between him and the successful bidders, and the successful bidder has practised no fraud, the loss falls upon the city. When, under the law, bids are to be made and contracts are let upon estimates of the work to be done, he who is the lowest bidder upon these estimates is the lowest bidder under the law and he does not lose his right because the estimates are erroneous.

If the contractor is not guilty of any fraud, the city cannot recover against him the ignorance or error of its own agents in making estimates. The validity of a contract let by a municipality to the lowest bidder does not depend upon the accuracy of the officer

¹ See *Matter of Anderson*, 109 N. Y. 554. ² *Matter of Anderson*, 109 N. Y. 554, 559.

charged with the duty of making the estimates, but upon an honest effort on his part to be accurate.¹ The fact that a bidder had superior knowledge as to the nature of the work done, and knew that the estimates erroneously stated the different kinds of work, is not sufficient *per se* to prove bad faith or fraud on his part.²

§ 780. **Fraud and Mistake; Misrepresentations by Municipal Officers.** — Contracts by or with a city, although required by law to be in writing, are subject to reformation or rescission for fraud, accident, or mistake. A municipality cannot profit by these in connection with its written contracts any more than a private individual.³

¹ *Reilly v. Mayor, &c. of New York*, 111 N. Y. 473, 479.

² *Mayor, &c. of New York v. Brady*, 115 N. Y. 599. In an action against the city to recover the balance due for work and materials furnished under a contract for regulating and grading a street, the city admitted that upon the estimated quantities of the work to be done the plaintiff was the lowest bidder, but alleged that by reason of "the inadvertence, ignorance, carelessness, or error of the surveyor," an error arose whereby the contract as awarded to the plaintiff required the payment of nearly twice the actual value of the work; that plaintiff, prior to making his bid, knew that the estimate misstated certain items, and in bad faith and with intent to profit by the ignorance of the surveyor made an unbalanced bid. There was no allegation or proof of fraudulent collusion between plaintiff and the officers of the corporation. The city surveyor testified at the trial that he made his estimate from surface indications and as correctly as he could, but that the nature of the locality was such that any estimate in advance was unreliable. It was held that no fraud was established on the part of the plaintiff, and he was entitled to recover; that he had a right to the benefit of his own knowledge, honestly acquired, so long as he did nothing to mislead or deceive the city; that as the city had invited bids upon the estimates made, and had awarded the contract to one who was the lowest bidder, tested by the proposals, it could not hold the contractor to a performance and then annul the contract because the actual result so varied from the estimate as to make the accepted bid higher than the

others, and that, having complied with the law and entered into the contract, the city could not urge against the contractor its own ignorance and error. *Reilly v. Mayor, &c. of New York* 111, N. Y. 473; s. c., see *ante*, § 778.

³ *Long v. Athol*, 196 Mass. 497; 82 N. E. Rep. 665; *McManus v. Philadelphia*, 211 Pa. 394. In *Long v. Athol*, 196 Mass. 497; 82 N. E. 665, it was held that a bill in equity to rescind a contract of a municipality for a sewer extension on the two-fold ground that it was fraudulently obtained from the plaintiffs by giving to them erroneous estimates for the work to be done which largely understated the amount thereof and concealing from them the maps, drawings, profiles, and specifications for the proposed contract, and that the contract was made under a mutual mistake of both parties arising from the fact that the estimates of the defendant's engineer, upon which the plaintiffs made their bid and upon the faith of which they entered into the contract, were erroneous and materially underestimated the amount of the work to be done, stated sufficient cause for rescission, if either ground claimed was made out. But on the facts of the case the plaintiffs failed to establish the fraud. The evidence, however, showed that the contract was entered into under a mutual mistake caused by the error of the municipality's engineer in making the estimates upon which the bids were based. It appeared that plaintiffs had access to correct profile maps and drawings and to printed specifications, and that it would have been possible for a skilled engineer, by correctly scaling these plans, to ascertain and correct the mistakes made in the estimate fur-

as also been held that a city may be charged with responsibility for misrepresentations which have been made by its agent to induce a person to enter into a contract with it.¹ In the case in which it was held the common council had authorized a committee to negotiate the lease of a ferry slip owned or claimed by the city, and the committee made representations as to the title of the city to the premises leased. The court adopted the view that a municipal corporation may delegate to agents the performance of any act which it cannot itself perform, and that the principal is liable for the false representations of the agent made in and about the matter for which he was appointed agent, not on the ground of express authority given to the agent to make the representations, but on the ground that as to the particular matter for which the agent is appointed, *he stands in the shoes of the principal*, and whatever he does or says in and about that matter is the act and declaration of the principal, for which the principal is just as liable as if he had personally done the act or made the declaration. The power of the agent to render the principal liable for representations flows from his mere appointment to do or transact the business such as that in question in and about which the representations were made. It was therefore held that the representations of the committee of the common council, though not expressly authorized, were binding upon the city and the city must answer any damages therefor. In another case, the plaintiff sought to recover damages from a city by reason of alleged false and fraudulent representations, which induced the plaintiff's agent to convey to the city his title to valuable lands forming a portion of the bed of a street for a merely nominal consideration. The court

held. It was found that the defendant acted in good faith in furnishing the estimates and believed that they were substantially approximately correct. The contract required plaintiffs to do the work "in strict accordance with the plans, drawings, profiles, and specifications prepared therefor and on file with the city, all of which are to be considered part and parcel of these presents and to be construed therewith." It was agreed "that the amounts and quantities of materials . . . and work to be done as stated in the notice to bidders governing the making of proposals for the work are approximate only," and that the contractors should judge for themselves as to all conditions affecting the cost of performance of the work. The court held that the contract was properly rescinded for mutual mistake, and that the contractors were entitled

to recover the reasonable value of the work performed. But see as to the effect of stipulations in a contract such as the foregoing to place upon the contracting parties the obligation to satisfy themselves as to the correctness of estimates of quantity, *Sullivan v. Sing Sing*, 122 N. Y. 389; *Lentilhon v. New York*, 102 N. Y. App. Div. 548, 558, aff'd 185 N. Y. 549. In *McManus v. Philadelphia*, 211 Pa. 394, a contract with the city was reformed for the mistake of the contractor caused by his executing the contract in reliance on the original estimates of the city engineer upon which he made his bid, and in ignorance of the fact that the city engineer had changed these estimates after the bid was made and before the contract was signed.

¹ *Sharp v. Mayor, &c. of New York*, 40 Barb. (N. Y.) 256.

determined the question upon the merits, and seems to have assumed that if fraudulent misrepresentations had in fact been made, the city was liable therefor, but it also held that the facts that the agent of the city had special information on the subject which was unknown to the plaintiff's testator, that the consideration was inadequate, and that the transaction was entered into hastily and without due deliberation, were not sufficient to sustain the charge of fraud in the absence of proof showing the misstatement of any actual fact.¹ But the liability of a municipality for misrepresentations fraudulently made by one of its officers or agents *does not exist* when the misrepresentation is made as to a fact concerning which it is the duty of the contractor to satisfy himself, when such fact is one of the statutory restrictions or limitations or conditions precedent upon the power of the officer. Thus, by charter no proceedings could be taken to open, regulate, grade, or pave any street or avenue unless upon petition signed by one-third of the persons owning land situated within the assessment limits, which were to be fixed in the manner directed by the act. Upon the presentation of a petition so signed, public notice was to be given that such application had been made and of the time when the common council would proceed on the petition. If a remonstrance was presented, signed by a majority of the persons who would be assessed for the expense of the improvement, nothing further could be done. If no such remonstrance was presented, the common council might, in its discretion, allow the improvement petitioned for. The plaintiff entered into a contract with the city to grade, pave, and flag the sidewalks of a street. Not having received payment of the contract price, he brought an action against the city for damages, claiming that the city had represented to him that certain persons, being one-third of the owners of the lands within the assessment limits, had petitioned for the improvement, and that the city had taken the necessary proceedings to authorize the improvement to be made under the provisions of the charter. The court held that no such action could lie. The provisions of the charter were, said the court, binding not only on the city, but also on all persons dealing with it, and such persons were charged at their peril with the duty of ascertaining whether all the preliminary facts existed. The plaintiff, therefore, *had no right to rely upon the representations made by the officers of*

¹ *Stevens v. Mayor, &c. of New Chicago Sanitary District v. Richer*, York, 14 J. & S. 274; aff'd 84 N. Y. 91 Fed. Rep. 833, rev'g 89 Fed. Rep. 286. See also *Marshall v. San Antonio* 251. (Tex. Civ. App.), 63 S. W. Rep. 138;

city, and he could not recover upon the ground set forth in complaint.¹

781. **Combinations among Bidders.**—Arrangements and combinations among those prepared and expecting to become bidders the letting of contracts by a municipality *to prevent competition between themselves* and to bring about an award at a figure which is not the result of an honest competition are contrary to public policy and void.² Such contracts are illegal in their nature and tendency, and for that reason no inquiry is necessary as to the particular effect of any one contract because it would not alter the general nature of the contract or the force of the public policy which condemns them.³ These principles apply to all combinations and agreements between intending bidders which have the tendency or effect of restricting or limiting competition, whether such contracts in the nature of an agreement between two or more bidders that no bidder shall refrain from bidding in competition with the other, that bids shall be put in upon terms previously arranged between parties; and whether the consideration be an agreement to share

Swift v. Williamsburgh, 24 Barb. (N. Y.) 427. The court pointed out, in giving this decision, that if the plaintiff could recover on the state of facts set forth in his complaint, the restrictions and limitations and conditions precedent which the legislature sought to impose upon the powers of the common council would go for nothing; that these restrictions and limitations were intended to protect the owners of land and the taxpayers of the city as well against the fraud and mispositions of the contractors who might be employed to make the local improvements as against illegal acts of the common council themselves in employing the contractors. The fact that it was necessary to preserve the safeguards adopted by the legislature for the protection of property owners in fact and in effective form plainly had great weight with the court. The case is not very fully reported as to what the common council officially did or determined and officially represented to the plaintiff. The decision on the facts may be sound, but a *quære* arises whether the common council was *estopped*, under the legislation, the tribunal pointed by law to determine whether the restrictions, or limitations, or conditions precedent, had or had not

been complied with, and whether the plaintiff acting in good faith might not justifiably rely upon the determination and representations of the officers of the city that the preliminary conditions to authorize the improvement had been complied with. Whether the council had made any such determination does not clearly appear. This decision conforms to or accords with the New York view in the *town-bonding railroad aid cases* and is to be read in connection with, and possibly is to be distinguished from, the decisions of the Supreme Court of the United States as to the effect of determinations and recitals in municipal bonds operating to establish an estoppel in favor of innocent bondholders. See chapter on Municipal Bonds, *post*, and the case of *Knox Co. v. Aspinwall*, 21 How. (U. S.) 539, and the numerous cases which have followed and approved it, and which are stated and commented on in the chapter just referred to.

¹ *People v. Stevens*, 71 N. Y. 527, *aff'd* 51 How. Pr. 227; *Conway v. Garden City Pav. Co.*, 190 Ill. 89.

² *McMullen v. Hoffman*, 174 U. S. 639; *Atcheson v. Mallon*, 43 N. Y. 147; *Richardson v. Crandall*, 48 N. Y. 348, 362.

the profits of the successful bidder or a sum paid in hand to secure the withdrawal of the bid. All such contracts and agreements are in violation of public policy.¹ But a *joint open proposal*, the result of honest co-operation, though it might prevent the rivalry of the parties and thus lessen competition, is not an act forbidden by public policy. Joint adventures are allowed. They are public and not secret. The risk as well as the profit is joint and openly assumed. The public may obtain the benefit of joint responsibility, or of the joint ability to do the services. The public agents know all that there is in the transaction, and can more justly estimate the motives of the bidders and weigh the merits of the bid.² But it is essential

¹ McMullen v. Hoffman, 174 U. S. 639, aff'g 83 Fed. Rep. 372, rev'g 75 Fed. Rep. 547; s. c. 69 Fed. Rep. 509; United States v. Addyston Pipe & Steel Co., 85 Fed. Rep. 271; Woodruff v. Berry, 40 Ark. 251; Swan v. Chorpennig, 20 Cal. 182; Kennedy v. Murdick, 5 Harr. (Del.) 458; Ray v. Mackin, 100 Ill. 246; Conway v. Garden City Pav. Co., 190 Ill. 89; Hunter v. Pfeiffer, 108 Ind. 197; Weld v. Lancaster, 56 Me. 453; Gibbs v. Smith, 115 Mass. 592; Hannah v. Fife, 27 Mich. 172; Boyle v. Adams, 50 Minn. 255; Engelman v. Skrainka, 14 Mo. App. 438; Pendleton v. Asbury, 104 Mo. App. 723; Whalen v. Bretnen, 34 Neb. 129; Wilbur v. How, 8 Johns. (N. Y.) 444; Sharp v. Wright, 35 Barb. (N. Y.) 236; Wichita Falls v. Skeen, 18 Tex. Civ. App. 632; Givins v. People, 194 Ill. 150. Where the auditors of a town were authorized to receive sealed proposals for the collection of the town taxes and to award the contract for collection to the most favorable bidder, and the plaintiff and defendant made proposals, but each saw the proposal of the other, and they agreed that, if either obtained the award, he should share the profits equally with the other, the agreement between the plaintiff and the defendant was void as against public policy, and the plaintiff could not recover from the defendant a share of the profits. Atcheson v. Mallon, 43 N. Y. 147. By an agreement between plaintiff, defendant, and two others, one of them bid, for certain canal work all to be jointly interested in the bid. Before the work was awarded they sold their bid for \$400 to a higher bidder for the same work. He gave his note for the amount, which was to be left with one of the four with the agreement that when

paid each should receive \$100. The note was subsequently paid to the holder; and it was held that one of the parties to the agreement, whose share of the \$400 had not been paid over to him, could not recover that share from the person who received it. Woodworth v. Bennett, 43 N. Y. 273, rev'g 53 Barb. 361. If an *intending bidder for public work*, for which bids have been advertised, makes his bid at a figure which is disclosed to a competitor on an agreement by which the competitor agrees to purchase from the person disclosing his bid a quantity of paving stone, which that person has on hand and which he wishes to use in the performance of the public work, the contract for the purchase of the paving stones is contrary to public policy and is void, and the person selling cannot maintain an action for the breach of the contract to purchase. Baird v. Sheehan, 38 N. Y. App. Div. 7.

² Atcheson v. Mallon, 43 N. Y. 147; Breslin v. Brown, 24 Ohio St. 565; Woodward v. Collett, 20 Ky. Law Rep. 1066; 48 S. W. 164. An agreement between the plaintiff and the defendants that if they or any of them should contract with any of the towns of the county of Washington to furnish recruits for the army during the Civil War, they would share equally in the profits and losses of the business, and without the consent of all of them, would not make any contract for a less sum than \$500 per man, was held to be a valid partnership, which might be the basis of an action for a partnership accounting. Marsh v. Russell, 66 N. Y. 288. In this case it did not appear that the parties had control of any recruits, much less that they had a monopoly of them, or that the towns were in any

the legality of any contract or agreement for a joint adventure or partnership in the performance of a public contract that the *joint interests of the parties should be public*, and if it appears that the interest of the parties is secret, that the parties jointly interested made separate bids, one being *bona fide* and the other fictitious, and that the so-called partnership agreement was really a cover or means for preventing competition between the parties, the courts will hold the agreement to be contrary to public policy and void.¹ An agreement by which a person undertakes to do a part of the work at a specified price in the event of the bidder obtaining the contract violates no rule of public policy and is valid.² If, by reason of an *unlawful combination among bidders*, the contract is awarded at an increased price, an action may be maintained against the successful bidder for the damage caused by the unlawful combination.³ But

any obliged to get their recruits from them, or that they could embarrass the owners in filling their quotas, or that the agreement was kept secret.

¹ *McMullen v. Hoffman*, 174 U. S. 19. When the statute requires the affidavit "of the bidder" to be submitted with the bid to the effect that the bid is not collusive, an affidavit by one of two persons making a joint bid is not sufficient. *Flinn v. Strauss*, 4 Cal. pp. 245. The mere fact that all the bidders are corporations a majority of whose stock is owned by another corporation does not make the contract fraudulent, when the law authorizes and recognizes such ownership. *Stuts v. Philadelphia*, 195 Pa. 619, 633. See also *Sawyer v. Pittsburg*, 217 Pa. 17.

² One Dutch, who intended making a bid for a certain work on a public schoolhouse, was asked by one Harrison whether he had a roofer's bill in his pocket. Upon Dutch telling him that he did, Harrison asked him if it exceeded a certain figure. Dutch asked him if that was his estimate, and Harrison said that it was. Thereupon Dutch told him that if he would make an estimate and agree to do it for that price, he would alter his estimate and accept his as it was lower than the estimate he already had. Harrison thereupon wrote an estimate and handed it to Dutch, who destroyed his previous estimate and made up a new estimate at a lower figure. The contract was awarded to Dutch, and it was held that Harrison had made a valid and binding contract to do the roofing of the building at the figure

specified, which entitled Dutch to maintain an action against Harrison for damages for a breach thereof. *Dutch v. Harrison*, 5 J. & S. (N. Y.) 306.

³ In an action by the State against a successful bidder for work upon a canal, and against his assignee who took with knowledge of the unlawful combination, it was alleged that a number of persons attended on the day of the letting, prepared to bid for the work and to give adequate security; that on that day and before the hour when the bids were to be put in, the defendant and other persons unknown to the plaintiff assembled and organized a meeting; that at said meeting the defendants and such other persons put up at auction among themselves the privilege of bidding for the work and the right to control all the bids which were to be put in; that it was agreed between the defendants and such other persons, that the person who would pay the most for the sole privilege for bidding for said work should receive the bids and control the same to the end that such person would destroy and omit to put in such of said bids as offered to do the work at fair and reasonable prices; that the defendants bought all such bids at the meeting and paid to the other persons large sums of money to induce them to withdraw from bidding and competition; that thereupon a bid was put in for maintaining the canals for five years at \$36,000 per annum; that the fair price for the work was \$25,000 per annum, and judgment was asked for a sum of \$55,000. It was held, that the com-

it is seldom that the question arises between the municipality and the bidder. Contracts of this nature usually come before the courts in an attempt by one of the parties thereto to enforce them or to recover a share of the profits. But no court will lend its assistance in any way towards carrying out the terms of an illegal contract, and when *any action is brought in which it is necessary to prove the illegal contract* in order to maintain the action, the courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract, but will leave the parties as they find them.¹

§ 782 (448). **Scope of Power to contract.** — Although it is true, as before stated, that a contract made by a municipality in *violation of an express legislative prohibition* is void, yet, in the absence of special legislative restriction the municipal authorities possess the same power as other debtors to make a new contract in any proper form, purging the former contract of its illegality. This principle is distinctly affirmed and well illustrated in a judgment by the Supreme Court of the United States. A city, in violation of local statutes forbidding the *issue, circulation, or receipt of scrip or currency intended to circulate as money*, issued such currency, engraved in the similitude of bank-paper, and by means thereof paid valid debts against itself; subsequently the holders of this illegal currency, at the instance of the city, surrendered the same, and received therefor new obligations of the city in the forms of bonds, to which there was no legal objection except that the consideration was illegal; it was held by the Supreme Court of the United States that the city was liable on the new bonds.²

plaint stated a good cause of action against the successful bidder and his assignee, who had performed the work and collected the stipulated sum from the State. *People v. Lord*, 6 Hun (N. Y.), 390.

¹ *McMullen v. Hoffman*, 174 U. S. 639; *Pendleton v. Asbury*, 104 Mo. App. 723; *Atcheson v. Mallon*, 43 N. Y. 147; *Woodworth v. Bennett*, 43 N. Y. 273; *Sharp v. Wright*, 35 Barb. (N. Y.) 236. Although an agreement has been made in writing which on its face purports to make the interests of the parties those of co-partners or joint adventurers in the contract, if it appears that this agreement is made as a part of a scheme to prevent competition between the parties, the courts will not sever the written agreement for a partnership or joint adventure from the

transaction or scheme of which it is a part for the purpose of sustaining or permitting a recovery. *McMullen v. Hoffman*, 174 U. S. 639.

² *Little Rock v. Merchants' National Bank*, 98 U. S. 308; s. c. below, 5 Dillon C. C. 299. The statement of the text as to the substance of the statutes of *Arkansas* in this regard is accurate. Mr Justice *Hunt* supported the judgment of the Supreme Court of the United States by the following argument: —

"It can scarcely be doubted that whoever is capable of entering into an ordinary contract to obtain or receive the means with which to build houses or wharves or the like, may, as a general rule, bind himself by an admission of his obligation. The capacity to make contracts is at the basis of the liability.

§ 783 (449). *Mode of exercising the Power.*—Respecting the *mode in which contracts by corporations should be made*, it is important to observe that when, as is sometimes the case, the *mode* of contracting is specially and plainly prescribed and limited, that mode is exclusive and must be pursued, or the contract will not bind the corporation;¹ but the courts have sometimes regarded provisions

The first liability of the city was disputed by it. It had gone beyond its power, as it said, in making a debt in the form of banknotes. If it had not denied its power, judgment and an execution might have gone against it, and the creditor would have obtained his money. This privilege of non-resistance every person retains, and continues to retain. He can reconsider at any time, and confess and admit that the moment before he denied. In 1874 the city of Little Rock did reconsider. It said, 'We will purge the taint of its illegality. We had no authority to accept from you in satisfaction of amounts received by us for legitimate purposes the sums in question. We did so receive and expend for legitimate purposes. We erred in making the payment to you in an objectionable form. We now pay our just and lawful debt by cancelling the banknotes issued by us, and delivering to you obligations in the form of bonds, in which form there is no legal objection.'" See also *Hitchcock v. Galveston*, 96 U. S. 341; *Nashville v. Ray*, 19 Vall. (U. S.) 468; *Police Jury v. Britton*, 15 Wall. (U. S.) 566; *Mullarky v. Cedar Falls*, 19 Iowa, 21; *Sykes v. Afferry*, 27 Ark. 407; *Wright v. Hughes*, 13 Ind. 113. See also the cases cited *post*, § 856, note. Where a city borrowed money of a bank upon its note at usurious interest, and the bank had subsequently cancelled the illegal note, had refunded the excessive interest, and received a new note for a lawful amount, the new note is valid. *Giller v. Hull*, 4 Denio (N. Y.), 144; *Kent v. Walton*, 7 Wend. (N. Y.) 256. So it has been held that where the consideration of a contract declared void by statute is morally good, a repeal of the statute will validate the contract. *Vashburn v. Franklin*, 35 Barb. (N. Y.) 407; 13 Abb. P. R. 140, same case; *infra*, § 856, note.

¹ *People v. Weber*, 89 Ill. 347; *Bryan v. Page*, 51 Tex. 532, approving *ext*; *Francis v. Troy*, 74 N. Y. 338; *State v. Passaic*, 41 N. J. L. 90; *Perrine*

v. Farr, 22 N. J. L. 356; *Carron v. Martin*, 26 N. J. L. 594; *State v. Hudson*, 29 N. J. L. 104; *State v. Marion County*, 21 Kan. 419; *Garvey, In re*, 77 N. Y. 523; *Smith v. Newburgh*, 77 N. Y. 130; *Allen v. Galveston*, 51 Tex. 302; *Dore v. Milwaukee*, 42 Wis. 18; *Butler v. Nevin*, 88 Ill. 575; *Kansas City v. Flanagan*, 69 Mo. 22; *Bentley v. Chisago County Com'rs*, 25 Minn. 259; *Fulton v. Lincoln*, 9 Neb. 358; *Hurford v. Omaha*, 4 Neb. 336; *Reis v. Graff*, 51 Cal. 86; *Addis v. Pittsburgh*, 85 Pa. St. 389; *McDonald v. Mayor, &c. of New York*, 68 N. Y. 23; *Leavenworth v. Rankin*, 2 Kan. 357; *McCoy v. Briant*, 53 Cal. 247, approving text; *Murphy v. Louisville*, 9 Bush (Ky.), 189; *post*, § 826, note; *Montgomery County v. Barber*, 45 Ala. 237; *Terre Haute v. Lake*, 43 Ind. 480; *Head v. Prov. Ins. Co.*, 2 Cranch, 127; *White v. New Orleans*, 15 La. An. 667; *infra*, § 801; *Dey v. Jersey City*, 19 N. J. Eq. 412; *Baltimore v. Reynolds*, 20 Md. 1; *Durango v. Pennington*, 8 Colo. 257; *Worthington v. Covington*, 82 Ky. 265; *Laycock v. Baton Rouge*, 35 La. An. 475; *North Pac. L. & M. Co. v. E. Portland*, 14 Ore. 3; *Los Angeles Gas Co. v. Toberman*, 61 Cal. 199; *Schwiesau v. Mahon*, 110 Cal. 543 (a contract referring to specifications annexed to which no specifications are annexed does not comply with a statute requiring contracts to be in writing and signed by the contractor); *Frick v. Los Angeles*, 115 Cal. 512; *Greenwood v. Morrison*, 128 Cal. 350; *Peckham v. Watsonville*, 138 Cal. 242; *Times Publishing Co. v. Weatherby*, 139 Cal. 618; *Wiley v. Columbus*, 109 Ga. 295; *Paxton v. Bogardus*, 201 Ill. 628; *Rogne v. People*, 224 Ill. 449; *Roemheld v. Chicago*, 231 Ill. 467; *Huntington v. Force*, 152 Ind. 368; *Windsor v. Des Moines*, 101 Iowa, 343; *Citizen's Bank v. Spencer*, 126 Iowa, 101; 101 N. W. Rep. 643; *Blanchard v. Ayer*, 148 Mass. 174; *Edge Moor Bridge Works v. Bristol*, 170 Mass. 528; *Wormstead v. Lynn*, 184 Mass. 425; *Bowditch v. Boston*, 168 Mass. 239;

on this subject as directory. Thus, where the charter directed the mode in which moneys should be drawn from the treasury to be by

Goddard v. Lowell, 179 Mass. 496; *Packard v. Hayes*, 94 Md. 233; *Wheeler v. Poplar Bluff*, 149 Mo. 36 (special ordinance required by statute); *State v. Butler*, 178 Mo. 272; *Savage v. Springfield*, 83 Mo. App. 323; *Unionville v. Martin*, 95 Mo. App. 28; *Van Reipen v. Jersey City*, 58 N. J. L. 262; *Keane v. New York*, 88 N. Y. App. Div. 542 (holding a contract invalid the necessity of which was not certified by the head of the appropriate department, as required by statute); *Wadsworth v. Concord*, 133 N. Car. 587; *McCloud v. Columbus*, 54 Ohio, 439; *Wellston v. Morgan*, 65 Ohio St. 219; *Kerr v. Bellefontaine*, 13 Ohio Cir. Ct. 24; *Strack v. Ratterman*, 18 Ohio Cir. Ct. 36; *McDougall v. Windsor Com'rs*, 27 Ont. App. 566; *Smart v. Philadelphia*, 205 Pa. 329; *Press Pub. Co. v. Pittsburgh*, 207 Pa. 623; *Bryan v. Page*, 51 Tex. 532; *Noel v. San Antonio*, 11 Tex. Civ. App. 580; *Nelden v. Clark*, 20 Utah, 382, citing text; *Arnott v. Spokane*, 6 Wash. 442, citing text; *Wiley v. Seattle*, 7 Wash. 576, citing text; *Moran v. Thompson*, 20 Wash. 525; *Paul v. Seattle*, 40 Wash. 291; *Ricketson v. Milwaukee*, 105 Wis. 591; *Chippewa Bridge Co. v. Durand*, 122 Wis. 85.

Any practice or custom of the officers of a municipal corporation not in compliance with the requirements of its charter cannot bind it on a contract not executed or authorized in the manner prescribed by the charter. *Paul v. Seattle*, 40 Wash. 294. See also *Wormstead v. Lynn*, 184 Mass. 425. The performance of work or furnishing material for a city, and the acceptance of the resulting benefits, will not render it liable to pay if the work was not authorized. The mere fact that the labor is beneficial will not create a liability. *Roemheld v. Chicago*, 231 Ill. 467. See also *Hope v. Alton*, 214 Ill. 102. A city is not liable on a contract executed by the mayor alone where he has no authority to act. *Indiana Road Mach. Co. v. Sulphur Springs* (Tex. Civ. App.), 63 S. W. Rep. 908; *Penn v. Laredo* (Tex. Civ. App.), 26 S. W. Rep. 636; *Woodward v. Grangeville*, 13 Idaho, 652. But in *Philadelphia v. Gorgas*, 180 Pa. 296, a contract was signed by the mayor, when it should

have been signed by the director of the department of public works, and under the express terms of the law the mayor was not authorized to sign it. It was held that the matter of the signature was not a jurisdictional fact, and hence the signing by the wrong official was not a fatal objection, but only an irregularity of which third persons could not be heard to raise questions as between the city and its contractors. See also *Potts v. Philadelphia*, 195 Pa. 619, 631.

Speaking of the subject mentioned in the text in a case above cited (*Head v. Prov. Ins. Co.*, 2 Cranch, 127), *Marshall, C. J.*, says: "The act of incorporation is to them an enabling act: it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated." Approved, *Bank of United States v. Dandridge*, 12 Wheat. 64, 68; see also *Angell & Ames Corp. § 253*; *Diggle v. London & B. Railway Co.*, 5 Exch. 442; *Homer-sham v. Wolv., &c. Co.*, 4 Eng. Law & Eq. 426; *Frend v. Dennett*, 4 C. B. (N. S.) 576; *Butler v. Charlestown*, 7 Gray (Mass.), 12; *Paris Township v. Cherry*, 8 Ohio St. 564; *Bladen v. Philadelphia*, 60 Pa. St. 464; *McCracken v. San Francisco*, 16 Cal. 591; *Pimental v. San Francisco*, 21 Cal. 351; *Zottman v. San Francisco*, 20 Cal. 96; *Argenti v. San Francisco*, 16 Cal. 253, 282, opinion of *Field, C. J.*; *post*, chapter on Taxation and Local Assessments. If a corporation sue upon a contract though it be executory on their part, and not executed, this amounts to a conclusive admission that the contract was duly entered into by them. *Grant on Corp.* 63; 5 *Man. & G.* 192. A contract by a city with a street railway company held not concluded, something remaining to be done. *People's Pass. R. Co. v. Memphis City R. Co.*, 10 Wall. (U. S.) 38. Where a charter limits the exercise of power, the mayor and council cannot, in a different mode, make a valid contract, nor can they, by any subsequent approval or conduct, impart validity to such contract, nor would the law imply any such contract: the law never implies an

order of the council, signed by the mayor, such an order, issued on a memorandum in the minutes of the corporation, without a formal order being entered, was adjudged a sufficient compliance with the charter.¹ But unless the mode be prescribed and limited, all contracts within the scope of the corporate powers may be made, as we shall see, otherwise than under seal or in writing. A contract with a municipal corporation, which by its terms is not to be performed within one year from the making thereof, is within the scope of the statute of frauds; but an entry in the official minutes of the corporation of a resolution passed by the governing body expressing the terms of the contract, signed by the clerk, constitutes a note or memorandum in writing sufficient to take the case out of the statute and bind the corporation.²

gation to do that which it forbids a party to agree to do. *Bryan v. E.*, 51 Tex. 532; *s. p.* *Francis v. Y.*, 74 N. Y. 338. In the absence of bad faith, or of a usurpation of authority, or that a public loss or state injustice will result from a contract made by a municipal council without complying strictly with charter provisions, the State will not be warranted in interfering to set it aside. *Jorney-General v. Detroit*, 55 Mich.

When a statute provides for a contract for street improvements, it provides no method by which separate assessments can be made on separate warrants issued to different tractors, the council has no power to award separate contracts for such improvements. *Treanor v. Houghton*, Cal. 53. A provision that no property shall be contracted for at one purchase exceeding \$500 cost, unless the purchase be authorized by a majority of the electors, controls another provision of the same act authorizing the council to purchase fire apparatus and make all necessary appropriations therefor. The two sections must be construed together so as to avoid conflict, and the council is not authorized to purchase any fire apparatus in excess of \$500 without a majority of the electors. *Fire Extinguisher Co. v. Perry*, 8 Okla. 429.

¹ *Kelley v. Mayor, &c. of Brooklyn*, 111 (N. Y.), 263; see *Neiffer v. Kentucky Bank*, 1 Head (Tenn.), 162; *Pentton v. Tanieri*, 12 Q. B. 1011; *Madoc v. Graham*, 2 Met. (Ky.) 56; *ante*, 40. Under charter, executory contracts for grading, &c., must be in writing. *Starkey v. Minneapolis*, 19 Minn.

203. Where one section of a city charter provides that every contract shall be countersigned by the finance committee, numbered and registered in a book kept for the purpose, and another section of the charter undertakes to set forth the essentials to a contract binding the city, but does not enumerate countersigning by the finance committee or numbering and registering, the countersigning is not intended as a part of the execution of the contract, but, like the numbering and registering, is merely for the purpose of more thorough authentication, and the contract is not invalid by reason of its absence. *Goodyear Rubber Co. v. Eureka*, 135 Cal. 613.

² *Argus Co. v. Albany*, 55 N. Y. 495, *Grover and Rapallo, JJ.*, dissenting. *Curtis v. Portsmouth*, 67 N. H. 506, citing text; *Jersey City v. Harrison*, 71 N. J. L. 69, *aff'd* 72 N. J. L. 185. A resolution of the council must not only be passed, but must also be communicated to and accepted by the other contracting party in order to take the contract founded thereon out of the statute of frauds. *Jersey City v. Harrison*, 71 N. J. L. 69, *aff'd*, 72 N. J. L. 185. A mayor cannot bind the city by his verbal assurance that the amount due under a contract will be paid out of a certain fund, such a promise being within the statute of frauds. *Wilmington v. Florence*, 51 S. Car. 462. Municipal corporations may contract by parol through their duly authorized agents, and such contracts cannot be changed without the consent of the parties to be affected thereby. *Duncombe v. Fort Dodge*, 38 Iowa, 281. The letting of contracts by a council

§ 784 (450). **Seal not Necessary; How concluded.** — Modern decisions have established the law to be, that the contracts of municipal corporations *need not be under seal* unless the charter or other legislative enactment so requires.¹ The authorized body of a municipal corporation *may bind it by an ordinance*, which in favor of private persons interested therein may, if so intended, operate *as a contract*; ² or they may bind it by a *resolution*, or by *vote* clothe its officers, agents, or committees with power to act for it; and a contract made by persons thus appointed by the corporation, though by parol (unless it be one which the law requires to be in writing), will bind it.³

is an administrative and not a ministerial act; it may be done by order or resolution, and does not require an ordinance. *Earl v. Bowen*, 146 Cal. 754; *Jersey City v. Harrison*, 71 N. J. L. 69; aff'd 72 N. J. L. 185. A resolution of a borough council authorizing or awarding a contract is merely a ministerial act, and not a legislative one, and its advertisement or transcription in the ordinance book is not necessary. *Straub v. Pittsburg*, 138 Pa. 356; *Shaub v. Lancaster City*, 156 Pa. 362; *Millvale Borough*, 162 Pa. 374; *Howard v. Olyphant*, 181 Pa. 191; *Seitzinger v. Tamaqua*, 187 Pa. 539; *Lansdowne v. Citizens, &c. Power Co.*, 206 Pa. 188. In the absence of a statute requiring a contract to be made by a formal ordinance or resolution, it need not be executed in that manner, and when it purports on its face to be the contract of the town and is signed by a person as president of the board of trustees and by one of the trustees and attested by the clerk and entered among the proceedings of the board, it is binding upon the town. *Gosport v. Pritchard*, 156 Ind. 400. Where defects in contracts with a city are irregularities only, third parties are not permitted to raise questions between the city and its contractors. *Fell v. Philadelphia*, 81 Pa. 58; *Philadelphia v. Gorgas*, 180 Pa. 296.

¹ *Draper v. Springport*, 104 U. S. 501; *Halbut v. Forrest City*, 34 Ark. 246. A written proposal by a town to have work done, a written bid to do it, and a written acceptance of the bid, held to constitute together a sufficient contract. *Wiles v. Hoss*, 114 Ind. 371.

² The obligation of a contract, made by an ordinance, cannot be impaired by a subsequent ordinance, though it be au-

thorized by a new city charter. *Ante*, § 584. So where the revenues of a market were, by ordinance, appropriated to pay municipal bonds, a later ordinance passed under a power granted by a new charter, diverting the revenues, was declared void. *Fazende v. Houston*, 34 Fed. Rep. 95. *Ante*, § 584, as to repeal, and chaps. iv. and ix., *passim*, as to extent of legislative power over Municipal Corporations.

³ *Fanning v. Gregoire*, 16 How. (U. S.) 524; *ante*, § 363; *Abbey v. Billups*, 35 Miss. 618; *Alton v. Mulledy*, 21 Ill. 76; *Western Sav. F. Soc. v. Philadelphia*, 31 Pa. St. 175; *ib.* 185; *Clark v. Washington*, 12 Wheat. (U. S.) 40; *Hamilton v. Newcastle & D. R. Co.*, 9 Ind. 359; *Ross v. Madison*, 1 Ind. 281; *Michigan City v. Leeds*, 24 Ind. App. 271, quoting text; *Decatur v. McKean*, 167 Ind. 249; *Logansport v. Dykeman*, 116 Ind. 15; *Jersey City v. Harrison*, 71 N. J. L. 69; aff'd 73 N. J. L. 185; *Bellmyer v. Marshalltown*, 44 Iowa, 564; *Chattanooga v. Geiler*, 13 Lea (Tenn.), 612. Where a contract is accepted unconditionally by the resolution of a city council the proceedings by which the resolution was adopted are presumed to be regular. *Over v. Greenfield*, 107 Ind. 231. Not essential that vote of directors appear on the record. *Story Agency*, § 22, where it is said that, "as the appointment of an agent of a corporation may not always be evidenced by written vote, it is now the settled doctrine — at least in America — that it may be inferred and implied from the adoption or recognition of the acts of the agent by the corporation." *Post*, § 793. And when this is the case an action of assumpsit lies against such corporation upon an express or implied promise.

(452). **Contracts made by Agents; Mode of Execution.** — Officers or agents of a corporation, duly appointed, and acting in the scope of their authority,¹ in executing an instrument in the corporation *sign their own names and affix their own seals* are simply nugatory, and the instrument, according to the light of modern judicial opinion, is to be regarded as the *act of the corporation*, and will bind the corporation and individuals executing it, where the purpose to act for the cor-

Parol contract by council physician. *Selma v. Mullen*, 561-570; *Montgomery Co.* 15 Ala. 237.

See also *Broom Com.* on J. S.) 338, it was urged that one could not authorize any one by an agent by a mere directors, but *only* by an *it under its corporate seal*. Court declared that such a *hatever* may have been its *rectness* as applied to *corporations*, had "no appli-
modern corporations created whose charters contemplate is of the corporation to be by a special body or board
1. And the acts of such a *ard*, evidenced by a written s completely binding upon *tion*, and as complete au-
their agents, as the utmost s done under the corporate
Story, J. Further, as to *al*, see *ante*, § 361. Au-
agent, in absence of special may be given by *parol* or *m* acts. *Detroit v. Jackson*, (Mich.) 106. See *ante*, § 361;
3.

sion in the organic act of a on the passage of every by-
r to enter into a contract by *, the ayes and nays* shall be recorded," prescribes how
contract shall be made and when directed by the coun-
is not a limitation on the uthorized agents to make a
parol. *Indianola v. Jones*, 182; *ante*, § 540; *Baker v.*
s. (parol contract), 33 Iowa,

may be concluded by ordi-
tion of the council (accepting
without signature by *par-*
le v. San Francisco, 27 Cal.
amento v. Kirk, 7 Cal. 419;

Logansport v. Blakemore, 17 Ind. 318.
How shown. *San Antonio v. Lewis*, 9
Texas, 69. In *Indianapolis v. Skeen*, 17
Ind. 628, it was held that third persons
dealing with an agent of the city ap-
pointed by the council "*to negotiate its
bonds* at not less than" a specified rate,
were not obliged to look to the records
of the council for either his appoint-
ment or his instructions, since they were
not necessarily of record there; but
persons dealing with such an agent are,
of course, bound to ascertain the fact
of his appointment and the *extent of his
authority*, but not his *private instruc-*
tions. Authority of agent to *negotiate
sales of bonds*. *Cady v. Watertown*, 18
Wis. 322.

¹ "The general rule is unquestion-
able that a municipal corporation is not
bound by the unauthorized act of an
individual, whether an officer of the
corporation or a mere private person.
But the corporation *may so deal with
third persons* as to justify them in as-
suming the existence of an authority
in another which in fact has never been
given." *Andrews, J., Davies v. Mayor,*
&c. of New York, 93 N. Y. 250. This
principle, it is supposed, would not be
applicable where the matter so dealt
with was under all circumstances *ultra
vires* the corporate power. Where a
committee was empowered to contract
for the erection of a building at a price
not to exceed a specified sum, it was held
they had no power to contract for a
larger sum, and that the person con-
tracting with them was bound to take
notice of the extent of their power.
Turney v. Bridgeport, 55 Conn. 412.
A mayor, authorized by a city ordi-
nance to enter into a paving contract,
can only bind the city to the extent of
the authority given to him. *State v.*
Michigan City, 138 Ind. 455, quoting
text. The council may authorize its
clerk to sign a contract for printing.
Earl v. Bowen, 146 Cal. 754.

poration is manifest from the whole paper, and where there are no words evincing an intention to assume a personal liability.¹

¹ *Regents, &c. v. Detroit, &c.*, 12 Mich. 133; *Sweetzer v. Mead*, 5 Mich. 107; *Bank of Metropolis v. Gutschlick*, 14 Pet. (U. S.) 19; *Story Agency*, §§ 154, 260, 276, 277; *Bank of Columbia v. Patterson*, 7 Cranch, 299; *Hatch v. Barr*, 1 Ohio, 390; *Baker v. Chambliss*, 4 G. Greene (Iowa), 428; *Lyon v. Adamson*, 7 Iowa, 509; 1 Am. Lead. Cas. 602; *Mott v. Hicks*, 1 Cow. (N. Y.) 513, 534; *Blanchard v. Blackstone*, 102 Mass. 343; *Stanton v. Camp* (contract signed individually with addition of "committee"), 4 Barb. (N. Y.) 274; *Alexandria Mechanics' Bank v. Bank of Columbia*, 5 Wheat. (U. S.) 326; *Hopkins v. Mehaffy*, 11 Serg. & Rawle (Pa.), 126; *Angell & Ames*, §§ 293, 295; *Gale v. Kalamazoo*, 23 Mich. 344; *Burrill v. Boston*, 2 Clifford C. C. 590. To justify the setting aside of a contract made by an agent of a municipal corporation on the ground of fraud, the fraud must be clearly proved: circumstantial evidence, if relied upon, must be such as is not fairly reconcilable with any other theory than one of fraud by the agent. *Baird v. Mayor, &c. of New York*, 96 N. Y. 567. Where a town clothes its agent, or its committee, with full power to make a contract, and it is accordingly made, it is valid and binding, notwithstanding there has been no formal acceptance by a vote, or even if it be afterwards rejected by the corporation. *Davenport v. Hallowell*, 10 Me. 317; *Junkins v. Doughty Falls School District*, 39 Me. 220; *Willard v. Newburyport*, 12 Pick. (Mass.) 227; *Kingsbury Quincy School District*, 12 Met. (Mass.) 99.

The selectmen of towns in Massachusetts have no authority to construct a way and pledge the credit of the town therefor, unless they are authorized by a vote of the town. *Bean v. Hyde Park*, 143 Mass. 245.

Where school directors gave an authorized bond for borrowed money, in their individual names, as school directors, though signed and sealed in their individual names, the corporation, and not the individuals, are liable thereon. *Heidelberg School Dist. v. Horst*, 62 Pa. St. 301.

The power of a committee, appointed by a vote of a town in Massachusetts

"to let out and superintend the making" of a highway, is completely executed by the making of a contract with a third person embracing the whole subject matter of the vote, and by the superintending of the construction of the highway. And therefore, if the person contracted with fails to complete the road according to his contract, this is a matter for the town to deal with, and the committee have no power, without new authority from the town, to enter into a contract with another person for its completion. If they do so, and pay money in pursuance thereof, the town is not liable to them therefor. Nor is it liable if they transcend their power, and make a contract for a more expensive road than they were authorized to do. *Keyes v. Westford*, 17 Pick. (Mass.) 273. Power of New England towns, *ante*, §§ 41, 42; *post*, § 1638.

Power to a town committee "to superintend the building of a house for the town" was adjudged to include the power to make the necessary contracts, it not appearing that any other or special committee or agent was appointed for that purpose. the court being of opinion that the making of contracts was essential to the building of the house. *Damon v. Granby*, 2 Pick. (Mass.) 345; *ante*, chap. xiii. Majority of committee must sign contract. So held, *Curtis v. Portland*, 59 Me. 483; *ante*, § 522, and note, as to powers of a majority of committee; *post*, § 788, note.

It has been held in *Upper Canada*, where work was done under a contract not made with the corporation, or any of its known officers, but merely with persons assuming to act as a duly appointed committee, that no action would lie against the corporation. *Stoneburgh v. Brighton*, 5 Upper Can. Law J. 38. No action can be sustained for a breach of duty against the head of a corporation in not applying the seal to make a contract between a corporation and an individual, founded on a refusal which, if there had been a previous valid contract, would have constituted a breach of it; in other words, there cannot be a remedy against the head of a corporation, equivalent to a remedy on the contract

§ 786 (453). **Same Subject; Illustrations.** — A few cases will be referred to *illustrating the rule* just stated. A contract in relation to the survey of a city, a subject exclusively appertaining to the corporation, was entered into "between T. Van V., J. W., C. D. C., a committee appointed by the corporation of the city of Albany for that purpose, of the first part, and John R., Jr., of the second part." The parties of the first part agreed to pay for the work to be done, and signed their individual *names* and affixed their individual *seals* to the agreement. The authority of the committee to act for the corporation and to make the contract being conceded, it was ruled that they were not personally liable, and that it must be enforced by and against the corporation.¹ In another case, a contract for the repair of an engine house of a city was entered into by the inspector of the fire department in his own name, describing himself as "G. N. S., inspector, &c., of the first part," and signed in the same way. It was, in fact, made for and on account of the city, and it was held that the city was liable thereon, although its agent did not use its name in contracting, the court being of opinion, however, that the contract on its face showed it was made for the city.²

against the corporation, had the contract been duly made so as to create a valid and binding agreement. *Fair v. Moore*, 3 Upper Can. C. P. 484.

¹ *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60; compare, however, *Fullam v. Brookfield*, 9 Allen (Mass.), 1, where the court denies the doctrine of *Randall v. Van Vechten*; *Bank of Columbia v. Patterson*, 7 Cranch, 299, and certain *dicta* in *Damon v. Granby*, 2 Pick. (Mass.) 345. But the text states the prevailing American rule. See also *Dubois v. Del. & H. Canal Co.*, 4 Wend. (N. Y.) 285; *Worrell v. Munn*, 5 N. Y. 229; *Ford v. Williams*, 13 N. Y. 577; *Richardson v. Scott, &c. Co.*, 22 Cal. 150.

² *Robinson v. St. Louis*, 28 Mo. 488. Where the corporate name of a village was "the president and trustees of the village of G," a contract reciting that it was made by the president and trustees of the "corporation" of G—, held, to warrant a finding that the contract was made by the board officially. *Parr v. Greenbush*, 72 N. Y. 463. In 1870 a village board, without advertising for proposals, contracted with P. to lay a sidewalk in May, 1871; the work, however, did not proceed, owing to the failure of the board to furnish the gravel and grading, as required by the contract

and P.'s notification. In 1873 the board passed a resolution requiring P. to go on, and if the necessary gravel and grading be not furnished, to furnish the same himself; whereupon he furnished the materials and did the work. In 1871 the village charter was so amended as to require the board to advertise for proposals for grading and paving any sidewalk, and to award any contract therefor to the lowest bidder. In an action by P. for labor and materials, in pursuance of the resolution, &c. — held, 1. That no abandonment of the contract was established. 2. That the contract was not affected by the subsequent amendment. 3. That the resolution was illegal, and no recovery could be had by P. for the gravel and grading, either upon contract or upon the *quantum meruit*. *Ib.* Where A., B., and C., a committee appointed by a meeting of citizens, make a contract with D., signing the contract as a committee, and affixing their seals thereto, they make themselves personally liable under the contract. The only effect of the word "committee" is like that of "executor" in a personal obligation, to identify the transaction, not to qualify the act. *Ulam v. Boyd*, 87 Pa. St. 477.

§ 787 (454). **Same Subject; Illustration.** — So, where on a sale of real property by a corporation, a memorandum of the sale was signed by the parties, on which it was stated that the sale was made to A. B., the purchaser, and that he, C. D., "mayor of the corporation, in behalf of himself and the rest of the burgesses and commonalty of the borough of Caermarthen, do mutually agree to perform and fulfil, on each of their parts respectively, the conditions of the sale," and then came the signature of the purchaser, and of "C. D., Mayor," it was held that the agreement *was that of the corporation, and not that of the mayor personally*; and that, consequently, the mayor could not sue thereon.¹

§ 788 (455). **Action must be Corporate, not Individual.** — But the action or contract of the officers of a public corporation in their *individual capacity* is not binding upon the corporate body.² For example: If the *selectmen of a town* in New England, as *individuals*, request a citizen to furnish supplies to a public enemy, to prevent violence to the town, this gives no legal right of recovery against the town; and as the transaction was wholly beyond the official duty of selectmen, or the duty of the town as a corporation, it was doubted whether a regular vote to pay the plaintiff would have been legal, though it was admitted that a voluntary agreement among the *inhabitants* to this effect would have been binding, being founded on a meritorious consideration, as it was *their* property, and not that of the town, which was in danger.³

¹ *Bowen v. Morris*, 2 Taunt. 374. The case of *Burrill v. Boston*, 2 Clifford C. C. R. 590, presents also an instance in which it was considered that a contract signed by the mayor was one intended to be made on behalf of the corporation. But in *Providence v. Miller*, 11 R. I. 272, a contract under seal between certain persons of the first part and one Doyle "in behalf of the city," party of the second part, Doyle being the mayor, and the contract relating to municipal matters, was held upon its face to be the contract of Doyle personally, and not that of the city.

² *Haliburton v. Frankford*, 14 Mass. 214; *Butler v. Charlestown*, 7 Gray (Mass.), 12.

³ *Haliburton v. Frankford*, 14 Mass. 214, *supra*; *Stetson v. Kempton*, 13 Mass. 272; *Burrill v. Boston*, 2 Clifford C. C. R. 590; *ante*, § 42. A majority of selectmen may, by statute, bind a town in *New Hampshire* by their written contract when acting within the limits of

their authority. But a contract signed by one only of the selectmen in his own name, "for the selectmen," does not bind the town, nor will it be rendered valid by proof that another selectman authorized him so to sign the contract, or by proof that such was the practice in the town. If the *corporate name* had been affixed by one, such proof might have been sufficient. *Andover v. Grafton*, 7 N. H. 298; *Mason v. Bristol*, 10 N. H. 36; *Hanover v. Eaton*, 3 N. H. 38. Powers of towns in *New England*. *Ante*, §§ 41, 42; *supra*, § 785, note.

Contracts made by a *majority of the board of aldermen*, without any official action of the city council, are not binding upon the city; so decided where counsel were thus employed who rendered legal services beneficial to the corporation. *Butler v. Charlestown*, 7 Gray (Mass.), 12; see also *Sikes v. Hatfield*, 13 Gray (Mass.), 347; see chapter on Corporate Meetings. *ante*. A contract entered into by a board of

§ 789 (456). **Specialty Contracts.** — While the agent of a public corporation, who by its vote or authority contracts for its use, cannot bind the corporation by *making a contract by deed*, yet if such agent had authority to make the contract, it is binding upon the corporation as *evidence* of such contract. It follows that a contract of an agent or committee of a town, under his or their own seals, cannot be declared on, *in covenant or debt*, as the deed of the town. The *form of the remedy* against the town¹ is for damages, or in *assumpsit*. Although in *Damon v. Granby*² it was left an open question whether a vote of a town having no corporate seal expressly authorizing an agent to make a deed of land, or other contract, *under seal*, would, if executed according to the power, become technically the deed of the town, no substantial reason is perceived why such an instrument, thus executed, should not be treated as having all the attributes and qualities of a sealed instrument. If the corporation, however, has a common seal, which is the case with towns in many of the States, and with cities generally, and it is affixed to an instrument in pursuance of the vote of the corporation, or by the proper officer, such an instrument is, beyond doubt, technically *the deed of the corporation*.³

§ 790. **Statutory Requirement of a Previous Appropriation.** — A statutory requirement which is frequently found is *that no contract shall be made by the municipality unless a previous appropriation shall have been made* for the purpose of liquidating the liability created thereby. It is sometimes also required that the comptroller or other officer of the city shall certify upon the contract that the money has been appropriated for the purpose of paying the obligations incurred. These requirements are imposed for the purpose

supervisors for and on behalf of the county, and signed by the chairman of the board, is the contract of the county. *Babcock v. Goodrich*, 47 Cal. 488.

¹ *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60, 65; *Damon v. Granby*, 2 Pick. (Mass.) 345; compare *Fullam v. Brookfield*, 9 Allen (Mass.), 1; *Bank of Columbia v. Patterson's Adm'r*, 7 Cranch, 299, and rule as stated by *Story, J.*, 306; *Clark v. Cuckfield Union*, 11 Eng. Law and Eq. 442; *Pennington v. Tanere*, 12 Queen's B. 1011. *Covenant* cannot be maintained against a city on a contract with the water commissioners of the city, although the statute declares that their contracts

should be binding upon and be considered as done by the mayor and council. *Keeney v. Hudson*, 27 N. J. L. 362; *ante*, § 363; *Providence v. Miller*, 11 R. I. 272.

² *Damon v. Granby*, 2 Pick. (Mass.) 345, 352.

³ *Ib.*; *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60, 65. But see *Fullam v. Brookfield*, 9 Allen (Mass.), 1. *Corporate seal. Ante*, §§ 361, 363; *Neely v. Yorkville*, 10 S. Car. 141, approving text. An agreement in writing by an attorney to refer a certain cause acted on by the court was held to bind his client. *Brooks v. New Durham*, 55 N. H. 559.

of protecting the treasury of the municipality against the incurring of excessive liabilities or liabilities for which no provision is made. They are mandatory; and if a contract is entered into without compliance with the statutory requirements, it is void, and there can be no recovery thereon.¹

§ 791 (457). **Contracts in Excess of Corporate Power; Ultra Vires as a Defence.**—The general principle of law is settled beyond

¹ *Garrison v. Chicago*, 7 Biss. (U. S.) 480; *Superior v. Norton*, 63 Fed. Rep. 357; *Jutte & Foley Co. v. Altoona*, 94 Fed. Rep. 61; *Johnston v. Philadelphia*, 113 Fed. Rep. 40; *Wiegel v. Pulaski County*, 61 Ark. 74; *Wallace v. San Jose*, 29 Cal. 180; *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 641; *Smith Canal Co. v. Denver*, 20 Colo. 84; *Chicago v. Fraser*, 60 Ill. App. 404; *May v. Chicago*, 222 Ill. 595, aff'g 124 Ill. App. 527; *Indianapolis v. Wann*, 144 Ind. 175; *Green v. Everett*, 179 Mass. 147; *Webb Granite & Const. Co. v. Worcester*, 187 Mass. 385; *Niles Water Works v. Niles*, 59 Mich. 311; *Putnam v. Grand Rapids*, 58 Mich. 416; *Tennant v. Crocker*, 85 Mich. 328; *Kiichli v. Minnesota Brush Electric Co.*, 58 Minn. 418; *Pryor v. Kansas City*, 153 Mo. 135; *Mister v. Kansas City*, 18 Mo. App. 217; *Blair v. Lantry*, 21 Neb. 247; *Gutta Percha & Rubber Mfg. Co. v. Ogalalla*, 40 Neb. 775; *Kearney v. Downing*, 59 Neb. 549; *Kelley v. Broadwell (Neb.)*, 92 N. W. Rep. 643; *Humphreys v. Bayonne*, 55 N. J. L. 241; *Atlantic City Water Works Co. v. Read*, 50 N. J. L. 665; *Hurley v. Trenton*, 66 N. J. L. 538, aff'd 67 N. J. L. 350; *Pullman v. Mayor, &c. of New York*, 49 Barb. (N. Y.) 57; *Williams v. New York City*, 118 N. Y. App. Div. 756; *Roberts v. Fargo*, 10 N. Dak. 230; *Jonas v. Cincinnati*, 18 Ohio, 318; *Lancaster v. Miller*, 58 Ohio St. 558; *Findlay v. Pendleton*, 62 Ohio St. 80; *Philadelphia v. Flanigan*, 47 Pa. St. 21; *Erie v. Land on 18th St.*, 176 Pa. 478; *Harrisburg v. Shepler*, 190 Pa. 374; *Bladen v. Philadelphia*, 60 Pa. 464; *Hinkle v. Philadelphia*, 214 Pa. 126; *Mineralized Rubber Co. v. Cleburne*, 22 Tex. Civ. App. 621; *Comstock v. Nelsonville*, 61 Ohio St. 288.

As to the necessity for and manner of making appropriations for contracts for a term of years, see *Toomey v. Bridgeport*, 79 Conn. 229. The city council cannot, without making previous appropriation as required by statute, accept a proposition to set a claim for damages for land taken by the city to widen a street. *Green Everett*, 179 Mass. 147. A statute provision prohibiting any expenditure or the incurring of any liability, upon an appropriation has been made by the council sufficient to meet the expenditure, or liability, "together with prior liabilities which are payable therefrom," does not include *estimated liabilities*, such as damages for land taken, which have not actually accrued or become payable, but are liabilities which have been actually incurred. *Webb Granite & Const. Co. v. Worcester*, 187 Mass. 385. A corporation furnishing water for the necessary use of the city cannot recover against the city the reasonable price for the use of the water in the absence of any definite appropriation as required by the statute. *Smith Canal Co. v. Denver*, 20 Colo. 84. Where there is an appropriation for the cost of municipal work, work which is necessary incident to the construction may be paid therefrom. *Chicago Norton Milling Co.*, 196 Ill. 580, aff'd 97 Ill. App. 61. There can be no ratification of a contract made in violation of these statutory requirements without compliance with the conditions essential to a valid agreement in the first instance. The receipt of property and its use is not sufficient to justify recovery against the municipality. *Gutta Percha & Rubber Mfg. Co. v. Ogalalla*, 40 Neb. 775. *Subsequent appropriations* for instalments becoming due under a contract for street lights for a term of years made by the city authorities in violation of a statute prohibiting contracts for which no appropriation has been made, do not operate as a ratification of the contract so as to make it binding. *Indianapolis v. Wann*, 144 Ind. 175.

ersy, that the agents, officers, or even city council or governing body of a municipal corporation, *cannot bind the corporation* contract which is *beyond the scope of its powers*, or entirely to the purposes of the corporation, or which (not being duly authorized) is against public policy. This doctrine is of the nature of such institutions and rests upon reasonable solid grounds. The inhabitants are the corporators; they are but the public agents of the corporation.¹ The duties of the officers or public agents of the corporation are fixed by statute or charter, which all persons not only may but are bound to know. The opposite doctrine would be with such danger and accompanied with such abuse that it soon end in the ruin of municipalities, or be legislatively withdrawn. These considerations vindicate both the reasonable necessity of the rule that the corporation is bound only by agents or officers, by whom it can alone act, if it acts at all, within the limits of the chartered authority of the corporation.² Every body of the workings of municipal bodies has demonstrated the true nature of this principle, and that it is the part of true and of judicial duty to keep the corporate wings clipped to the lawful standard.³ It results from this doctrine that contracts not authorized by the charter or by other legislative act, and not within the scope of the powers of the corporation under the circumstances, are void, and in actions thereon the corporation may successfully interpose the plea of *ultra vires*, setting up as a defence its own want of power under its charter or constituent to enter into the contract.⁴ In favor of *bona fide* holders of

at v. Forrest City, 34 Ark. 100; *re v. Donaldsonville*, 33 La. 100; *Winchester v. Redmond*, 93 Ark. 75 (approving text), ordinance authorizing the certificates of indebtedness at issue was held not admissible as against the city. *approved*, *Eufaula v. Mc-la*, 588; *Fort Wayne v. Lehr*, 12; *Pine Civil Township v. g. Co.*, 83 Ind. 121; *Cowdrey*, 16 Fed. Rep. 532. subject is touched upon in the portion of chap. i., *ante*. of *construction of corporate* *Ante*, §§ 237-240. See also *Lyddy v. Long Island City*, 218 (contractor chargeable with limitations upon agent's

authority); *Appeal of Whelen*, 108 Pa. St. 162. Text quoted in *Bell v. Kirkland*, 102 Minn. 213, where the important distinction between contracts which are wholly *ultra vires* because entirely beyond the scope of the corporate powers, under any circumstances, and those which are *ultra vires* because not made in the manner or form prescribed, although within the general scope of the corporate powers, is discussed at length.

¹ *Post*, chap. xxxii. § 1610, where the subject of *ultra vires* is further considered; and see also the following cases: *Cheaney v. Brookfield*, 60 Mo. 53, citing text; *Marsh v. Fulton County*, 10 Wall. 676; *Thomas v. Richmond*, 12 Wall. 349; *Bridgeport v. Housatonic R. Co.*, 15 Conn. 475; *Burrill v. Boston*, 2 Clifford C. C. 590; *Martin v. Brooklyn*,

negotiable securities, the corporation may be estopped to avail itself of irregularities in the exercise of power conferred; but it may

Hill, 541; Norwich Overseers, &c. v. New Berlin, &c., 18 Johns. (N. Y.) 382; Donovan v. New York, 33 N. Y. 291; Saibrecht v. New Orleans, 12 La. An. 491; Clark v. Des Moines, 19 Iowa, 199, 209; Loker v. Brookline, 13 Pick. (Mass.) 343, 348; Philadelphia v. Flanigan, 447 Pa. St. 21; Paris Tp. Tr. v. Cherry, 8 Ohio St. 564; Hague v. Philadelphia, 48 Pa. St. 527; Albany v. Cunliff, 2 N. Y. 163, rev'g 2 Barb. 190; Cuyler v. Rochester, 12 Wend. (N. Y.) 165; Hodges v. Buffalo, 2 Denio (N. Y.), 110; Halstead v. New York, 3 N. Y. 430; Martin v. Brooklyn, 1 Hill (N. Y.), 541; Boom v. Utica, 2 Barb. (N. Y.) 104; Cornell v. Guilford, 1 Denio (N. Y.), 510; Boyland v. Mayor, &c., of New York, 1 Sandf. (N. Y.) 27; Dill v. Wareham, 7 Met. (Mass.) 438; Vincent v. Nantucket, 12 Cush. (Mass.) 103, 105, *per Merrick, J.*; Stetson v. Kempton, 13 Mass. 272; Parsons v. Goshen, 11 Pick. (Mass.) 396; Wood v. Lynn, 1 Allen (Mass.), 108; Spalding v. Lowell, 23 Pick. (Mass.) 71; Mitchell v. Rockland, 45 Me. 496; s. c. 41 Me. 363; Western College v. Cleveland, 12 Ohio, 375; Tippecanoe Co. Com'rs v. Cox, 6 Ind. 403; Congressional Township v. Weir, 9 Ind. 224; Smead v. Indianapolis, P. & C. R. Co., 11 Ind. 104; Brady v. New York, 20 N. Y. 312; Appleby v. New York, 15 How. Pr. (N. Y.) 428; Estep v. Keokuk County, 18 Iowa, 199, and cases cited by Cole, J.; Clark v. Polk County, 19 Iowa, 248; *supra*, § 777; *post*, § 1610; Perry v. Superior City, 23 Wis. 64; McDonald v. New York, 68 N. Y. 23; Maupin v. Franklin Co., 67 Mo. 327; Driftwood Valley Turnp. Co. v. Bartholomew County Com'rs, 72 Ind. 226; New Jersey & N. E. Tel. Co. v. Fire Com'rs, 34 N. J. Eq. 117; Laycock v. Baton Rouge, 35 La. An. 475; Lincoln v. Stockton, 75 Me. 141; Baltimore v. Eschbach, 18 Md. 276; Horn v. Baltimore, 30 Md. 218; Baltimore v. Musgrave, 48 Md. 272; Mealey v. Hagerstown, 92 Md. 741; Austin v. Coggeshall, 12 R. I. 329; McAleer v. Angell, 19 R. I. 688; Berlin Iron Bridge Co. v. San Antonio, 62 Fed. Rep. 882; Berwind v. Galveston & H. Inv't. Co., 20 Tex. Civ. App. 426; Earley's Appeal, 103 Pa. St. 273, where the purchase from a third party of a judgment against

a creditor of a city for the purpose of setting it off against his claim was held *ultra vires* and void. Salt Lake City v. Hollister, 118 U. S. 256, aff'g a. c. 3 Utah, 200; but, in this case the city, having engaged in the business of distilling liquors without power so to do, was held liable for the United States taxes thereon.

In Illinois, it is held that, where a municipal corporation enters into a contract which, although not expressly authorized by its charter, is not in violation of the charter or of any statute, and has thereby induced the other party to it to expend money in the performance of his part of it, the municipal corporation may be held liable. East St. Louis v. East St. Louis Gas L. & C. Co., 98 Ill. 415. *Supra*, § 772. Corporation may defend against unauthorized contract, although its assent is attached to it. Leavenworth v. Rankin, 2 Kan. 357; *ante*, § 363.

Mr. Justice Coultter, in delivering the opinion in Allegheny City v. McClurken, 14 Pa. St. 81, expresses the opinion that a municipal corporation may be liable for the contracts *ultra vires* of its officers, when these are publicly entered into with the knowledge of the people, and not objected to until after the rights of third persons have attached. Such a principle is believed to be both unsafe and unsound; the only true and safe view being that all persons are bound to take notice of the powers and authority which the law confers upon the officers of such corporations. See Loker v. Brookline, 13 Pick. (Mass.) 343. Any liability in such cases must, according to the present weight of authority, be independent of the contract, and cannot be asserted in an action based upon the contract to enforce its executory provisions. *Supra*, § 772. Auditing and paying part of a claim presented accompanied with a denial of liability for the residue, does not estop the corporation from contesting the residue, even though it be upon grounds which show the former allowance to have been improper. People v. New York Supervisors, 1 Hill (N. Y.), 362. In an action on a contract for doing work which a municipal corporation had the power to make, it is no defence that the city ought to have adopted some less ex-

always show that under no circumstances had the corporation *power* to make a contract of the character in question. This subject has been already referred to and is considered in another chapter.¹ The mere fact, however, that a city, in making a contract for a public improvement within its corporate powers, promises to make payment in negotiable bonds, which it has no power to issue, does not make the entire contract *ultra vires*; and therefore if work be done under such contract the city will be liable therefor.²

pensive means of accomplishing the purpose in view. *Livingston v. Pippin*, 31 Ala. 542.

The case of *State v. Buffalo*, 2 Hill (N. Y.), 434, determines an interesting point. Arms belonging to the State were loaned to the city authorities to suppress disorderly assemblages. The keeper of the arsenal had no right to make the loan, but it was made in good faith, and the bond of the city taken for their return on demand. The city being sued on this bond made the point that it was void for illegality; but the court regarded it rather as a *bona fide* excess of authority simply, and held that though the loan was unauthorized, the State might waive the tort committed on the property and seek a remedy upon the bond. See *infra*, § 792, and note.

The power of State building commissioners to discharge at their discretion the building superintendent whom they employ is vested in them for the public benefit, and they cannot be divested of that power by any contract entered into by them with the person so employed, where such contract is not *ratified* by the legislature. If the legislature, with full knowledge of the contract entered into by the commissioners with the plaintiff, and of all the facts relating thereto, recognizes and acts upon it, making appropriations to complete the building in question upon its assumed validity, that will constitute a *ratification* of the contract; but such ratification can be shown only by some action of both houses by statute or resolution. *Shipman v. State*, 43 Wis. 381. See *Index, Curative Acts*.

¹ *Ante*, § 323; *infra*, §§ 870 *et seq.* *Moore v. New York*, 73 N. Y. 238, approving text. See chapter on *Municipal Bonds*. *Index, Ultra Vires*.

² *Hitchcock v. Galveston*, 96 U. S. 341. In this case the city made a contract with the plaintiffs to pave streets. It had the power to make a valid contract for this purpose; but the city

having in the contract agreed to make payment for the work in negotiable city bonds payable at a future day, it was objected that, since no express power was given to issue bonds for this purpose, *the whole contract was therefore inoperative and void*; and the lower court so decided, and its ruling was supposed to be supported by the cases of *Tensas Parish Police Jury v. Britton*, 15 Wall. (U. S.) 566; and *Memphis v. Ray*, 19 Wall. (U. S.) 468. (See *ante*, §§ 278-290.) But the Supreme Court held otherwise, and in giving its judgment on this point, Mr. Justice *Strong* observed: "In the view which we shall take of the present case, it is perhaps not necessary to inquire whether those cases justify the court's conclusion; for if it were conceded that the city had no lawful authority to issue the bonds described in the ordinance and mentioned in the contract, it does not follow that the contract was wholly illegal and void, or that the plaintiffs have no rights under it. They are not suing upon the bonds, and it is not necessary to their success that they should assert the validity of those instruments. It is enough for them that the city council have power to enter into a contract for the improvement of the sidewalks; that such a contract was made with them; that under it they have proceeded to furnish materials and do work, as well as to assume liabilities; that the city has received and now enjoys the benefit of what they have done and furnished; that for these things the city promised to pay; and that after having received the benefit of the contract the city has broken it. It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law. The contract between the parties is in force so far as it is lawful. There may

§ 792 (458). **Contracts Ultra Vires or Invalid.** — Agreeably to the foregoing principles, a corporation cannot maintain an *action on a bond or a contract which is invalid*, as where a city, without authority, loaned its bonds to a private company, and took from it a penal bond, conditioned for the faithful application of the city bonds to payment for works which the city had no power to construct or assist in constructing.¹ The remedy in such case must be in some other form than in an action to enforce the contract. So, a contract by a city to waive its right to go on with the laying out of a street or not, as it might choose, is, it seems, against *public policy*, and it is void if it amounts to a surrender of its legislative discretion.² So,

be a difference between the case of an engagement made by a corporation to do an act expressly prohibited by its charter, or some other law, and a case of where legislative power to do the act has not been granted. Such a distinction is asserted in some decisions. But the present is not a case in which the issue of the bonds was prohibited by any statute. At most, the issue was unauthorized; at most, there was a defect of power. The promise to give bonds to the plaintiffs in payment of what they undertook to do was, therefore, at farthest, only *ultra vires*; and in such a case, though specific performance of an engagement to do a thing transgressive of its corporate power may not be enforced, the corporation can be held liable on its contract. Having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform. This was directly ruled in the *State Board of Agriculture v. The Citizens' Street Railway Co.*, 47 Ind. 407. There it was held that 'although there may be a defect of power in a corporation to make a contract, yet if a contract made by it is not in violation of its charter, or of any statute prohibiting it, and the corporation has by its promise induced a party relying on the promise and in execution of the contract to expend money, and perform his part thereof, the corporation is liable on the contract.' See also substantially to the same effect, *Allegheny City v. McClurkan*, 14 Pa. St. 81; and, more or less in point, *Maher v. Chicago*, 38 Ill. 266; *Oneida Bank v. Ontario Bank*, 21 N. Y. 490; *Argenti v. San Francisco*, 16 Cal. 255; *Silver Lake*

Bank v. North, 4 Johns. (N. Y.) Ch. 373." This case is approved and the principle followed and applied in *Houston & T. C. R. Co. v. Texas*, 177 U. S. 66, 91. But *quere* as to the liability in such case being on the contract. See *ante*, §§ 237-239, 772; *post*, § 793, note. A charter provision that after a pavement has been laid at the expense of the abutter, "the city shall take charge of and keep the same in repair, without further assessment," is *not* a contract exempting the owners from future assessments. *State v. Newark*, 37 N. J. L. 415, rev'g s. c. 35 N. J. L. 168.

¹ *Montgomery v. Montgomery & W. Plank Road Co.*, 31 Ala. 76. See *Wetumpka v. Winter*, 29 Ala. 651; *Halstead v. New York*, 3 N. Y. 430; a. c. 5 Barb. 218; *Bridgeport v. Housatonic R. Co.*, 15 Conn. 475. But see *State v. Buffalo*, 2 Hill (N. Y.), 434, cited *supra* in note to § 791. Where a city having without proper authority guaranteed the payment of railroad bonds which were secured by a trust deed, and become the owner of the bonds from having paid them at maturity, it was held that, while the city might have successfully contested its liability on the bonds, yet the want of authority to guarantee the bonds did not affect the lien created by the deed in its favor as against other creditors of the railroad company. *Hay v. Alexandria & W. R. Co.*, 20 Fed. Rep. 15. *Infra*, § 814, as to suretyship.

² *Martin v. Brooklyn*, 1 Hill (N. Y.), 545; *ante*, § 245. As to *public policy*, see *Ohio Life Ins. & T. Co. v. Merchants Ins. & T. Co.*, 11 Humph. (Tenn.) 1; *ante*, chap. xvi.; *Indianapolis v. Indianapolis Gas L. & C. Co.*, 66 Ind. 396, citing text. Index, *Powers and Duties. Corrupt agreements with aldermen*, to

a promise to pay a public corporation, or its agents, a premium *for doing their duty is illegal and void*; and a contract will not be sustained which tends to restrain or control the unbiased judgment of public officers. But a *promise by individuals to pay a portion of the expenses of public improvements* does not necessarily fall within this principle, and such a promise is not void as being against public policy; and if the promisors have a peculiar and local interest in the improvement, their promise is not void for want of consideration, and may be enforced against them.¹ So, on the other hand, a party making with a city a contract which is *ultra vires* is *not estopped*, when sued thereon by the corporation for damages, to set up its want of authority to make it.²

influence them to a particular course in the discharge of official duties, are, of course, void, no matter to whom executed. *Cook v. Shipman*, 24 Ill. 614.

Contracts with *municipal officers*. *Id.*, §§ 522, 541, 772.

¹ *Townsend v. Hoyle*, 20 Conn. 1. This case holds that a promise by the defendants to pay the city the expense of laying a certain street was binding; and *Ellsworth, J.*, in delivering the opinion, said: "We cannot assent to the proposition that a promise by individuals to pay a part of the expenses of public improvements, ordered by public authority, is, of course, illegal and void. The amount or cost may properly enough enter into the question of expediency or necessity. If made in one way or in one place, it will be much better for the public, though more expensive; but individuals specially benefited stand ready, by giving their land, their money, or their labor, to meet the extra expense. Will these promises be void, as being without consideration or against public policy? We think not." See chapter on Streets, *post*; *Springfield v. Harris*, 107 Mass. 532. An arrangement or combination among the parties applying, whereby a few individuals, desirous of causing paving and grading to be done, *procured the signatures of others to the application by paying them a consideration therefor*, directly or indirectly, is a fraud in law and contrary to public policy. *Howard v. First Indep. Church*, 18 Md. 451. If executory, such an agreement cannot be enforced. *Maguire v. Smock*, 42 Ind. 1. A written promise to pay into the county treasury a certain sum of money, upon the condition that the county commissioners, who had re-

moved the county court-house from the public square, and were building a new court-house elsewhere, would remove it back to said square, which offer was accepted by said commissioners, who entered on their records an order for such relocation, was not void as against public policy, though the commissioners were not expressly authorized by statute to receive such donations. *Stilson v. Lawrence Co.*, 52 Ind. 213; *State v. Johnson's Admr.*, 52 Ind. 197; *post*, § 1032.

² *Montgomery v. Montgomery & W. Pl. R. Co.*, 31 Ala. 76; *Penn., D. & M. Steam Nav. Co. v. Dandridge*, 8 Gill & J. (Md.) 248; *Hodges v. Buffalo*, 2 Denio (N. Y.), 110. If a corporation has received money in advance on a contract void on account of want of authority to make it, and afterwards refuses to fulfil the contract, the party advancing the money may, without demand, recover it back in an action for money had and received. *Dill v. Wareham*, 1 Met. (Mass.) 438. In this case the corporate defendant undertook, without authority, to transfer to the plaintiff the right of taking oysters within its limits; contract held wholly void. See also *McCracken v. San Francisco*, 16 Cal. 591; *infra*, §§ 793, 794; compare *Herzo v. San Francisco*, 33 Cal. 134. The contract of agents within the scope of corporate power may be ratified, or a contract implied from the enjoyment of the benefit of the consideration. *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453, opinion of *Field, J.*; *Backman v. Charlestown*, 42 N. H. 125; see *Bissell v. Michigan S. & N. I. R. Co.*, 22 N. Y. 258; *post*, §§ 1610-1615.

§ 793 (459). **Implied Contracts.**—The present state of the authorities clearly justifies the opinion of Chancellor Kent, that corporations may be bound by *implied contracts* within the scope of their powers, to be deduced by inference from authorized corporate acts, without either a vote, or deed, or writing.¹ This doctrine is

¹ 2 Kent Com. 291; Bank of Columbia v. Patterson, 7 Cranch, 299 (a leading American case); Mott v. Hicks, 1 Cow. (N. Y.) 513; Dunn v. St. Andrews Church Rector, 14 Johns. (N. Y.) 118; Bank of U. S. v. Dandridge, 12 Wheat. (U. S.) 64; Perkins v. Wash. Ins. Co., 4 Cow. (N. Y.) 645; Davenport v. Peoria M. & F. Insurance Co., 17 Iowa, 276, and cases cited by Cole, J.; American Insurance Co. v. Oakley, 9 Paige (N. Y.), 496; Magill v. Kauffman, 4 Serg. & Rawle (Pa.), 317; Randall v. Van Vechten, 19 Johns. (N. Y.) 60; Wayne County v. Detroit, 17 Mich. 390; Lesley v. White, 1 Speers (S. Car.) Law, 31; Canaan v. Derush, 47 N. H. 211; Lebanon v. Heath, *Ib.* 353; Adams v. Farnsworth, 15 Gray (Mass.), 423; Shrewsbury v. Brown, 25 Vt. 197; Gassett v. Andover, *Ib.* 342; Peterson v. Mayor, &c., of New York, 17 N. Y. 449, 453; Danforth v. Schoharie Turnpike Co., 12 Johns. (N. Y.) 227; Angell & Ames, § 237; Maher v. Chicago, 38 Ill. 266; Frankfort Bridge Co. v. Frankfort, 18 B. Mon. (Ky.) 41; Bryan v. Page, 51 Tex. 532; State Board v. Aberdeen, 56 Miss. 518, approving text; Taylor v. Lambertville, 43 N. J. Eq. 107 (for brief statement of facts of this case, see § 819, note); Brush El., &c. Co. v. Montgomery, 114 Ala. 433, quoting text; Brown v. Board of Education of Pomona, 103 Cal. 531, quoting text; Michigan City v. Leeds, 24 Ind. App. 271, citing text; Bodewig v. Port Huron, 141 Mich. 564; Central Bitulithic Pav. Co. v. Mt. Clemens, 143 Mich. 259; Taylor v. Lambertville, 43 N. J. Eq. 107, citing text; Wentink v. Passaic County, 66 N. J. L. 65, citing text; Davies v. Mayor, &c. of New York, 83 N. Y. 207; s. c. 93 N. Y. 250; Albany City Nat. Bank v. Albany, 92 N. Y. 363; Fleming v. Suspension Bridge, 92 N. Y. 368; Poillon v. Brooklyn, 101 N. Y. 132; Kramrath v. Albany, 127 N. Y. 575, citing text; Port Jervis Water Co. v. Port Jervis, 151 N. Y. 111, aff'd 71 Hun (N. Y.), 66; Kent v. North Tarrytown, 50 N. Y. App. Div. 502; North River El. Co. v. New York, 48 N. Y. App. Div. 14,

citing text; Lines v. Otego, 91 N. Y. Supp. 785; San Antonio v. French, 80 Tex. 575; Rowell v. School District, 59 Vt. 658; Hardwick v. Wolcott School Dist., 78 Vt. 23. Further see Index, *Assumpsit*; *Contracts*; *Ultra Vires*; *supra*, § 784; Broom, Commentaries on Com. Law, 561-570, where the English cases are collected. The reader will be interested in the letter of Mr. Justice Story to Mr. Justice Coleridge on the subject of corporate liability for the parol contracts, *infra vires*, of the authorized agents of the corporation. 2 Story's Life and Letters, 335, 337. He there adds, what is now settled law, "that all duties imposed upon a corporation by law, and all services performed at its request, raise implied promises binding on the corporation, if, of course, no statute be thereby infringed." *Ib.*

Illinois Doctrine. While it has been frequently decided that where a municipal corporation has received the benefit of labor or materials without any special contract to pay for them, the law implies a promise to pay for what has been received and enjoyed by the corporation, this doctrine has been confined to instances where the corporation *has had the power* to contract in a proper manner for the labor and material thus received, although it may not have followed the proper manner. Maher v. Chicago, 38 Ill. 266; Badger v. Inlet Drainage Co., 141 Ill. 540; East St. Louis v. East St. Louis Gas, &c. Co., 98 Ill. 415; Harvey v. Wilson, 78 Ill. App. 544; Keith v. Du Quoin, 89 Ill. App. 36. In other cases where labor or materials have been furnished to a municipal corporation in a manner not authorized and where the municipality has had the power to contract for the same in a different manner, the municipality has been held upon the same doctrine of *estoppel*, but differently expressed, as upon the ground that any positive acts by municipal officers which may have induced the action of the adverse party, and when it would be inequitable to permit the corporation to stultify itself by

applicable equally to public and private corporations, but in applying it, however, care must be taken not to violate other principles of law.¹ Thus it is obvious that an implied promise cannot be raised against a corporation, where by its charter it can only contract in a prescribed way, except it be a promise for money received or property appropriated under the contract.² So, where the corporation orders local street improvements to be made, for which the abutters are the parties ultimately liable, and which by the charter must be made in a prescribed mode, if made without any contract or a valid

retracting what its officers have done, may work an estoppel. *Sexton v. Chicago*, 107 Ill. 323; *Chicago v. Sexton*, 115 Ill. 230. But the decisions are all grounded upon the same doctrine of estoppel as their foundation, and in each will be found, in addition to the element of a misleading of the one party by some act of an officer of the other, the further element of a benefit received and enjoyed by the corporation. Where, therefore, there is no showing that the city received any benefit, it is not liable to respond on a *quantum meruit*; and where a sidewalk has been ordered to be built without the authority of the city but through the mistake of one of the city's employees, the city is not liable where it is not shown that it required any sidewalk where it was placed. *Chicago v. Beck Lumber Co.*, 93 Ill. App. 70.

¹ *Peterson v. Mayor, &c. of New York*, 17 N. Y. 449, 453; *Poultney v. Wells*, 1 Aiken (Vt.), 180. Where a city contracted with a railroad company to do certain work, and the company employed persons to do it, there is no implied contract on the part of the city to pay them, although the city saw them at work. *Alton v. Mulledy*, 21 Ill. 76. When contracts can only be proved by the record; and when there is no implication as to contracts; and when they must appear by the records of the corporate proceedings. See *Crump v. Colfax Co. Supervisors*, 52 Miss. 107; *Huntington County Com'rs v. Boyle*, 9 Ind. 296; *Warwick v. Butterworth*, 17 Ind. 129; *St. Louis v. Cleland*, 4 Mo. 84; *Alton v. Mulledy*, 21 Ill. 76; *San Antonio v. Gould*, 34 Tex. 76; *People v. Fulton Co.*, 14 Barb. (N. Y.) 56; *Bryan v. Page*, 51 Tex. 532; *Gilbert v. New Haven*, 40 Conn. 102.

That an unauthorized contract, however advantageous, does not bind the corporation, see *Loker v. Brookline*, 13

Pick. (Mass.) 343; *Jones v. Lancaster*, 4 *Pick. (Mass.)* 149; *Wood v. Waterville*, 5 *Mass.* 294.

A contract was implied on the part of a city, which was bound to support its paupers, and which had refused to pay a person who had furnished a pauper with necessaries. *Seagraves v. Alton*, 13 Ill. 371. Here it will be noticed that there was an express refusal on the part of the city to support the pauper, and yet a promise was implied. This implication is a pure fiction to support what the court regarded as a just claim. A contract made by one member of a committee or county board for services which are authorized to be obtained is not obligatory on the municipality. The power is vested in the whole body, and no one member can bind the corporation. *Bentley v. Chicago Com'rs*, 25 *Minn.* 259.

² *McSpedon v. Mayor of New York*, 7 *Bosw. (N. Y.)* 601; *McCracken v. San Francisco*, 16 *Cal.* 591; *Pimental v. San Francisco*, 21 *Cal.* 351; *Dickinson v. Poughkeepsie*, 75 *N. Y.* 65; *Richardson v. County of Grant*, 27 *Fed. Rep.* 495; *Denver v. Hindry*, 40 *Colo.* 42; 90 *Pac. Rep.* 1028; *Jersey City Supply Co. v. Jersey City*, 71 *N. J. L.* 631; *Agawam Nat'l Bank v. South Hadley*, 128 *Mass.* 503; *Kansas City Sewer Pipe Co. v. Thompson*, 120 *Mo.* 218; *Brady v. Mayor, &c. of New York*, 20 *N. Y.* 312; *Donovan v. Mayor, &c. of New York*, 33 *N. Y.* 291; *McDonald v. Mayor, &c. of New York*, 68 *N. Y.* 23; *Parr v. Greenbush*, 72 *N. Y.* 463; *Smith v. Newburgh*, 77 *N. Y.* 130; *Lyddy v. Long Island City*, 104 *N. Y.* 218; *Kramrath v. Albany*, 127 *N. Y.* 575; *Ft. Edward v. Fish*, 156 *N. Y.* 363; *Noel v. San Antonio*, 11 *Tex. Civ. App.* 580; *Appleton Water Works Co. v. Appleton*, 132 *Wis.* 563; 113 *N. W. Rep.* 44.

one, the doctrine of implied liability does not apply in favor of the contractor, unless, indeed, the corporation has collected the amount from the adjoining owners and has it in its treasury.¹ But in order to establish the liability of the city upon an implied contract, it is necessary to show that the work was done or the services rendered under such circumstances as to raise an implication of a promise by some person duly authorized to represent the municipality. A municipal corporation does not become liable for work and labor performed or services rendered by a *mere volunteer* without any request, either express or implied.²

¹ *Argenti v. San Francisco*, 16 Cal. 255, opinion of *Field*, C. J. See also *Green River Asphalt Co. v. St. Louis*, 188 Mo. 576. As to the liability of a city when the contract is, by its terms or by statute, payable from the proceeds of an assessment, see *post*, § 827. Where a contractor has entered into a contract in good faith, relying upon the regularity of the proceedings of the common council, the city, having received the benefit of the performance, is estopped from questioning the regularity in that regard. *Moore v. New York*, 73 N. Y. 238. If the members of the common council of a city, in passing an ordinance and letting a contract for the improvement of a street, act in good faith, under a misapprehension, they and the contractor, as well as the adjacent owner of real estate, believing the street to be within the corporate limits of the city, the contractor having like knowledge with the members of the council, they cannot be held liable for the cost of such improvement, though the place where the same is made is not within the corporate limits. *Newman v. Sylvester*, 42 Ind. 106.

It is the general doctrine that corporations possess the powers expressly conferred by law, and such implied powers as are necessary to enable them to exercise the powers expressly granted, and no others: yet, although there may be a defect of power in a corporation to make a contract, if a contract made by it is not in violation of the charter of the corporation or any statute prohibiting it, and the corporation by its promise induced a party, relying upon such promise and in execution of the contract, to expend money and perform his part of the contract, the corporation is liable on the contract. *State Board of Agriculture v. Citizens' St. R.*

Co., 47 Ind. 407. See on this point and as to this case, *supra*, § 791, note.

² *Jeffersonville v. Ferryboat*, 35 Ind. 19; *Baltimore v. Poultney*, 25 Md. 18; *Lydecker v. Nyack*, 6 N. Y. App. Div. 90; *Haughwout v. Mayor, &c. of New York*, 2 Keyes (N. Y.), 419; *Dolloff v. Ayer*, 162 Mass. 569. "No person can make himself a creditor of another by voluntarily discharging a duty which belongs to that other." *Strong, J.*, in *Salsbury v. Philadelphia*, 44 Pa. St. 303. In *Seibrecht v. New Orleans*, 12 La. An. 491, carpets were furnished for certain corporation courts, by order of the clerks or judges, but without any authority of the common council, and were worn out before the plaintiff presented his bill. It was contended that the city was liable *ex æquo et bono*, having used and not returned the carpets; but it did not appear that the council knew that they had been purchased for the city and were being used in its buildings. The court denied the liability, saying that "the only safe rule is to hold that the city cannot be bound for any contract made without its authorization, expressed by a resolution of the common council." Where goods have been requisitioned by one employee of a municipal corporation, and accepted by another employee without authority, and have been used by the corporation, but it is not shown that the board having control of the matter had any knowledge of such acceptance and use, no implied contract will arise on the part of the corporation to pay for the goods. To hold otherwise would enable employees who have not been authorized to purchase goods for the city's use nor empowered to bind the city to pay for the same, to impose a liability on the city without the determination and judgment of the board

§ 794 (460). *Same Subject.* — “The doctrine of *implied municipal liability*,” says Mr. Chief Justice Field, in a case where the subject underwent very thorough examination, “applies to cases where money or other property of a party is received under such circumstances that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same. If the city obtain money of another by mistake, or without authority of law, it is her duty to refund it, — not from any contract entered into by her on the subject, but from the general obligation to do justice which binds all persons, whether natural or artificial.¹ If the city obtain other property which does not belong to her, it is her duty to restore it; or if used by her, to render an equivalent to the true owner, from the like general obligation: the law, which always intends justice, implies a promise. In reference to *money or other property*, it is not difficult to determine in any particular case whether a liability with respect to the same has attached to the city. The money must have gone into her treasury, or been appropriated by her;² and when it is property other than money, it must have been used by her, or be under her control. But with reference to *services rendered*, the case is different. Their acceptance must be evidenced by ordinance [or express corporate action] to that effect. If not originally authorized, no liability can attach upon any ground of implied contract. The acceptance, upon which alone the obligation to pay could arise, would be wanting.”

§ 795 (461). *Same Subject.* — “As a *general rule*, undoubtedly, a city corporation is *only liable upon express contracts*, authorized

to whom that function has been committed. It was also questioned whether an implied contract would be established by proof of knowledge on the part of the board of such acceptance and use. *New Jersey Car Spring & Rubber Co. v. Jersey City*, 64 N. J. L. 544.

¹ See *Dowell v. Portland*, 13 Oreg. 248. Where a contract, fair and reasonable in its terms and within the scope of the powers conferred upon the council, was known to the members of the council, who permitted it to go unrescinded and unchallenged, and allowed the other party to continue the work through several months to completion in the belief that the contract was valid, and with the unquestionable result of large and permanent advantage to the municipality, liability arises by implication of law and pay-

ment must be made according to the benefits received. The law implies a promise, although by reason of irregularity in the execution, the contract was invalid. *Land Co. v. Jellico*, 103 Tenn. 320, citing text. See also *Baxter Springs v. Baxter Springs Light & P. Co.*, 64 Kan. 591.

² The power of the *Massachusetts towns* to appropriate money is derived wholly from the statutes (*ante*, § 42), and when they are *confined to a particular mode of creating a debt, the mode is a limitation of the power*. One, therefore, who loans money to a town treasurer in a manner not authorized by statute has no right of action against the town to recover it, although the money was used in paying the debts of the town. *Agawam Nat. Bank v. South Hadley*, 128 Mass. 503.

by ordinance [or other due corporate proceedings]. The *exceptions relate to liabilities* from the use of money or other property which does not belong to her, or to liabilities springing from the neglect of duties imposed by the charter, from which injuries to parties are produced. There are limitations even to these exceptions in many instances, as where property or money is received in disregard of positive prohibitions; as, for example, the city would not be liable for moneys received upon the issuance of bills of credit, — as this would be, in effect, to support a proceeding in direct contravention of the inhibition of the charter.”¹ But it may in a proper case make a new contract purging a former contract of its illegality.² Nor is a city liable for money received for notes issued by it to circulate as money, in violation of an express statute and the public policy of the State.³

¹ *Per Field, C. J.*, in *Argenti v. San Francisco*, 16 Cal. 255. Where statute provisions enacted to prevent the making of certain contracts are disregarded and a contract made without observing them, the contractor cannot recover the value of articles supplied under the contract upon an implied liability; in such a case no liability can be implied. *McDonald v. New York*, 68 N. Y. 23; commenting on *Nelson v. New York*, 63 N. Y. 535; and *Argenti v. San Francisco*, 16 Cal. 255, *supra*.

“The law,” says an eminent judge, “never implies a promise to pay unless some duty creates such an obligation, and more especially it never implies a promise to do an act contrary to duty or contrary to law. Assumpsit may be maintained against a municipal corporation in certain cases upon an implied promise, but the better opinion is that a promise to pay can never be implied in a case where the corporation possesses no power to contract.” *Per Clifford, J.*, in *Burrill v. Boston*, 2 Clifford C. C. 590, 596. The subject is further expounded by the same learned justice in his opinion in *Collector v. Hubbard*, 12 Wall 1, 12. See also *Curtis v. Fiedler*, 2 Black (U. S.), 461; *Murphy v. Louisville*, 9 Bush (Ky.), 189.

See on subject of implied liability, the judgment of the United States Supreme Court in *Louisiana v. Wood*, 102 U. S. 294; see §§ 793 and 1615, where the subject is further considered; and see *Litchfield v. Ballou*, 114 U. S. 190. *Morawetz on Corp.* (2d ed.) §§ 689–706, 714–724, collects and reviews the authorities as to the rights and obliga-

tions arising out of the performance or part performance of contracts in excess of corporate power. Further see *Index. Assumpsit*.

² *Little Rock v. Merch. Nat. Bank*, 98 U. S. 308, quoted *supra*. § 782, note.

³ *Thomas v. Richmond*, 12 Wall. 349. The principles upon which the decision rests are admirably stated in the opinion of Mr. Justice *Bradley*. *Cheaney v. Brookfield*, 60 Mo. 53, citing text: *State Board of Education v. Abernethy*, 56 Miss. 518 (approving text); *Brown v. Belleville*, 30 Upper Can. Q. B. 373; *Wentworth v. Hamilton*, 34 Upper Can. Q. B. 585; *Brown v. Lindsey*, 50 Upper Can. Q. B. 509; *Parsons v. Monmouth*, 70 Me. 262, approving text. *Supra*, § 782; *post*, § 1615.

In *Cheaney v. Brookfield*, 60 Mo. 53, it was held that a municipal corporation is not liable upon a warrant issued to a bank-note company in payment of a debt to the company for engraving and printing on bank-note paper notes payable to bearer, to be put into circulation by the corporation as money without authority of law. The court held that there could be no implied assumpsit in such a case, and distinguished it from *Allegheny City v. McClurkan*, 14 Pa. St. 81, and denied *Underwood v. Newport Lyceum*, 5 B. Mon. (Ky.) 130.

Illustrations of implied liability. — City is liable for gas furnished to it with knowledge of the council, though no ordinance or resolution was passed authorizing it to be furnished. *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453, 466, opinion of *Field, J.* If

§ 796 (462). *Contracts Ultra Vires; Assumpsit.* — Where a city, without authority of law, issued its bonds in exchange for the bonds of a railroad company, which remain wholly unpaid, the city is not liable on its bonds. If in such case value has been received by the city, the remedy, if any exists under the special circumstances, must be for the money or property received without consideration.¹

a city sells its *void* bonds, there is an implied assumpsit to repay the purchase-money. *Paul v. Kenosha*, 22 Wis. 266. See and compare *Litchfield v. Ballou*, 114 U. S. 190. Assumpsit held to lie against a city which had availed itself of the property and services of an individual in the care of the indigent sick. *Nashville v. Toney*, 10 Lea, 643. Where a bridge corporation was requested by the city authorities to communicate to them the terms upon which the city might attach its water-pipes to the bridge, to carry the water from one side of the river to the other, which the bridge company answered, fixing a sum, upon which the city council took no action, but proceeded to extend the water-works and used the bridge, the court held the city was liable. *Bridge Co. v. Frankfort*, 18 B. Mon. (Ky.) 41. Broom Commentaries on Com. Law, 567, where the English cases are cited in which corporations have been held *liable by reason of enjoying the benefits* resulting from particular contracts. See *McDonald v. New York*, 68 N. Y. 23; *Folger, J.*, suggests instances of implied liability; *post*, §§ 1615, 1616.

Chief Justice Harrison, in his excellent "Municipal Manual for Upper Canada," has digested the decisions in the Province on the subject of the power of corporations to contract. He says (5th ed., p. 11), "It is a principle applicable to all corporations that they must contract under seal. To this principle there are some exceptions. *Albert Cheese Co. v. Leeming*, 31 Upper Can. C. P. 272. One of some moment has been created with regard to *municipal corporations*. It is that such a corporation is liable to be sued in an action of debt on simple contract for the price of goods furnished, or labor done at their request and accepted by them. *Fetterly v. Municipality of Russell and Cambridge*, 14 Upper Can. Q. B. 433. Though in such a case there be no contract under seal, the law implies an undertaking by a corporation to pay for labor and materials employed in

their service, and of which they have accepted and are enjoying the benefit, provided the purpose for which the labor and materials have been applied is one clearly within the legitimate object of their charter. *Bartlett v. Amherstberg*, 14 Upper Can. Q. B. 152; *Fetterly v. Russell and Cambridge*, 14 Upper Can. Q. B. 433; *Pim v. Ontario*, 9 Upper Can. C. P. 304; *Perry v. Ottawa*, 23 Upper Can. Q. B. 391; *Brown v. Belleville*, 30 Upper Can. Q. B. 373; *Wentworth v. Hamilton*, 34 Upper Can. Q. B. 585; *Brown v. Lindsay*, 35 *ib.* 509. The exception, however, does not extend to executory contracts, such as work, &c., to be done, but is confined to work in fact done and accepted. *McLean v. Brantford*, 16 Upper Can. Q. B. 347; *Wingate v. Enniskillen Oil Refining Co.*, 14 Upper Can. C. P. 379; *Kidderminster v. Hardwick*, L. R. 9 Exch. 13; *Austin v. Bethnal Green Guardians, &c.*, L. R. 9 C. P. 91; *Houck v. Whitney*, 14 Grant, 671." See *Biggar's Mun. Manual* (Canada, 1900), 42.

¹ *Thomas v. Port Hudson*, 27 Mich. 320. In this case *Cooley, J.*, observes: "A municipal corporation has no general authority to exchange promises with other corporations or persons; its contracts, to be valid, must be within the scope of the authority conferred upon it by law, and for municipal purposes. And if, under pretence of law, its officers in its name obtain money, property, or rights in action which equitably belong to another, the fact may entitle the party to the proper remedy, but it cannot make good bonds issued in violation of law, unless it is to be held [which is not the law] that the power of municipal corporations to make legal promises is co-extensive with that of individuals, and that any contracts they may make are valid where it can be said that anything of value was given or inconvenience submitted to in exchange."

If the consideration received under an *ultra vires* contract can be restored, equity will not relieve a municipal

§ 797 (463). **Ratification of Unauthorized Contracts.** — A municipal corporation *may ratify* the unauthorized acts and contracts of its agents or officers, which are *within the scope of the corporate powers, but not otherwise*. Ratification may frequently be inferred from acquiescence after knowledge of all the material facts, or from acts inconsistent with any other supposition. The same principle is applicable to corporations as to individuals.¹ But a subsequent ratifica-

corporation from the contract without providing for its restoration. *Turner v. Cruzen*, 70 Iowa, 202; *Coker v. Atlanta, K. & N. R. Co.*, 123 Ga. 483, 492, citing text. See *Litchfield v. Ballou*, 114 U. S. 190, where bonds were issued by a city in excess of a constitutional limitation, and the holder was adjudged to have no remedy against the city. *Post*, § 914.

¹ *People v. Swift*, 31 Cal. 26; *Bleu v. Bear River Co.*, 20 Cal. 602; *Peterson v. Mayor, &c. of New York*, 17 N. Y. 449, 453, and authorities cited, rev'g s. c. 4 E. D. Smith, 413; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; *Hoyt v. Thompson*, 19 N. Y. 207, 218; *Clarke v. Lyon Co.*, 8 Nev. 181; *Howe v. Keeler*, 27 Conn. 538; *Emerson v. Newberry*, 13 Pick. (Mass.) 377; *Hodges v. Buffalo*, 2 Denio (N. Y.), 110; 5 Denio (N. Y.), 567; *People v. Flagg*, 17 N. Y. 584; s. c. 16 How. (N. Y.) Pr. 36; *Brady v. Mayor, &c. of New York*, 20 N. Y. 312; aff'g s. c. 2 Bosw. (N. Y.) 173; *Delafield v. State of Illinois*, 2 Hill (N. Y.), 159, 176; s. c. 8 Paige, 531, and 26 Wend. (N. Y.) 192; *Mills v. Gleason*, 11 Wis. 470; *Dubuque Fern. College v. Dubuque*, 13 Iowa, 555; *Merrick v. Burl. & W. Plank Road Co.*, 11 Iowa, 74, *per Wright, J.*; *Detroit v. Jackson*, 1 Doug. (Mich.) 106; *Crawshaw v. Roxbury*, 7 Gray (Mass.), 374; *Burrill v. Boston*, 2 Clifford C. C. 590; *Albany National Bank v. Albany*, 92 N. Y. 363; *Philadelphia v. Hays*, 93 Pa. St. 72; *Galveston v. Morton*, 58 Tex. 409; *Strong v. District of Columbia*, 1 Mackey, 265; *Durango v. Pennsylvania*, 8 Colo. 257; *Bruce v. Dickey*, 116 Ill. 527; *Morris County v. Hinchman*, 31 Kan. 729; *Lincoln v. Stockton*, 75 Me. 141; *Davis v. Jackson*, 61 Mich. 530; *Schmidt v. County of Stearns*, 34 Minn. 112; *Kinsley v. Norris*, 60 N. H. 131 (a vote authorizing an attorney to compromise or settle suits held a ratification of the suits to commence them); *Moore*

Shreveport, 108 U. S. 282 (a city cannot ratify a subscription to a railroad, which it had no power to make, unless authorized to do so by statute). *Later illustrative cases*: *Findlay v. Perts*, 66 Fed. Rep. 427; *Hill v. Indianapolis*, 92 Fed. Rep. 467; *Denver v. Webber*, 15 Colo. App. 511; *Bruce v. Dickey*, 116 Ill. 527; *Frederick v. People*, 83 Ill. App. 89; *Chicago v. McKechney*, 91 Ill. App. 442; *Cooper v. Cedar Rapids*, 112 Iowa, 367 (acceptance of unauthorized sewer); *Mound City v. Snoddy*, 53 Kan. 126; *Ilsenberg v. Salvage*, 103 Ky. 260; *Roberts v. Cambridge*, 164 Mass. 176; *May v. Gloucester*, 174 Mass. 583; *Nelson v. Georgetown*, 190 Mass. 225; *Clapp v. Titus*, 138 Mich. 41; *Wheat v. Van-tine*, 149 Mich. 314; *Swenson v. Birch Island*, 93 Minn. 336; *State v. Cowgill & Hill Mill Co.*, 156 Mo. 620; *Devens v. Howard*, 88 Mo. App. 253; *Boulton v. Kolkmeier*, 97 Mo. App. 530; *Hett v. Portsmouth*, 73 N. H. 334; *North River Electric Light & Power Co. v. New York*, 48 N. Y. App. Div. 14; *Kent v. North Tarrytown*, 50 N. Y. App. Div. 502; *Lines v. Otego*, 91 N. Y. Supp. 785; *Mount Vernon v. State*, 71 Ohio St. 428; *Harrisburg v. Shepler*, 190 Pa. 374; *Brighton Road, Inc. v. Pa.*, 521; *In re Millvale Borough No. 2*, 14 Pa. County Ct. Rep. 82; *Sandy Lake v. Sandy Lake, &c. Gas Co.*, 16 Pa. Super. Ct. 234; *Arnott v. Spokane*, 6 Wash. 442; *Koch v. Milwaukee*, 89 Wis. 220, citing text. Further see *Index, Curative Acts*. *Mere silence on the part of a town will not create ratification*. *Otis v. Stockton*, 76 Me. 506; *post*, § 1383, note.

A municipal corporation may ratify unauthorized expenditures, not ultra vires, which they deem beneficial to it, and such ratification, as in the case of natural persons, is equivalent to previous authority. *Backman v. Charlestown*, 42 N. H. 125; *Harris v. Canaan School District*, 28 N. H. 58; *Wilson v. Chester School District*, 32 N. H. 118; *Keyser*

tion cannot make valid an unlawful act without the scope of corporate authority. An absolute excess of authority by the officers of a corporation, in violation of law, cannot be upheld; and where the officers of such a body fail substantially to pursue the material requirements of a statutory enactment under which they are acting, the corporation is not bound. In such cases the statute must be strictly followed, and a person who deals with a municipal body is obliged to see that its charter has been fully complied with: when this is not done, no subsequent act of the corporation can make an *ultra vires* contract effective.¹ The employment, however, by a

v. Sunapee Charitable School District, 35 N. H. 477; *Episcopal Society v. Dedham Episcopal Church*, 1 Pick. (Mass.) 372; *Bank of Columbia v. Patterson*, 7 Cranch, 299; *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60; *Trott v. Warren*, 11 Me. 227; *Topsham v. Rogers*, 42 Vt. 199; *People v. Swift*, 31 Cal. 26. In *DeGrave v. Monmouth*, 4 Carr. & P. 411, it was held that the examination of weights and measures, which had been ordered by a mayor *de facto*, and which were the subject of the controverted contract, at a meeting of the corporation, and the subsequent use of some of them, recognized the contract for their purchase and made the corporation liable to pay for them. As to ratification of contracts for *local improvements* when not primarily a charge on the city, see *Murphy v. Louisville*, 9 Bush (Ky.), 189; *post*, § 826, note; *infra*, §§ 799, 1413; 4 Broom Commentaries on Com. Law, 567. A vote ratifying an unauthorized contract cannot be rescinded at a subsequent meeting. *Brown v. Winterport*, 79 Me. 305.

Ratification, in order to be binding upon a municipal corporation, must be of such a nature as would have been binding upon the corporation in the first place. Thus, where an ordinance was in the first place required to authorize a contract, the contract can only be ratified by an ordinance. *Bryan v. Page*, 51 Tex. 532; *Citizens' Bank v. Spencer*, 126 Iowa, 101; *Mulligan v. Lexington*, 126 Mo. App. 715; *Paul v. Seattle*, 40 Wash. 294; *Arnott v. Spokane*, 6 Wash. 442. But where there is neither statute nor ordinance prescribing any particular method or form of procedure to be resorted to in entering into a contract, adoption of a resolution or any other corporate act which clearly manifests the intention

to ratify constitutes a complete ratification. *Board of Education v. DeKay*, 148 U. S. 591; *Illinois Trust & Savings Bank v. Arkansas City*, 76 Fed. Rep. 271; *McCracken v. San Francisco*, 16 Cal. 591; *Zottman v. San Francisco*, 20 Cal. 96; *People v. Swift*, 31 Cal. 26; *Durango v. Pennington*, 8 Colo. 257; *Denver v. Webber*, 15 Colo. App. 511; *State v. Cowgill, &c. Milling Co.*, 156 Mo. 620; *Kroffe v. Springfield*, 86 Mo. App. 530; *Unionville v. Martin*, 95 Mo. App. 28; *Cory v. Freeholders of Somerset*, 44 N. J. L. 445; *Green Bay v. Brauns*, 50 Wis. 204. "Where formalities prescribed, or conditions imposed, are not intended as a restriction upon the corporate powers, a binding ratification may be made in a different mode." *Gutta Percha & Rubber Mfg. Co. v. Ogalalla*, 40 Neb. 775. An action by a city to enforce an assessment to meet an obligation under a contract was held to amount to a ratification of the contract in *Harrisburg v. Scepter*, 190 Pa. St. 374.

¹ *Sault Ste. Marie Co. v. Van Dusan*, 40 Mich. 429; *Jefferson Co. v. Arrighi*, 54 Miss. 668; *Nash v. St. Paul*, 11 Minn. 174; *Hague v. Philadelphia*, 48 Pa. St. 527; *Brady v. Mayor, &c. of New York*, 20 N. Y. 312; *Bryan v. Page*, 51 Tex. 532; *Peterson v. Mayor, &c. of New York*, 17 N. Y. 449; *Cowen v. West Troy*, 43 Barb. (N. Y.) 48; *Brown v. Mayor*, 63 N. Y. 239; *Hodges v. Buffalo*, 2 Denio (N. Y.), 110; *McDonald v. Mayor, &c. of New York*, 68 N. Y. 23; *Smith v. Newburgh*, 77 N. Y. 130; *Green v. Cape May*, 41 N. J. L. 45, approving text; *Taymouth v. Koehler*, 35 Mich. 22; *Marsh v. Fulton Co.*, 10 Wall. 676; *Horton v. Thompson*, 71 N. Y. 513; *McCracken v. San Francisco*, 16 Cal. 591; *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 E. & I. App. C. 653; *Lewis v. Shreveport*, 108 U. S.

municipal council, of an attorney to defend a policeman charge with an assault, does not adopt his act so as to render the city liable for the damages recovered against him.¹

282; *Scott v. Shreveport*, 20 Fed. Rep. 714; *San Diego Water Co. v. San Diego*, 59 Cal. 517; *Statesville Bank v. Statesville*, 84 N. C. 169; *Laredo v. Macdonnell*, 52 Tex. 511. See also the following more recent cases: *Ft. Scott v. Eads Brokerage Co.*, 117 Fed. Rep. 51; *Newport v. Batesville, &c. R. Co.*, 58 Ark. 270, quoting text; *Packard v. Hayes*, 94 Md. 233; *Indianapolis v. Wann*, 144 Ind. 175; *Cedar Rapids Water Co. v. Cedar Rapids*, 117 Iowa, 250; *Kidson v. Bangor*, 99 Me. 139, citing text; *Davis v. Jackson*, 61 Mich. 530; *Newberry v. Fox*, 37 Minn. 141; *Union Depot Co. v. St. Louis*, 76 Mo. 393; *State v. Murphy*, 134 Mo. 548; *Savage v. Springfield*, 83 Mo. App. 323; *Cory v. Freeholders of Somerset*, 44 N. J. L. 445, 455; *Jersey City Supply Co. v. Jersey City*, 71 N. J. L. 631; *Squire v. Preston*, 82 Hun (N. Y.), 88; *McTwiggan v. Hunter*, 19 R. I. 265; *McAleer v. Angell*, 19 R. I. 688; *Ellis v. Cleburne* (Tex. Civ. App.), 35 S. W. Rep. 495; *Noel v. San Antonio*, 11 Tex. Civ. App. 580; *Arnott v. Spokane*, 6 Wash. 442; *Dullanty v. Vaughn*, 77 Wis. 38; *Trester v. Sheboygan*, 87 Wis. 496.

The city cannot, by acquiescence or waiver, estop itself from denying the validity of an act beyond its corporate powers. *Cedar Rapids Water Co. v. Cedar Rapids*, 117 Iowa, 250. Where the statute provides that no city shall make any contract unless in writing, a parol contract, being void *ab initio*, cannot be ratified by the city. *Savage v. Springfield*, 83 Mo. App. 323; but *quære* if the subject matter of the contract was not *ultra vires*. Where the city charter required all purchases to be made from the lowest bidder on advertised proposals, the city could not by acceptance and subsequent approval ratify a purchase made by fire commissioners without authority. *La France Fire Engine Co. v. Syracuse*, 33 Misc. (N. Y.) 516. In *Unionville v. Martin*, 95 Mo. App. 28, the mayor of a city, without an ordinance authorizing him to do so, entered into a contract for the sinking of a well. Subsequently,

payments were made upon the contract not under any ordinance appropriating the same out of a fund, but upon the simple direction of the board of aldermen entered on its journal. It was held that the making of such payment did not amount to a ratification of the contract, since the board of aldermen could not authorize the making of the contract except, as provided by the statute, by an ordinance signed by the mayor; neither could it ratify the contract except in the same manner. When the contract of a municipal corporation is void for *absolute lack of power* to enter into it, the corporation is not estopped from pleading *ultra vires* by the expenditure of money on the faith of the contract, or by any other act on its part. *Mealey v. Hagen town*, 92 Md. 741. When a contract for grading a street is void in its entirety by reason of the omission of the city council to pass a special ordinance directing the grading as required by the charter, the city is *not estopped* to deny the validity of the contract although the work has been done according to its provisions and the city has received the benefit of it. *Wheel v. Poplar Bluff*, 149 Mo. 36. Where illegality does not involve any *real power to contract*, but is merely a defect in the execution of the contract resulting from inattention on the part of city council to the form of proceeding prescribed by law and the contract has been fully performed according to terms by the other party, the city cannot avail itself of the illegality to defeat its liability. *Marion Water Co. v. Marion*, 121 Iowa, 306. If the contract is *absolutely void as being in violation of a constitutional provision* wise beyond the power of the city, the contractor cannot recover the value of the work as on a *promise*. *Berlin Iron Bridge Co. v. Antonio*, 62 Fed. Rep. 882. In *Ohio* it has been held that a city has no common-law municipal liability in that state for the passage of the act of April

¹ *Buttrick v. Lowell*, 1 Allen (Mass.), 172; *post*, §§ 824, 1656; *Moore v. Mayor*, 73 N. Y. 238, approving text; *Bryan v. Page*, 51 Tex. 532; *Wilk Co.*, 50 Iowa, 254, approving text.

§ 798 (464). **Assent and Ratification.** — Where work done for a corporation without complete legal authorization is for a corporate purpose and is beneficial to it, and the price reasonable, strong *evidence of the assent* of the corporation is not required; *but such assent must be shown*. Ratification of the acts of a committee in building upon the land of a school district a more expensive house than they were authorized to do by the vote of the corporation cannot be inferred from the mere fact that the school is kept in it for a few weeks, there being no evidence that the corporation had knowledge of the over-expenditure, or had taken any action on the subject.¹

carried into Revised Statutes, § 1693, providing that no contract shall be entered into except by ordinance or resolution, since that act conflicts with the common law as to such liability. Before the passage of that act, the decisions of the Ohio court seemed to impliedly recognize this liability. See *Cincinnati v. Cameron*, 33 Ohio St. 336. But in the cases decided since the passage of the act, full force has been given to the restrictive statute, and implied liability has been denied. In order, therefore, to state a good cause of action against a municipality, the petition must declare upon a contract, agreement, obligation, or appropriation made and entered into according to statute, and a petition on account merely or on *quantum meruit* is not sufficient. *McCloud v. Columbus*, 54 Ohio St. 439; *Lancaster v. Miller*, 58 Ohio St. 558; *Buchanan Bridge Co. v. Campbell*, 60 Ohio St. 406; *Comstock v. Nelsonville*, 61 Ohio St. 288; *Wellston v. Morgan*, 65 Ohio St. 219.

In *Illinois* a contract for the construction of improvements which are to be paid for by a special assessment is invalid where it is entered into before the passage of the assessment ordinance, and cannot be validated by the subsequent passage of an ordinance confirming the contract. *Paxton v. Bogardus*, 201 Ill. 628.

¹ *Wilson v. Chester School District*, 32 N. H. 118. See further as to effect of use as a ratification, *Kingman v. No. Bridgewater School District*, 2 Cush. (Mass.) 425; *Davis v. Bradford School District*, 24 Me. 349; *Lane v. Weymouth School District*, 10 Met. (Mass.) 462; *Chaplin v. Hill*, 24 Vt. 628; *Fisher v. Attleboro School District*, 4 Cush. (Mass.) 494; *Taft v. Montague*, 14 Mass. 285; *Keyser v. Sunapee School District*, 35 N. H. 477; *Pratt v. Swan-*

ton, 15 Vt. 147 (use of bridge by public); *Texarkana v. Friedell*, 82 Ark. 531; *Norwalk Gas Light Co. v. Norwalk*, 63 Conn. 495.

In *Wilson v. School District*, 32 N. H. 118, above cited, Mr. Justice Bell well remarks: "In most cases where work and labor is performed upon real estate by contract, the mere fact that the owner makes use of the building or structure built upon his land furnishes no evidence of approval or acceptance, because he has no choice to reject it. Alone, the use of such buildings gives no evidence of acceptance. Accompanied by silence and absence of complaint, where to complain would be natural and suitable, or by any circumstance indicating acquiescence, it would be sufficient." 32 N. H. 125. As to effect of acceptance of public work by the agents of the town, see *Wadleigh v. Sutton*, 6 N. H. 15. Of schoolhouse built upon a *quantum meruit* employment by a committee, but without a legal contract, see *Kimball v. Roxbury School District*, 28 Vt. 8. See also *Corwin v. Wallace*, 17 Iowa, 334; *Zottman v. San Francisco*, 20 Cal. 96 (valuable discussion); approved, *Murphy v. Louisville*, 9 Bush (Ky.), 189; *Jordan v. Lisbon School District*, 38 Me. 164; *Reichard v. Warren County*, 31 Iowa, 381. Surveyor of highways cannot recover of the town for work voluntarily performed, there being no contract, not even if beneficial. *Sikes v. Hatfield*, 13 Gray (Mass.), 347; *infra*, § 801.

A public corporation is not liable for work done against, or even without, its direction or authority (such as building a bridge, road, schoolhouse, &c.), although these are afterwards used by the public or the district. *Loker v. Brookline*, 13 Pick. (Mass.) 343; *Knowles v. Plantation No. 4*, 14 Me. 25, where note *critique* on, and remarks of

§ 799 (465). *Same Subject.*—The *ratification*, whatever its form, must be by the *principal or by authorized agents*. This is well illustrated by a case where, by statute, certain agents or officers of a *State* were authorized to borrow money for public use, and for that purpose to sell its bonds at not less than their *par* value. They exceeded their power by selling for *less than par*, and *on credit*. It was contended that this contract was *ratified*, because the governor, after he knew of the contract, signed the bonds and caused them to be delivered, and because the auditor and some of the other State officers acted under the contracts, drawing money and receiving payments. But it was held that these officials were likewise agents of limited authority; that, as they would have had no power to make the contracts originally, they could not ratify them; that ratification

Mellen, C. J., as to *Hayden v. Madison*, 7 Me. 79; *Morrell v. Dixfield*, 30 Me. 157, 160; *Davis v. Bradford School District*, 24 Me. 349; *Hayward v. No. Bridgewater School District*, 2 Cush. (Mass.) 419; *Ib.* 426; *Moor v. Cornville*, 13 Me. 293 (where the action was brought by the surveyor or supervisor of highways, who built a bridge without pursuing the course pointed out by law); *Allen v. Cooper*, 22 Me. 133 (deciding that the power of a committee with authority to contract to make a road does not embrace power to accept the work or waive performance). But if the work be done under belief of authority, as where it was performed under a contract with a committee who assumed to have authority, but who, in fact, had none, then if the corporation accept it, or even knowingly avail itself of it, it will be liable to pay a reasonable compensation; and a promise thus to pay may be implied on the part of a corporation from the acts of its general agent, or an agent with powers of a general character [?]. *Abbot v. Hermon*, 7 Me. 118; *Hayden v. Madison*, *Ib.* 79. "Perhaps these two cases carry the doctrine of the implied responsibility of corporations as far as it ought to be carried." *Per Emery, J.*, in *Ruby v. Abyssin. Society*, 15 Me. 306, 308. As to extent of powers of New England towns, see *ante*, §§ 41, 42. And see, particularly, *Jordan v. Lisbon School District*, 38 Me. 164, and other cases cited, *supra*; *Baltimore v. Reynolds*, 20 Md. 1; *Hague v. Philadelphia*, 48 Pa. St. 527;

Moore v. New York, 73 N. Y. 235. approving text.

The corporation cannot retain the fruits of a contract and escape liability thereunder, if it is only attacked for irregularity in the making, and not for lack of power. *Drainage Com'n v. Lewis*, 101 Ill. App. 150; *Neosho City Water Co. v. Neosho*, 136 Mo. 498; *Lincoln Land Co. v. Grant*, 57 Neb. 70; *Tappen v. Long Branch, &c.*, 59 N. J. L. 371. Where a contract entered into by a municipal corporation is within its powers and apparently advantageous to the corporation, it will be estopped from challenging it, although it was invalid from its inception, if it has received the benefit of it. *Chicago v. Norton Milling Co.*, 97 Ill. App. 61. *aff'd* 196 Ill. 580. Knowledge of individual members of the council that the plaintiff was rendering services for the city expecting to be paid therefor does not bind the city, or its representative body, the council. *Texarkana v. Friedell*, 82 Ark. 331, citing text. But when the charter or statute requires the contract to be made by the city in a prescribed manner and the contract has not been made in that manner, the fact that the city is enjoying the benefit of it does not estop the city from denying liability. *Keane v. New York*, 88 N. Y. App. Div. 52 (letting to lowest bidder); *Arnott v. Spokane*, 6 Wash. 442 (contract required to be made by ordinance); *Paul v. Seattle*, 40 Wash. 294 (same requirement); *Chippewa Bridge Co. v. Durand*, 122 Wis. 85 (letting to lowest bidder).

t come from the principal, — the State, represented by its legislature.¹

800. Estoppel to plead Unconstitutionality of Statute; Ohio

a. — The principles of estoppel may in exceptional cases

Delafield v. Illinois, 2 Hill (N. Y.), 175, where difference between ratification by a State and by other corporations or by individuals is clearly shown by *Bronson, J.*; affirming s. c. *ge*, 531; s. c. further, 26 Wend.

In further illustration of the text, *ague v. Philadelphia*, 48 Pa. St.

Hotchin v. Kent, 8 Mich. 526;

by v. Louisville, 9 Bush (Ky.),

Marsh v. Fulton County, 10 Wall.

) 676 (a leading case in the Su-

Court of the United States on

subject of ratification); *Dubuque*

College v. Dubuque, 13 Iowa, 555;

v. Inhabitants of Westminster,

ss. 324; *Branham v. San Jose*,

l. 585; *Attorney-General v. La-*

24 Mich. 235; *Wilhelm v. Cedar*

v. 50 Iowa, 254. The case of

uis v. Armstrong, 56 Mo. 298, is

an instance in which the city was

to ratify the acts of its officers by

of itself of the benefit of their

The case was this: The city

to build a sewer through the

land's lot; it was necessary to

own or get his consent; he con-

on condition that he could

three years in which to pay his

portion of the cost of the sewer; the

of the city, without any express

city, so agreed. The sewer was

and before the three years ex-

the city sued the defendant for

portion of the cost of the sewer;

it was held that the suit was pre-

viously brought, and that the city,

ing the defendant's land under the

ment of its officers, was bound by

agreement. What would have

the rights if the city had put the

defendant *in statu quo*, by condemning

right of way and tendering the

amount before bringing suit for the cost

of the sewer, was a question not in-

cluded, and not decided.

In applying the doctrine that *unau-*

thorized corporate acts may be ratified,

the principles of law must be borne

in mind. The care which, in this re-

spect, should be observed, is very

fully set forth by *Denio, J.*, in giving

opinion in *Peterson v. Mayor, &c. of*

New York, 17 N. Y. 449, 454: "For

instance, no sort of ratification can make good an act without the scope of the corporate authority. So where the charter or a statute binding upon the corporation has committed a class of acts to particular officers or agents, other than the governing body, or where it has prescribed certain formalities as conditions to the performance of any description of corporate business, the proper functionaries must act, and the designated forms must be observed, and generally no act of recognition can supply a defect in these respects."

Brady v. Mayor, &c. of New York, 20

N. Y. 312; *Hodges v. Buffalo*, 2 *Denio*

(N. Y.), 110; 17 *N. Y.* 584; *Gates v. Han-*

cock, 45 *N. H.* 528; *Reilly v. Philadel-*

phia, 60 *Pa. St.* 467; *supra*, §§ 797, 798;

Wilhelm v. Cedar County, 50 *Iowa*, 254.

Where the corporation can only act

by ordinance, the ratification must be

by ordinance. *McCracken v. San Fran-*

cisco, 16 *Cal.* 591; *Pimental v. San*

Francisco, 21 *Cal.* 351; *Cross v. Morris-*

town, 18 *N. J. Eq.* 305; *Unionville v.*

Martin, 95 *Mo. App.* 28, citing text.

See also *supra*, § 463; *ante*, § 572.

Legislature may, within constitu-

tional limits, ratify or authorize ratifica-

tion. *Campbell v. Kenosha*, 5 *Wall.*

194; *Supervisors v. Schenck*, *ib.* 772;

Keithsburg v. Frick, 34 *Ill.* 405; *Mills*

v. Gleason, 11 *Wis.* 470; *Winn v. Macon*

21 *Ga.* 275; *Grogan v. San Francisco*,

18 *Cal.* 590; *Hasbrouck v. Milwaukee*,

21 *Wis.* 217; *Mills v. Charleaton*, 29

Wis. 400; *Mill Creek Valley St. Ry.*

Co. v. Carthage, 18 *Ohio Cir. Ct.* 216;

ante, § 129, § 321, note. In *Shawnee*

County v. Carter, 2 *Kan.* 115, the Su-

preme Court of *Kansas* held invalid, as

not being within the rightful scope of

legislative power, an act of the legis-

lature which declared valid and binding

bonds which had been issued by the

county officers on account of the county

court-house, and which bonds were not

enforceable against the county because

differing in form and substance from

the warrants authorized by the statute.

Such a strict limitation on legislative

power is not generally asserted. See,

on this point chap. iv. *ante*, and *post*,

§ 948; Index, *Curative Acts*.

apply where proceedings are questioned on the ground of unconstitutionality of the statute under which they are had, as well as where they are sought to be impeached upon other grounds. It has accordingly been held in Ohio that the unconstitutionality of the statute under which proceedings for an improvement are had, will not defeat a recovery upon the contract, or the levying of a special assessment to pay the contractor, where the improvement is one which is within the *general authority* of the city to make under its general powers, or under a statute other than that under which the proceedings are had.¹ If, however, it appears that no legislative authority for the contract existed other than the unconstitutional statute, then the statute, being void *ab initio*, the power to make the contract never existed, and the contract cannot be invoked as the foundation of a right to be enforced in a court of equity.²

¹ *State v. Mitchell*, 31 Ohio St. 592; *Tone v. Columbus*, 39 Ohio St. 281; *Mott v. Hubbard*, 59 Ohio St. 199; *Mt. Vernon v. State*, 71 Ohio St. 428. In *Mt. Vernon v. State*, 71 Ohio St. 428; the contractor asked for mandamus to compel the city authorities to levy an assessment and to pass an ordinance for an issue of bonds to pay him the contract price of a street improvement. On the question of estoppel it appeared that in the spring of 1902, a majority of the abutting lot owners petitioned the city council to pave the street. The council determined that a majority of the owners of real estate abutting on the improvement had filed the petition, that it was necessary to improve the street by grading and paving the same and to assess the cost thereof upon the abutting property and to issue bonds according to law for the payment of the cost. Plans and specifications were prepared and bids advertised for. The relator's bid, which was the lowest, was filed with the city June 16, 1902. On June 26, 1902, a decision was handed down to the effect that a statute similar to that under which it was proposed to make the improvement was unconstitutional. Twelve days after the announcement of the decision, the city accepted the relator's proposal and entered into a written contract with him without having suggested any objection upon the ground of the unconstitutionality of the act. The relator proceeded with the work and substantially performed his contract. Irrespective of the unconstitutional statute, the city had ample power to improve the street and to pay for the improvement under other statutes, the unconstitutional law differing only in terms as to the amount that the city should pay as its portion of the cost and as to the manner in which bonds should be issued and sold and the proceeds applied. It was held that the city, having general authority to contract for the improvement of the property and to levy an assessment therefor, was estopped to take advantage of the unconstitutionality of the statute under which the proceedings were had as a ground for resisting an application for mandamus to enforce the payment of the contract price. Similar principle; where municipal bonds recite a *wrong act* of the legislature, they are not invalid if there exists another act conferring the power. *See post*, § 936.

² In *Findlay v. Pendleton*, 62 Ohio St. 80, an unconstitutional statute appointed a board of city improvement fund. That board employed the plaintiffs to render legal services on its behalf. It was held that as the power of the board to employ the plaintiffs necessarily was founded upon the unconstitutional law appointing the board, the contract of employment was absolutely void for lack of authority to enter into it, and the plaintiff could not recover.

§ 801 (466). *Letting to the Lowest Bidder.* — Where the charter or incorporating act requires the officers of the city to award *contracts to the lowest bidder*, a contract made in violation of its requirements is illegal; and in an action brought on such contract for the work, the city may plead its illegality in defence; ¹ and neither the munici-

¹ *Brady v. Mayor, &c. of New York*, 20 N. Y. 312. It is intimated that it is not essential to the defence that the city should show a fraudulent collusion between the bidder and the officers awarding the contract. Whether the city is liable on a *quantum meruit* to one who has *bona fide* performed labor under a void contract, where the work has been accepted and used, was not determined. *Ib.*; s. c. 2. *Bosw. 173*; 7 *Abb. Pr. R. 234*; 16 *Abb. Pr. R. 432*. As further illustrating the text, see *People v. Flagg*, 17 N. Y. 584; *Peterson v. Mayor, &c. of New York*, 17 N. Y. 449, referring to but expressing no opinion upon *Christopher v. Mayor, &c. of New York*, 13 *Barb. (N. Y.) 567*; *Appleby v. Mayor, &c. of New York*, 15 *How. (N. Y.) Pr. 428*; *Harlem Gas Co. v. Mayor, &c. of New York*, 33 N. Y. 309; *Macey v. Titcombe*, 19 *Ind. 135*; *Bonesteel v. Mayor, &c. of New York*, 22 N. Y. 162; *Smith v. Mayor, &c. of New York*, 21 *How. (N. Y.) Pr. 1*; *Greene v. Mayor, &c. of New York*, 60 N. Y. 303; *rev'g s. c. 1 Hun, 29*; *Yarnold v. Lawrence*, 15 *Kan. 126*; *Dickinson v. Poughkeepsie*, 75 N. Y. 65, citing text; *Eager, In re*, 46 N. Y. 100; *Nash v. St. Paul*, 8 *Minn. 172*; s. c. 11 *Minn. 174*; *White v. New Orleans*, 15 *La. An. 667*; *State v. Barlow*, 48 *Mo. 17*; *post*, § 1489, note; *Brevoort v. Detroit*, 24 *Mich. 322*; *May v. Detroit*, 2 *Mich. C. C. Rep. 230*; *Shaw v. Trenton*, 49 N. J. L. 339; *Trenton v. Shaw*, 49 N. J. L. 638; *Davenport v. Kleinschmidt* (contract to take water), 6 *Mont. 502*; *Inge v. Mobile*, 135 *Ala. 187*; *Santa Cruz Rock Pavement Co. v. Broderick*, 113 *Cal. 628*; *City Imp. Co. v. Broderick*, 125 *Cal. 139*; *Anderson v. Fuller*, 51 *Fla. 380*; *Chicago v. Hanreddy*, 211 *Ill. 24*, *aff'g 102 Ill. App. 1*; *Chicago Sanitary Dist. v. McMahon*, 110 *Ill. App. 510*; *Nicholasville Water Works v. Nicholasville*, 18 *Ky. Law. Rep. 592*; 36 *S. W. Rep. 549*; *Warren v. Boston*, 181 *Mass. 6*; *Le Tourneau v. Hugo*, 90 *Minn. 420*; *Fairbanks, Morse & Co. v. North Bend*, 68 *Neb. 560*; *McDermott v. Board of Street & Water Com'rs of Jersey City*, 56 N. J. L. 273 (the work cannot be divided between the lowest and the highest bidders); *Townsend v. Atlantic City*, 72 N. J. L. 474; *Mullane v. Newark* (N. J. L.), 68 *Atl. Rep. 412*; *Board of Finance v. Jersey City*, 57 N. J. L. 452; *Walton v. New York*, 26 N. Y. App. Div. 76; *Kingsley v. Bowman*, 33 N. Y. App. Div. 1; *La France Engine Co. v. Syracuse*, 33 *Misc. (N. Y.) 516*; *People v. Buffalo*, 84 N. Y. Supp. 434; *Coughlin v. Gleason*, 121 N. Y. 631; *Mutual Life Ins. Co. v. New York*, 144 N. Y. 494; *State v. Cincinnati*, 1 *Ohio N. P. 377*; *State v. Nieman*, 6 *Ohio N. P. 419*; *Interstate Brick Co. v. Philadelphia*, 3 *Pa. Dist. Rep. 544*; *Frame v. Felix*, 167 *Pa. 47*; *Times Pub. Co. v. Everett*, 9 *Wash. 518*; *Moran v. Thompson*, 20 *Wash. 525* (applies to city water system); *Ricketson v. Milwaukee*, 105 *Wis. 591*; *Chippewa Bridge Co. v. Durand*, 122 *Wis. 85*. Index, *Lowest Bidder*. Bidders may be advised that no bid in excess of a certain sum will be considered. *Seaboard Nat. Bank v. Woesten*, 147 *Mo. 467*. Statute providing that contracts "may" be let by competitive bidding after advertisement construed as permissive only and not mandatory. *Dillingham v. Spartanburg*, 75 *S. Car. 549*. If the lowest bidder is required to *give security* and the law *requires public notice of proposals*, any contract without a compliance with the law is unauthorized and void. *Dickinson v. Poughkeepsie*, 75 N. Y. 65; *Eager, In re*, 46 N. Y. 100; *Maxwell v. Stanislaus*, 53 *Cal. 389*. A bid for street-paving is not defective in not distinguishing between the portions of the improvement chargeable to the lots fronting on the street and the portion chargeable to the city, where the relative proportions have already been fixed. *Beniteau v. Detroit*, 41 *Mich. 116*. Remedy of taxpayer. *Follmer v. Nuckolls Co.*, 6 *Neb. 204*; compare *Clark v. Dayton*, *Ib.* 192. Whether, when the work is of such a character that its ultimate cost cannot be foreseen, there can be any choice among bids,

pality nor its subordinate officers can make a binding contract for such work except in compliance with the requirements of the law.¹ If the charter requires not only that work for the city shall be let to the lowest bidder after advertisement, but also that similar advertisement shall be made where *the work is relet* on an abandonment of the contract by the original contractor, the requirements of the statute as to reletting must be followed, otherwise the contract for completion is void and an assessment based thereon cannot be sustained.² When the *statute is silent* on the subject of *reletting*, it has been held in New York and in Indiana that a readvertisement and new letting of the contract is not necessary when the original contractor has abandoned the work. In theory, the property owners who are liable for the expense are not damaged. They are indemnified by the obligation of the contractor and his surety; and if the statute does not in terms require a reletting to the lowest bidder after advertisement, it is not necessary to go through these formalities.³ In Illinois, a contrary view has been adopted, and it has been held that a simple requirement that any work or other public improvement, when the expense thereof shall exceed \$500, shall be let to the lowest responsible bidder after advertisement does not admit of any exception on a reletting when a valid contract has been let after advertise-

quere. McBrien v. Grand Rapids, 56 Mich. 95.

The New York City charter of 1873, containing a provision similar to that stated in the text, was construed to require a submission for competition of every important item of a contemplated work. Matter of Merriam, 84 N. Y. 596. Where the charter is imperative that contracts for public works should be let to the lowest bidder and the lowest bidder withdraws his bid, it is the duty to advertise again and not to award the contract to the next lowest bidder. Twiss v. Port Huron, 63 Mich. 528.

¹ Addis v. Pittsburg, 85 Pa. St. 389. The hiring of pumps from day to day at a daily rental for the purpose of a special test is not a contract for work the expense of which will exceed \$500 within the contemplation of a statute requiring the letting of contracts to the lowest bidder, although the aggregate daily rental exceeds that sum. Chicago Sanitary Dist. v. Blake Mfg. Co., 179 Ill. 167, aff'g 77 Ill. App. 287. The lighting of city streets by electric light suspended above the intersection of the streets is not "street work" within the

meaning of a statute requiring contracts for "street work" to be advertised and let to the lowest responsible bidder. Electric Light Co. v. San Bernardino, 100 Cal. 348. See also Reid v. Trowbridge, 78 Miss. 542; Tanner v. Auburn, 37 Wash. 38; Nebraska City v. Gas Co., 9 Neb. 339.

As to the meaning of the term "work" in a statute requiring letting by competition, see Chippewa Bridge Co. v. Durand, 122 Wis. 85, 94. See also State v. Barlow, 48 Mo. 17; Mast v. Pittsburgh, 137 Pa. 548; American Pav. Co. v. Wagner, 139 Pa. 623; State v. St. Louis, 169 Mo. 31; State v. Butler, 178 Mo. 272; State v. St. Louis, 161 Mo. 371.

² Mitchell v. Milwaukee, 18 Wis. 92. See also Wells v. Burnham, 20 Wis. 112; Hasbrouck v. Milwaukee, 21 Wis. 217.

³ Bass Foundry and Machine Works v. Parke County, 115 Ind. 234; Gibson County v. Motherwell Iron & Steel Co., 123 Ind. 364; Matter of Leeds, 53 N. Y. 400; Melbank v. Western Surety Co., 21 S. Dak. 261; 111 N. W. Rep. 561. See also Camden v. Ward, 67 N. J. L. 558.

ment for bids and the contractor has abandoned the work.¹ It has been held that a statutory requirement of competitive bidding does not prevent the city from providing in specifications and contracts that the contractor shall do such *extra work* as the officer in charge of the improvement shall direct, and that the compensation therefor shall be the reasonable cost to the contractor plus a percentage for profits, &c. The extra work does not require to be let by separate advertisement.²

§ 802. *When Competition is Impossible or Unavailing.* — It has been held that where competitive proposals work an incongruity and are unavailing as affecting the final result, or where they do not produce any advantage, but the nature of the supply requires that it be determined from inspection and test, which are made from personal examination and trial and depend upon special knowledge and judgment, or where the thing to be obtained is a monopoly, or the requirement is of personal skill or professional service, or it is practically impossible to obtain what is required and observe such forms, a *statute requiring competitive bidding* does not apply.³ In discussing the nature of the *contracts which are excepted* from the operation of statutes requiring competitive bidding, the court has said that the purpose of the statute is to insure economy in the public administration, and honesty, fidelity, and good morality in the administrative officers. Competitive offers or bids have no other object but to insure economy and exclude favoritism and corruption in the

¹ *Chicago v. Hanreddy*, 211 Ill. 24, aff'g 102 Ill. App. 1. Although a statute provides that if any work be abandoned by the contractor, it shall be readvertised and relet to the lowest bidder, yet if it appears that the contractor was not in fact abandoned by the contractor, but that the local authorities completed the work themselves for the contractor, and as his agent, under a stipulation in the contract authorizing them to do so in certain contingencies, and to apply the contract compensation to the payment of the expense of completion, readvertising and reletting was not necessary, if the expense of the completion be less than the balance of the original contract price. *Simermeyer v. New York*, 16 N. Y. App. Div. 445. A contractor who has abandoned the work cannot take advantage of the omission of the city authorities to readvertise and relet the work of completion to the lowest re-

sponsible bidder, nor can any person in privity with the contractor do so. *McChesney v. Syracuse*, 75 Hun, 503; *Camden v. Ward*, 67 N. J. L. 558; *Jones v. Savage*, 24 N. Y. Misc. 158.

² *Smith v. Chicago Sanitary Dist.*, 108 Ill. App. 69; *Clark v. Pittsburgh*, 217 Pa. 46. But see *McBrien v. Grand Rapids*, 56 Mich. 95; *Ely v. Grand Rapids*, 84 Mich. 336. In *New York* it has been held that when the work furnished by the contractor is defective, a contract or agreement by which the contractor agrees to remove material called for by the contract because of its defects, and to substitute other material therefor, is within a statute requiring the letting of contracts to the lowest bidder and cannot be made without advertisement. *Cahn v. Metz*, 115 N. Y. App. Div. 516.

³ *Gleason v. Dalton*, 28 N. Y. App. Div. 555, 559, rev'g 23 Misc. (N. Y.) 18.

furnishing of labor, services, property, and materials for the uses of the city. This is the only purpose of the statutes, and when this effect is given to them, nothing further is needed. But they are not to have such a construction as to defeat this purpose, to impede the usual and regular progress of the local business, or to deprive the inhabitants, even temporarily, of those things necessary and indispensable to their subsistence, their health, or the security and protection of their persons or property. Contingencies may arise when services, materials, and property may be immediately needed, and where competitive offers and written contracts would be unserviceable and impossible. In such cases the statutes would not apply, because such implication could not have been intended. Whenever the nature of the service, or of the property needed for the public uses, or the time within which it must be had to prevent irreparable mischief, is impossible under competitive offers, then the provisions of the statute cannot apply, because such could not have been the intention of the law-makers, and such emergencies were not amongst the mischiefs which the provisions referred to were designed to correct. A city needs lands in a particular locality for a public market, an engine house, or other public building: it requires professional services, those of an engineer, physician, lawyer, or an artist, or it may require services of any kind, and property, to be furnished upon a sudden and unforeseen emergency of greater value than the sum fixed by the statute as the minimum for which orders can be given without competitive bidding. If these things can only be obtained through the forms prescribed by the statutes, they cannot be obtained at all, for these things cannot become the subject of a competitive offer to be consummated by a written contract with the person making the most favorable offer.¹

Emergency has been recognized as a ground for the exception.² The nature of an emergency which will justify the making of a contract without advertisement and competitive bidding is illustrated by the necessity of preventing a *city from being left in darkness*

¹ *Harlem Gas Co. v. Mayor, &c. of New York*, 37 N. Y. Misc. 432. See also *Clark Co. v. Allegheny City*, 143 Fed. Rep. 644. *Emergency as a ground of exception to a statute prohibiting the employment of a municipal officer*; *Greenfield v. Black*, 42 Ind. App. 645; 82 N. E. Rep. 797; as justifying the employment of a third person to perform the official duties of an officer or employee; *Warren County v. Osburn*, 4 Ind. App. 590; *Morgan County v. Seaton*, 90 Ind. 158; *Washburn v. Shelby County*, 104 Ind. 321.

² *Harlem Gas Co. v. Mayor, &c. of New York*, 33 N. Y. 309; *Sheehan v.*

through failure to light its streets, &c.¹ But every supposed emergency will not be considered as furnishing an excuse for failing to comply with the terms of the statute. If it is possible for the municipal authorities to meet the emergency and protect the city interests whilst still observing the forms prescribed by law, then the provisions of the statute must be complied with.² The *correct rule* is that the

¹ In December, 1898, a controversy arose between the departments of public buildings, lighting, and supplies, and the board of public improvements on the one hand, and the municipal assembly of the city of New York on the other hand, as to their respective rights, powers, and duties relative to contracts for lighting the streets and public buildings of the city. Assuming that it was necessary for the assembly to first pass ordinances, the board of public improvements prepared suitable resolutions and ordinances on that subject and forwarded them to the assembly for adoption. Notwithstanding the urgent necessity for action, the municipal assembly refused to act, and various lighting companies having threatened to cut off the supply of light unless contracts were made in writing, the resolutions were withdrawn from the assembly. As a result of the contest the city would have been plunged in darkness after January 1, 1899, had not the various lighting companies, on being applied to, expressed a willingness to proceed without written contracts, provided an assurance were given that the city authorities would see to it that they should be eventually paid. Such assurances were given by the commissioner of public buildings, lighting, and supplies, and the board of public improvements, who were the officers upon whom the duty devolved of attending to the lighting of the streets of the city, and the lighting was furnished at the earnest solicitation of the law department, which hoped to find some way of solving the difficulty. The officials, alive to the necessity and importance of having the city lighted at night, were anxious to discharge their duty, in the performance of which they had been hampered and obstructed by the assembly. That there was serious doubt as to where the power resided when the question was presented, appeared from the view taken by a judge at Special Term, who enjoined the municipal officers from proceeding to execute any lighting con-

tracts without the approval of the assembly, though it was subsequently held by the Appellate Division, reversing the Special Term, that those officers could proceed without any affirmative action of the assembly (*Blank v. Kearny*, 44 N. Y. App. Div. 592). The fact remained, however, that the belief had a reasonable foundation; and it was conceded that the prices agreed to were fair and reasonable, and the obligation sought to be enforced against the city was just. The court held that there was shown a great public necessity and an emergency not contemplated by the statute, — one which would not permit of delay but required immediate action to protect the city as well as the lives and property of the citizens, and as there was no attempt to override the statute, or to do that which it prohibited, and a situation being presented to which the statute did not apply, the lighting companies were entitled to recover from the city. *North River Electric Co. v. New York*, 48 N. Y. App. Div. 14.

² It has been held that the provisions of the New York *Health Law*, authorizing boards of health to take steps to protect the health of the municipality, must be regarded as in the nature of an amendment to, or at least a part of, all municipal charters. But in proceeding under the powers conferred by the public health law, the board of health and the municipal officers must, if the public interests permit, still comply with charter provisions requiring advertisement for contracts. Therefore, where a charter requires that no sewer exceeding twenty rods in length shall be constructed without advertising, the construction of sewers under the direction of the local board of health as a preventive of an epidemic then existing in the village or apprehended, although an emergency calling for prompt and vigorous action, must still proceed under the provision and in the method prescribed by the charter. If the municipal authorities

municipal authorities have power to meet any emergency which may exist without complying with charter provisions requiring advertisement, but that they must satisfy themselves and be able to satisfy the courts that the emergency is such as to prevent them from complying with these provisions. If an emergency exists, which can only be overcome by disregarding the charter provisions, the municipal authorities must be prepared to show that fact, and if they can show it, the courts will uphold their action and will doubtless construe and apply their acts in a liberal and beneficent spirit. But in harmony with the other decisions, construing and applying statutory provisions relating to municipal contracts, the courts will not permit a supposed emergency to be made an excuse for a violation of a beneficent law, particularly where fraud, corruption, or extravagance is apparent.

A practical monopoly of the subject matter of the contract is also regarded as furnishing a sufficient reason for an exception to a statutory requirement to advertise for bids.¹

construct sewers longer than those specified in the charter without complying with its provisions, that is at least a technical disregard of the law. It is the duty of the municipal authorities to hold the orders of the board of health in abeyance until the expiration of the time provided by the charter for advertising. In the case in which this opinion was expressed, the validity of a contract for the construction of these sewers did not come in question, and to some extent, at least, the opinion must be regarded as in the nature of a *dictum*. *Matter of Plattsburgh*, 157 N. Y. 78, rev'g 27 N. Y. App. Div. 353. Where a statute requires an emergency resolution to be passed by a two-thirds vote of the city council and such a contract is let without previously advertising for bids, a contract so let is not binding on the city where no emergency resolution has been passed. *Newton v. Toledo*, 8 Ohio Dec. 607.

¹ Where a company furnishing gas to a city has a practical legislative monopoly, a contract for the supply of light is not within the provisions of the city charter requiring contracts for supplies involving expenditures exceeding \$250 to be made in writing with the lowest bidder after an advertisement for proposals. In the case in which it was so decided, there was no other gas-light company having mains

or pipes laid in the particular district of the city. Although there were other companies furnishing gas in the city, they were confined to particular districts, and no company or person could enter into competition with the gas-light company in furnishing the gas in question. *Harlem Gas Co. v. Mayor &c. of New York*, 33 N. Y. 309. See also *Hartford v. Hartford Elec. Co.*, 65 Conn. 324. If there is *but one water company* which can furnish a supply of water, a contract with that company is not embraced within the provisions of the charter. *Gleason v. Dalton*, 28 N. Y. App. Div. 555, 560. See also *Hurley Water Co. v. Vaughn*, 115 Wis. 470. Compare *State v. Barlow*, 48 Mo. 17.

It has been said that *patented articles* which can be obtained from only one person are not within the provisions of the charter. *Baird v. Mayor &c. of New York*, 96 N. Y. 567; *Matter of Dugro*, 50 N. Y. 513; *Kilvington v. Superior*, 83 Wis. 222. But see *Nicolson Pavement Co. v. Painter*, 35 Cal. 699. See *post*, § 803. But there are now usually special statutory provisions in each charter which either regulate or prohibit the purchase of patented articles on behalf of the municipality. The greater New York Charter provides that "Except for repairs no patented pavement shall be laid and no patented article shall be advertised for, con-

Scientific knowledge or professional skill has also been regarded as furnishing a ground for an exception to the statutory rule. Thus it has been said that the services of a lawyer, of a physician, or of an architect or surveyor, are not embraced within a provision requiring the letting of contracts to the lowest bidder.¹

Selection upon tests has also been deemed a sufficient reason for excepting the subject matter from the statutory provisions. Thus, a statute authorized a commissioner of public works of the city of

racted for, or purchased, except in such circumstances that there can be a fair and reasonable opportunity for competition, the conditions to secure which shall be prescribed by the board of estimate and apportionment." L. 1897, ch. 373, § 1544, continued without change by L. 1901, ch. 466.

When, by the Constitution of the State, the duty is imposed upon the city of fixing the rates for water, a contract for a supply for city purposes is not within a charter requirement that contracts shall be let to the lowest bidder. *Contra Costa Water Co. v. Creed*, 139 Cal. 432. The fact that the kind of steel prescribed in an advertisement for the building of a bridge is made only by one company does not unlawfully limit competition, where the successful bidder would be free to buy such steel in the open market, and therefore free competition to the extent required by law would not be restricted. *Knowles v. New York*, 37 Misc. (N. Y.) 195.

Where a city ordinance provided that "no contract or purchase which is estimated to involve an expenditure of more than ten thousand dollars, except a contract for the laying of pipe, shall be made by the said board (the water board) until they have advertised . . . or sealed proposals therefor," the water board prepared an order which was passed by both branches of the city council and approved by the mayor to the effect that the board "be authorized to exchange such pumping engines and machinery as are inadequate or of insufficient capacity for those of the capacity required by the plans and estimates of the new high-service extension, the expense of such changes to be charged to the appropriation for high service extension." It was held that the object of the order was to enable the water board by contract, without advertising for sealed proposals from bidders, to exchange the

engines and machinery then in use for the new and improved Worthington engine, exclusively manufactured by the firm of Henry R. Worthington, although an expenditure largely exceeding ten thousand dollars was involved, and that the necessity of advertising for proposals for such engines was dispensed with. *Worthington v. Boston*, 152 U. S. 695.

¹ *People v. Flagg*, 17 N. Y. 584, rev'g 5 Abb. Pr. 232. See also *Harlem Gas Co. v. Mayor, &c. of New York*, 33 N. Y. 309; *Newport News v. Potter*, 122 Fed. 321 (supervising engineer); *Horgan v. New York City*, 114 N. Y. App. Div. 555, 559. This principle has been invoked to remove from the statutory restriction fire works furnished for the purpose of celebrating the anniversary of American Independence upon the ground that the contract was for articles of a peculiar character depending entirely on the skill of the manufacturers, and for which a general advertisement for proposals could not well be made. *Detwiller v. Mayor, &c. of New York*, 1 T & C. (N. Y.) 657. But at the present time it would probably be difficult to persuade a court that any manufacturer of fireworks has acquired such a degree of peculiar skill as to prevent competition between the different firms engaged in the business. The decision may have been good law when it was made, but it would scarcely be regarded as resting on a sufficient basis at the present time.

A contract for the supervision of the construction of an improvement is not within a statutory requirement of letting of works of improvement to the lowest bidder; *Houston v. Potter*, 41 Tex. Civ. App. 381; 91 S. W. Rep. 389; nor is the employment of an architect to prepare plans. *Houston v. Glover*, 40 Tex. Civ. App. 177; 89 S. W. Rep. 425.

New York to *cause water meters* of approved pattern and suitable for the purposes to be placed in stores, &c., where water was furnished for business purposes, and the rule was adopted that when a supply, as in the case under consideration, was one involving scientific results attained by mental and corporal labor, the advantage could not spring out of mere bids, but of tests to which the thing should be subjected, and that therefore the selection of water meters was withdrawn from the general rule applicable to contracts for work and supplies.¹

Where the subject matter of the contract is such that the statute has no applicability, the courts will, if the work be done or the supplies be furnished without any express order, *imply a contract to pay therefor*, from the rendering of the services and the furnishing of the supplies, with the knowledge and assent and at the implied request of the municipal authorities.²

§ 803 (467). **Patented Inventions.** — When no provision of the charter restricts the power of the municipality to contract, *e. g.*, by requiring all contracts to be let to the lowest bidder, a municipality may contract for the use of a patented or monopolized article in a public improvement.³ When the statute or charter requires that contracts for work or material shall be let by competition and after advertisement, a divergence in the views of the courts has arisen on the question whether a city can contract for the purchase or use of patented articles. In Michigan, New York, and some other States, it has been held that where the statute or charter provides that no contract shall be made by the city except with the lowest bidder after advertisement for proposals, such provision was not intended to prevent the city from taking advantage of patented articles, and does not prohibit it from contracting for the use of an article or material although the article is patented, and the patent is owned and controlled by a single person.⁴ But, on the other hand, the Supreme

¹ *People v. Van Nort*, 64 Barb. 205. See also *Baird v. Mayor, &c. of New York*, 96 N. Y. 567.

² *Harlem Gas Co. v. Mayor, &c. of New York*, 33 N. Y. 309, aff'g 3 Robt. 100; *North River Electric Co. v. New York*, 48 N. Y. App. Div. 14.

³ *Field v. Barber Asphalt Co.*, 117 Fed. Rep. 925; *Baltimore v. Raymo*, 68 Md. 569; *Warren v. Barber Paving Co.*, 115 Mo. 572; *Verdin v. St. Louis*, 131 Mo. 26.

⁴ *Hobert v. Detroit*, 17 Mich. 246; *Holmes v. Detroit*, 120 Mich. 226.

New York. Under provisions of law relating to the *city of New York*, which require all work to be done and supplies to be furnished to be by contract, where the expenditure will exceed \$1000, and which direct all contracts to be made or let, after advertisement, to the lowest bidder, the city council was not, in the opinion of the Court of Appeals, prohibited from making a contract for paving a street in a manner or with materials which did not admit of competitive bids. *Dugro, In re*, 50 N. Y. 513. See also *People v. Van Nort*, 64 Barb. (N. Y.) 205; *Baird v. Mayor, &c. of New York*,

Courts of Wisconsin, Louisiana, Illinois, and some other States have adopted the contrary view and hold that the statute intends that

96 N. Y. 567, 583. But if part of the work to be done is not covered by the patent, it has been held that separate proposals should be invited therefor. *Matter of Eager*, 46 N. Y. 100. The *Greater New York Charter* now provides that, except for repairs, no *patented pavement* shall be laid, or *patented article purchased*, except under conditions securing a fair and reasonable opportunity for competition. This provision does not prohibit the owners of a patented pavement complying with the general acquirements specified in an advertisement for bids from bidding upon and receiving an award of the contract in competition with others who may be able to lay unpatented pavements of the description advertised. The municipal authorities cannot advertise for proposals to pave a street with a patented pavement, although the patentees agree to furnish to any contractor to whom the contract is awarded all the materials and authority necessary to lay the pavement at a uniform price, since the patentee would be afforded, if he chose to bid, an advantage over all other bidders which would effectually prevent competition. *Rose v. Low*, 85 N. Y. App. Div. 461. The fact that a city in its specifications indicated three methods of pavement, one of which was patented, did not afford a fair and reasonable opportunity for competition under this statute when the three kinds of pavement were materially different, and no standard of comparison between them could be obtained by which to determine which was the lowest in price. *Barber Asphalt Paving Co. v. Willcox*, 90 N. Y. App. Div. 245. See also *Kay v. Monroe*, 93 N. Y. App. Div. 484.

California. A city can contract for any kind of pavement, even if it be patented and the contract relates to an improvement which is payable by an assessment against the property owners. *Perine Cont. Co. v. Quackenbush*, 104 Cal. 684, distinguishing *Nicolson Paving Co. v. Painter*, 35 Cal. 699, on the ground that, under the statute before the court in that case, the city could only contract for Nicolson pavement when it was petitioned for by the property owners, and no petition was presented, although the

opinion of the court contains language which seems to tend to the contrary view.

Iowa. A statute requiring competitive bidding and letting to the lowest bidder is not intended to prevent the acquisition of a patented article or to apply when competition is impossible. Hence a specification for a street improvement may call for a patented article or material without violating the statute. *Saunders v. Iowa City*, 134 Iowa, 132; 111 N. W. Rep. 529.

Kansas. In this State it is held that a statute requiring competitive bidding is not intended to prevent the use of a patented article. *Yarnold v. Lawrence*, 15 Kan. 126; *State v. Shawnee County*, 57 Kan. 267; *Bunker v. Hutchinson*, 74 Kan. 651, 654.

Maryland. In this State the court has expressed its approval of the rule which permits a city to contract for a patented article notwithstanding a provision requiring the contracts to be let by competition. The facts of the case, however, did not require the absolute application of the rule. Specifications for paving a street called for pavement of three different kinds, and it was held that competition was possible between the different kinds and that the statutory requirement was substantially complied with. *Baltimore v. Flack*, 104 Md. 107. See also *Baltimore v. Raymo*, 68 Md. 569.

Missouri. The Supreme Court of this State adopts the view that a patented article or material may be called for notwithstanding a statute requiring competitive bidding. *Barber Asphalt Pav. Co. v. Hunt*, 100 Mo. 22. See also *Warren v. Barber Asphalt Pav. Co.*, 115 Mo. 572; *Verdin v. St. Louis*, 131 Mo. 26; *Swift v. St. Louis*, 180 Mo. 80.

New Jersey. The decisions in this State do not appear to have definitely settled the rule which is favored by the court. In *Kean v. Elizabeth*, 35 N. J. L. 351, the Supreme Court held, on *certiorari* to review the proceedings under an ordinance directing advertisement for paving with a patent process, that charter requirements that all contracts for public works shall be advertised and awarded to the lowest bidder are inconsistent with a resolution of the

there shall be competitive bidding in all cases; that when an article is patented there cannot be competitive bidding, and that a specification calling for a patented article violates the implied requirement of a statute prohibiting the letting of contracts otherwise than by competition to the lowest bidder.¹ But even in those jurisdictions where the court has held that the statutory requirement of competitive bidding prevents the purchase of a patented article, some decisions limit the application of the principle to cases where the charter imposes the expense of the improvement upon the property benefited thereby,² and the city may purchase a patented article

council to use a patented pavement and to advertise for proposals therefor, because under such circumstances there can be no competition. But in *Newark v. Bonnell*, 57 N. J. L. 424, a case involving Trinidad Lake asphalt, a proprietary article, the opinion of the Court of Errors and Appeals seems to disapprove of this decision. See also *Ryan v. Patterson*, 66 N. J. L. 533.

Ohio. It has been held by the Circuit Court in this State that an advertisement may call for a patented article notwithstanding a statutory requirement of competitive bidding. *Holbrook v. Toledo*, 28 Ohio Cir. Ct. Rep. 284. See also *Hastings v. Columbus*, 42 Ohio St. 585.

Pennsylvania. A provision requiring advertisement and a letting to the lowest bidder does not apply to or prevent the purchase of a patented article. *Silsby Mfg. Co. v. Allentown*, 153 Pa. 319.

South Carolina. In a case where competitive bidding was held under certain conditions but there was no mandatory requirement that the contract be let by competition to the lowest bidder, the Supreme Court of this State expressed the opinion that the city might, even when competitive bidding is required, advertise for bids and let a contract for paving streets with a patent material when all the competition possible under the circumstances is permitted. *Dillingham v. Spartanburgh*, 75 S. Car. 549.

When the charter or statute prescribes the terms or method by which a patented article may be used, its requirements must be complied with. *Allen v. Milwaukee*, 128 Wis. 678; *Cawker v. Milwaukee*, 133 Wis. 35; 113 N. W. Rep. 417. Liability of city to pay "royalty" to patentee. *Bigelow v. Louisville*, 3 Fish. Pat. Cas. 602.

¹ *Siegel v. Chicago*, 223 Ill. 428; *Monaghan v. Indianapolis*, 37 Ind. App. 280; *Seibert v. Indianapolis*, 40 Ind. App. 296; 81 N. E. 99; *Fineran v. Central Bitulithic Pav. Co.*, 116 Ky. 495; *Burgess v. Jefferson*, 21 La. An. 143; *Barber Asphalt Co. v. Gogreve*, 41 La. An. 251; *Dean v. Charlton*, 23 Wis. 590. See also *Fishburn v. Chicago*, 171 Ill. 338. Sequel to *Dean v. Charlton*, 23 Wis. 590, *supra*; see *Mills v. Charleston*, 29 Wis. 400, and *Dean v. Borschsenius*, 30 Wis. 236, the legislature having validated the assessment.

Indiana. The Appellate Court in this State has held that when a pavement is patented there cannot be competitive bidding therefor, and a specification specifying such patented article does not comply with a statute requiring competitive bidding, when the article is not intended for the use of the municipality itself but is to be paid for by an assessment upon the abutters. *Monaghan v. Indianapolis*, 37 Ind. App. 280. The court seems to lay stress upon the fact that there may be a distinction between a purchase for the use of the municipality itself payable from its general funds and a purchase for an improvement which is payable by assessment. The objection that a contract is for the use of patented processes and articles and that the city cannot contract for such use where the charter requires competition, is not available to the contractor or his surety in an action by the city on the bond for damages for breach of the contract. *Madison v. American Sanitary Engineering Co.*, 118 Wis. 480.

² *Indiana*. In *Monaghan v. Indianapolis*, 37 Ind. App. 280, it has been held that the specifications cannot call for a patented article for use in an improvement which is not intended for the use of the municipality itself, but

without competition when it is intended for the use of the city itself and is not to be paid by assessment on the property owners.¹ Other

is to be paid for by abutters, and stress is laid upon the fact that the article is not intended for the use of the city itself and to be paid from its funds.

Later Wisconsin decisions: The early case of *Dean v. Charlton*, 23 Wis. 590, is distinguished in *Kilvington v. Superior*, 83 Wis. 222, where it was held that the fact that the method of building a crematory for garbage was patented did not render invalid a contract therefor let to the lowest bidder, where the entire work was done at the expense of the city, and where there was a definite and settled price for the patent at which it was held and offered to the city and all contractors so that in fact there was free competition for the work and materials and all else not within the patent. The application of *Dean v. Charlton*, *supra*, was limited to assessments charged against abutting lots where the lot owners had the right secured to them to construct in front of their property the improvements for or in which the patented article or process was used. The court expressed its opinion that under any other theory a municipal corporation would be obliged to forego the purchase and use of all patented implements, modes, or processes, a result which they did not think the legislature contemplated. In *Ricketson v. Milwaukee*, 105 Wis. 591, where proceedings to construct a garbage crematory were held invalid because the council did not cause plans and specifications to be prepared, but required bidders to submit their own plans and specifications, the court declared that *Dean v. Charlton*, *supra*, as limited by *Kilvington v. Superior*, *supra*, embodies the rule that prevails in Wisconsin. In *Hurley Water Co. v. Vaughn*, 115 Wis. 470, the court held that a village might contract with a corporation organized in the main for the special purpose of supplying the village with water without advertisement and competitive bidding, remarking that where, in the very nature of things, competition would be impossible or improbable, it could not be supposed that the legislative purpose was to compel the municipality to go through the useless form of a letting to the lowest bidder. In *Allen v. Milwaukee*, 123 Wis. 678, a case involving the power of a city to use a patented

pavement in a local improvement payable by a special assessment on the abutting property, *Dodge, J., explained the decisions of the Wisconsin courts as follows:* "In *Dean v. Charlton*, 23 Wis. 590, this court decided that under charters, which give power to the city to impose, by special assessment, upon abutting lots the cost of a street improvement only upon competitive bids, cities have no power to adopt a patented pavement so controlled by a monopoly that there can be no competition, in the fair and reasonable meaning of the word. For nearly forty years the legislature has approved this construction of such grants of power by re-enacting them in substantially the same form and in some instances by making special provision for obtaining the benefits of patents. The authority of that case in this respect has not been contradicted. In *Kilvington v. Superior*, 83 Wis. 222, urged by respondent, the decision in no wise conflicts with the earlier case. It proceeds upon and gives effect to a distinction fully recognized in *Dean v. Charlton*, 23 Wis. 590; namely, that such general city powers as lighting streets, purchase of a fire engine, or destruction of garbage, are generally and broadly conferred by other clauses of our city charters and that as to them the requirement that purchases of materials or letting of work be done upon competitive bidding is merely regulative of a duty which the city government is bound to perform; and, as a result, that the legislature must be deemed not to have intended the requirement for competitive bidding to apply where it could not. The field is one of construction of our own statutes enacted after the rule of *Dean v. Charlton* was announced, so that views of courts in other jurisdictions upon their statutes are by no means controlling, if even relevant."

¹ *Wisconsin.* In this State the qualification of the general rule stated in the text is adopted when the article is intended for the use of the city and is not to be paid by special assessment. See *Kilvington v. Superior*, 83 Wis. 222; *Ricketson v. Milwaukee*, 105 Wis. 591; *Hurley Water Co. v. Vaughn*, 115 Wis. 470. The qualification in *Kilvington v. Superior*, 83 Wis. 222,

decisions permit the use of a patented article even in the case of a special improvement payable by assessment, when the city has acquired the right to permit any bidder who may be successful to use the patent in the improvement on reasonable terms,¹ and in Kentucky it is held that, although the improvement may be payable by assessment, if the specifications specify other articles of like quality and equally well suited for the purpose with the patented article, the patented article is thereby brought into such competition as the situation permits, and the requirement of the statute is complied with.²

§ 804. **Proprietary Articles; Monopolies.** — Under a charter provision requiring contracts to be advertised and let by competition, similar principles apply to *proprietary articles* and to articles and materials *controlled by practical monopolies*, as are applied to patented articles and processes, and a similar divergence of view has apparently resulted. The tendency of the courts, however, seems to be to adopt the view that in the case of articles which are a practical monopoly, or which are proprietary in their nature, and which cannot be obtained from more than one manufacturer, a municipality is not prohibited by reason of such monopoly and ownership from contracting therefor notwithstanding that the charter contemplates that there shall be competition.³ If, however, the article sought to

that there should be a definite and settled price for the patent, at which it is held and offered to the city and all contractors, so that there should be in fact free competition for the work and materials and all else not within the patent, does not seem to have been adhered to in the later *Wisconsin* cases cited *supra*.

¹ *Hastings v. Columbus*, 42 Ohio St. 585. In *Lacoste v. New Orleans*, 119 La. 469, 44 So. Rep. 267, it was held that when the patentee of an article has filed with the city authorities an agreement to allow the successful competitor the free use of his patent upon payment of a fixed royalty which appears to be reasonable, the fact that the patented article is called for by the specifications does not invalidate a contract, although the statute requires competitive bidding. The court said that its ruling was not intended to affect its decision in *Burgess v. Jefferson*, 21 La. An. 143, *supra*, or its *dictum* in *Barber Asphalt Pav. Co. v. Gogreve*, 41 La. An. 251, where no such agreement had been filed by the patentee. But

in *Illinois* and *Indiana*, it has been held that an agreement by the patentee to allow any bidder to use its article for a specified price does not enable such competition to be had as complies with the statute. *Siegel v. Chicago*, 223 Ill. 428; *Seibert v. Indianapolis*, 40 Ind. App. 296; 81 N. E. Rep. 99.

In *New Jersey*, it has been held that a city may ask for bids on a patented article when the price at which the article may be obtained by any one is definitely fixed and it is known to be obtainable by all at such price. *Bye v. Atlantic City*, 73 N. J. L. 402.

² *Fineran v. Central Bitulithic Pav. Co.*, 116 Ky. 495; *In re Paducah* (Ky.), 89 S. W. 302; *Campbell v. Southern Bitulithic Co.* (Ky.), 106 S. W. 1189. See to the same effect, *Baltimore v. Flack*, 104 Md. 107; *Dillingham v. Spartanburg*, 75 S. Car. 459.

³ A municipality may contract for a *proprietary* article. *Field v. Barber Asphalt Co.*, 117 Fed. Rep. 925, *aff'd* 194 U. S. 618; *Newark v. Bonnell*, 57 N. J. L. 424; *Holmes v. Detroit*, 120 Mich. 226; *Rhodes v. Denver Board of*

be obtained is *in general use and of general manufacture*, — *e. g.*, vitrified brick for street paving, — and it cannot be shown that there are special and peculiar reasons why the supply should be purchased from a particular manufacturer, then the weight of authority is to the view that a municipality cannot by its specifications limit the article to be furnished to those manufactured by a particular maker.¹

Public Works, 10 Colo. App. 99; *Beazley v. Kennedy* (Tenn. Ch. App.), 52 S. W. Rep. 791; *Verdin v. St. Louis*, 131 Mo. 26; *Swift v. St. Louis*, 180 Mo. 80; *Barber Asphalt Pav. Co. v. Field*, 188 Mo. 182, 200; *Schuck v. Reading*, 186 Pa. 248. *Contra*: *Fishburn v. Chicago*, 171 Ill. 338; *Boon v. Utica*, 5 N. Y. Misc. 391; *Diamond v. Mankato*, 89 Minn. 48; *Carroll v. Philadelphia*, 6 Pa. Dist. Rep. 397. In *Swift v. St. Louis*, 180 Mo. 80, the city advertised for bids as required by its charter for paving certain streets, but the specifications of material to be used required that the pavement should be of certain composition *manufactured only by one Warren* and known as "Warren's Puritan Brand." The city authorities were advised that the only proper and reliable binding cement for the macadam, known at that time, was cement of that brand. It was held that the specification of material did not violate the provisions of the charter relative to letting contracts to the lowest bidder; that while it would be necessary to specify that the cement used should be equal to the brand named, if more than one firm manufactured a uniform cement of the quality required, yet where only one firm manufactured that cement this course did not require to be followed.

When the specifications for a paving contract named the vitrified bricks of three different makers "or any other vitrified brick equally as good as those designated," it was held that they merely prescribed a standard to which bidders should conform, and that fair competition was not thereby prevented. *Gilsonite Const. Co. v. Arkansas McAlester Coal Co.*, 205 Mo. 49. In *Fishburn v. Chicago*, 171 Ill. 338, it was held that under a statute providing that all contracts for public improvements should be let to the lowest responsible bidder "in the manner to be prescribed by ordinance," an ordinance providing that the cementing

material for the pavement of a street should be a paving cement prepared from refined Trinidad asphaltum obtained from Pitch Lake in the Island of Trinidad was void, since such asphaltum was under the absolute control of one company and there were at least five other companies engaged in the business of selling asphaltum procured in the Island of Trinidad for street paving but not procured at Pitch Lake in said island, but which was equal to the asphaltum obtained from Pitch Lake, all of these companies being competitors in the contract in question, since such provision prevented competition and tended to foster and create a monopoly. As in a question with an abutting owner who is assessed for the improvement, a contract let to a party having a monopoly of the material to be used is only voidable and not void, and the property owner must move without unreasonable delay. It is too late to object to assessment after the work has been done. *Givins v. People*, 194 Ill. 150.

¹ *Kansas City Brick Co. v. National Surety Co.*, 157 Fed. Rep. 620; *National Surety Co. v. Kansas City, &c. Brick Co.*, 73 Kan. 196; *Shoenberg v. Field*, 95 Mo. App. 241; *Swift v. St. Louis*, 180 Mo. 80; *Larned v. Syracuse*, 17 N. Y. App. Div. 19; *Smith v. Syracuse Improvement Co.*, 161 N. Y. 484; *Tucker v. Newark*, 19 Ohio Cir. Ct. 1. *Contra*: *Holmes v. Detroit*, 120 Mich. 226. In *Beazley v. Kennedy* (Tenn. Ch. App.), 52 S. W. Rep. 791, it was held that a board of public works who were required to advertise for bids and let public contracts to the lowest responsible bidder were entitled to restrict the bidding to two designated brands of fire hose in the absence of bad faith, there being nothing in the charter nor in any general law limiting the discretion of the board in selecting the character or kind of materials to be used in supplying the various needs of the city.

§ 805 (468). **Same Subject.** — Where the municipal authorities were required by law to *advertise for sealed proposals* for making local improvements, and award the work to the *lowest responsible bidder*, to publish a notice of the award, and to allow the owners of the major part of the frontage to take the contract upon the same terms if they should desire, the court were of opinion that the city authorities had no power to do work which could not be contracted for in this mode, or which the abutters could not themselves perform, and that the award of a contract for a *patented pavement* to the assignee of the patentee, who had the exclusive right to lay the same, was unauthorized, and the contract void.¹

As the purpose of such a provision in the charter is to secure, through competition, the most advantageous terms, something is necessarily left to the discretion, to be fairly exercised of course, of the council, in the adoption of the course which will best attain the end; and it does not contravene this restriction to call for bids for putting down various kinds of wood and stone pavements, some patented and some not, and afterwards, when all the proposals are in, selecting the one which is relatively the lowest or the most satisfactory, all things considered; but when the kind is thus selected, the lowest responsible bidder who has the lawful power to perform his undertaking has the absolute legal right to have the contract awarded to him as against a higher bidder.²

§ 806 (469). **Lowest Bidder; Exclusive Right.** — In an action on a contract for lighting certain streets in New York City with gas, it appeared that the company had, by law, *the exclusive right* to fur-

¹ *Nicolson Pavement Co. v. Painter*, 35 Cal. 699. This case was decided before *Dean v. Charlton*, 23 Wis. 590, *supra*, and the opinion of *Sanderson, J.*, in its general scope, sustains the view of the *Wisconsin* court; and approving of the language of *Field, C. J.*, in *Zottman's Case*, 20 Cal. 96, treats "the mode as constituting the measure of the power." *Post*, chap. xxvii; *ante*, § 246; *post*, § 1189.

² *Attorney-General v. Detroit*, 41 Mich. 224. Remedy of lowest bidder when contract is awarded to another. *Id.*; *Kelly v. Chicago*, 62 Ill. 279; *post*, chap. xxxi, § 1582.

The council of a city held to have no power to contract for the grading of a street until they first shall have enacted an ordinance for the improvement, nor except such contract be let to the lowest bidder, after publication of no-

tice and fair competition. *Fulton v. Lincoln*, 9 Neb. 358. A council may select three kinds of brick for repaving the streets of a city, and in advertising for proposals may request bidders to name a separate price for the different kinds of brick; and it may reject a bid for brick not in conformity with its specifications, but alleged to be as good, in favor of a higher bid conforming to the specifications, although the sale of the brick named in the specifications was controlled by one dealer, the court saying that in their opinion "the law is complied with, in the absence of actual fraud or corruption, when specifications are submitted to competitive bidding, although some article is specified, which, by reason of a patent or circumstances, is in the hands or under the control of a single dealer." *Holmes v. Detroit*, 120 Mich. 226.

nish that part of the city with gas. The charter of the city, however, required all contracts for wants and supplies beyond a certain value, which the contract in suit exceeded, *to be let to the lowest bidder*, and the contract not being so let, it was claimed to be void. It was held that since the company had the exclusive right to furnish the gas (which prevented competition), the provision of the charter requiring contracts to be let to the lowest bidder (with a view to secure competition) was inapplicable, and the contract was sustained under the general corporate power of the city to contract for the lighting of its streets.¹

§ 807. *Necessity for and Sufficiency of Specifications.* — When by charter or statute a municipality can only let its contracts to the lowest bidder after advertisement, an implied condition and restriction is placed upon the proceedings of the municipality that the various steps adopted by it to let a contract shall be of such a nature and taken in *such form as in good faith to invite competition*. Hence, persons bidding must bid upon a uniform basis, and the municipality must take steps to determine in advance the nature of the improvement, the material of which it is to be constructed, and to ascertain all those facts which are necessary to enable an intending bidder to comprehend the scope of the improvement and the nature of the supposed contract, and bid accordingly. Therefore, something in the nature of a *specification* of the material or of a plan and specification for the improvement *must be adopted by the municipality* prior to inviting bids. This specification in the case of a contract for an article of general use is undoubtedly satisfied by describing it by its trade name, but in the case of an expensive and complicated improvement *plans and specifications* setting forth the improvement in sufficient detail to enable competitors to bid must be adopted before advertisement. This is the rule whether the statute expressly requires plans and specifications to be furnished or is silent thereon, merely imposing the general duty upon the municipality to advertise for bids and to let the contract to the lowest bidder. The plan and specification are essential to competitive bidding because it is only through their agency that there is a reasonable assurance that all bidders are competing upon the same basis and without favoritism

¹ *Harlem Gas Co. v. New York*, 33 N. Y. 309. Where a city has authority to contract therefor, it cannot resist payment for gas-light furnished, because of illegal provisions as to the particular fund from which payment would be made. The consideration of such pro-

visions being legal, the price would be payable, if not otherwise, out of the general fund; and the objectionable provisions may be rejected, and the rest of the contract permitted to stand. *Nebraska City v. Nebraska Gas Co.*, 9 Neb. 339.

and that no fraud enters into the award.¹ Under such a charter provision, a city cannot require each bidder to submit *with his bid*

¹ Fones Hardware Co. v. Erb, 54 Ark. 645; Ertle v. Leary, 114 Cal. 238; Piedmont Pav. Co. v. Allman, 136 Cal. 88; Coggeshall v. Des Moines, 78 Iowa, 235; Windsor v. Des Moines, 101 Iowa, 343; Polk v. McCartney, 104 Iowa, 567; Packard v. Hayes, 94 Md. 233; Wilkins v. Detroit, 46 Mich. 120; Detroit Free Press Co. v. State Auditors, 47 Mich. 135; McBrien v. Grand Rapids, 56 Mich. 95; Detroit v. Wayne Co. Circuit Judge, 79 Mich. 384; Cass Farm Co. v. Detroit, 124 Mich. 433; Moreland v. Detroit, 130 Mich. 343; State v. Barlow, 48 Mo. 17; Excelsior Springs v. Ettenson, 120 Mo. App. 215, 225; People v. Buffalo County, 4 Neb. 150; Van Reipen v. Jersey City, 58 N. J. L. 262; Tift v. Buffalo, 25 N. Y. App. Div. 376, aff'd 164 N. Y. 605; People v. Board of Improvement, 43 N. Y. 227; Gage v. New York City, 110 N. Y. App. Div. 403, 411; Boren v. Darke County, 21 Ohio St. 311; American Clock Co. v. Licking County Com'rs, 31 Ohio St. 415; State v. Crawford County, 17 Ohio Cir. Ct. 370; Mazet v. Pittsburgh, 137 Pa. 548; Myrick v. LaCrosse, 17 Wis. 442; Kneeland v. Milwaukee, 18 Wis. 411; Wells v. Burnham, 20 Wis. 112; Kneeland v. Furlong, 20 Wis. 437; Houghton v. Burnham, 22 Wis. 301; Ricketson v. Milwaukee, 105 Wis. 591; Chippewa Bridge Co. v. Durand, 122 Wis. 85.

In Fones Hardware Co. v. Erb, 54 Ark. 615, it is said that the plan and specification must be not merely of a general character, but so *definite and detailed* as to disclose the thing to be undertaken with circumstantial fullness and precision. It is a sufficient compliance with a statute requiring the proposals to state the amount and kinds of material to be furnished, that the data given enable bidders to compute the amount of material required. Jenny v. Des Moines, 103 Iowa, 347. See also Arnold v. Fort Dodge, 111 Iowa, 152. Where contracts for public work are required by law to be made by advertising proposals and specifications, for the purpose of securing competitive bidding, such specifications must be *definite as to the quantity as well as the quality* of materials required, or the contract will be void. Bigler v. New York, 5 Abb. N. Cas. (N. Y.) 51.

The fact that a notice inviting bids for the necessary labor and material for the improvement of streets refers to plans and specifications makes the notice sufficiently definite and specific as to the proposed work. Bozarth v. McGillicuddy, 19 Ind. App. 26; Arnold v. Ft. Dodge, 111 Iowa, 152. Where plans are essential under the statute, the commissioners authorized to have them prepared are the judges of the sufficiency thereof. Ampt v. Cincinnati, 6 Ohio N. P. 208.

Where the specifications which form part of the contract are not sufficiently definite to enable the contractor to complete the work without giving him full discretion to determine precisely how every part of the work is to be done, it is necessary that the *municipality furnish detailed working plans* definitely describing how the several parts of the work are to be performed in advance of the contractor's entering upon the performance of the work, and daily instruction to the contractor's laborers as to how the work is to be constructed is not sufficient. Delafield v. Westfield, 41 N. Y. App. Div. 24, aff'd 169 N. Y. 582. A contract for a street improvement, which requires the work to be done in accordance with specifications declared to be annexed thereto and made a part of the contract, is invalid *where no specifications are annexed* to the contract and it is not shown that any had ever been prepared for signature or annexed thereto. Gray v. Richardson, 124 Cal. 460.

In some jurisdictions *alternative bids* on express alternative specifications have been sustained. See Attorney-General v. Detroit, 26 Mich. 263; Barber Asphalt Pav. Co. v. Gaar, 115 Ky. 334; Tucker v. Newark, 19 Ohio Cir. Ct. 1. In Van Reipen v. Jersey City, 58 N. J. L. 262, it is said, "The city may invite bids in various forms, provided each proposal is on a *specific definite plan*." Under a statute authorizing a majority of the property owners to select the kind of material to be used in paving streets, it was held that bids for paving may properly be advertised for and received either before or after the selection of the material, and in case satisfactory bids should be received prior to the designa-

scheme for doing the work. Such a course leaves no definite basis for competition among the bidders, and the municipality has no authority under such a statute to make comparisons as to different material proposed to be used, or the work proposed to be done according to the different bids.¹ In keeping with the same general

on of materials, it is not absolutely necessary that the board of public works should again re-advertise for and receive bids after such designation. The court said that it was incorrect to say that no reasonable bid could be made until it is known what material is to be used. The advertisement, or notice to contractors, might, and in this case did, call for bids on the various kinds of materials liable to be used, and that event contractors could bid as intelligently as if bids were asked for a vitrified brick alone or on any other material. The alternative method adopted was considered by the court to be more likely to prevent combination between contractors than if bids were asked upon any one kind of material. The selection thereof had been made by the property owners. *State v. Irkhauser*, 37 Neb. 521. Specifications for furnishing lights of 2000 candle power on any plan other than now then in use, held to be sufficiently definite in conjunction with specifications for lighting according to the systems in use. *Detroit v. Wayne Co.* Circuit Judge, 79 Mich. 384. But bidding upon alternative specifications is held to be improper in Wisconsin. *Locking v. Warren Bros. Co.*, 134 Wis. 35; 114 N. W. Rep. 789. A failure to state in the notice and advertisement the terms and time of payment² as required by statute held to invalidate a contract. *Dyer v. Erwin*, 106 Ga. 845; *Janly Building Co. v. Newton*, 114 Ga. 15; *Scott v. Crow*, 121 Ga. 68. When competitive bidding is required by statute, and a specification of dredging states the work to be done as "about 1,000 cubic yards" with extra work not to exceed five per cent of the cost, the work done cannot exceed the amount stated. Otherwise, by advertising small contracts, the intent of the statute might be defeated. *Matter of Morris & Cumings Dredging Co.*, 116 N. Y. App. Div. 257.

¹ *Ertle v. Leary*, 114 Cal. 238; *Loggesshall v. Des Moines*, 78 Iowa, 235; *Backard v. Hayes*, 94 Md. 233; *People v. Buffalo County*, 4 Neb. 150; *Mazet*

v. Pittsburgh, 137 Pa. 548; *Ricketson v. Milwaukee*, 105 Wis. 591. But when there is no provision in the charter requiring bids to be let to the lowest bidder, although the charter requires proposals to be advertised for, bidders may be required in an advertisement to furnish their own plans for the improvement instead of requiring them to bid on a particular plan or specification already adopted. *Kundinger v. Saginaw*, 132 Mich. 395.

In California, the contract proposed to be offered to competitors cannot contain a stipulation delegating to the superintendent of streets or other executive official the power to determine whether more or less work shall be done by the contractor and what materials shall be used. *Stansbury v. White*, 121 Cal. 433; *Bolton v. Gilleran*, 105 Cal. 244; *Warren v. Chandos*, 115 Cal. 382; *Perine Contracting Co. v. Pasadena*, 116 Cal. 6; *California Improvement Co. v. Reynolds*, 123 Cal. 88; *Chase v. Scheerer*, 136 Cal. 248. See also *Dixon v. Greene County*, 76 Miss. 794. But this does not prevent the delegation to the superintendent of streets or other officer of the supervision of the mere details of construction in performing the work under the specifications. *Haughawout v. Hubbard*, 131 Cal. 675. As to delegation of public powers and trusts generally, see *ante*, § 96. A charter provision that where the voters have authorized the construction of water works, the city council shall invite written proposals with plans and specifications for the construction thereof, is inconsistent with the provision of an earlier statute requiring contracts for \$500 or more to be let to the lowest responsible bidder after advertisement, and, when plans and specifications are to constitute a part of such contract, to state in the notice where the same may be seen, and repeals such earlier provision. The charter provision commits to the council a discretionary power to determine which system is the best upon the plans and specifications submitted by the bidders, and introduces

principle that all the proceedings must be of such a nature as to secure competition, *the bid must conform to the plans, specifications, and advertisement of the municipality,*¹ and *the contract entered into must also conform to the plans, specifications, and advertisement.* If a contract differing therefrom in terms be awarded or made, it cannot be said to have been the result of the competition which the statute requires, and it is invalid.² The rule that the contract must

an element inconsistent with competitive bidding upon plans and specifications previously adopted. *Reno Water, &c. Co. v. Osburn*, 25 Nev. 53.

¹ *Osburn v. Lyons*, 104 Iowa, 160; *McDermott v. Jersey City*, 56 N. J. L. 273; *Moreland v. Passaic*, 63 N. J. L. 208; *Lake Shore Foundry v. Cleveland*, 8 Ohio Cir. Ct. 671; *Hermann v. State*, 11 Ohio Cir. Ct. 504; *Many v. Cleveland*, 19 Ohio Cir. Ct. 58.

A blank bid omitting the name of the bidder is void, and it is not rendered valid by a bond attached, signed by the contractors and the sureties, referring to and misreciting the bid. The bid must be in such form as to be binding upon its acceptance, otherwise the bond would be of no avail. *Williams v. Bergin*, 129 Cal. 461. Bid was held not to be invalidated by the fact that the price offered was written on an erasure where the erasure was made before the bid was verified or submitted, or that it is verified but not signed, where the ordinance does not require it to be signed, but only to be verified. *Matter of Clamp*, 33 Misc. (N. Y.) 250. The action of a board or of an individual member of a board in directing their engineer to inform intending bidders that no bid would be received which was not accompanied by a bid for the purchase of bonds, will not nullify the contract actually made, where it does not appear that any one was deterred by this fact from bidding on the contract, or that any persons would have bid without such condition who did not bid with it, or that the bids which were put in were any higher by reason of that condition than they would have been without it. *Rice v. Haywards*, 107 Cal. 398.

A bid which manifestly contained various mistakes in the figures, whereby it was clear that the amount the bidder would receive if the bid were accepted and the work performed would be diminished many thousands of dollars, does not ripen into a contract where

there was no doubt of the mistake on the part of the bidder and he made a prompt declaration of it as soon as it was discovered. *Moffett Hodgkins, &c. Co. v. Rochester*, 178 U. S. 373. When the paving of a street is treated as an entire improvement, a bid for a part of the work, *e. g.*, the curbing, may be ignored. *Stimson v. Handley*, 151 Cal. 379; 90 Pac. Rep. 945. A sealed bid cannot be changed after it is opened. *Chicago v. Mohr*, 216 Ill. 320; *State v. Douglas County*, 11 Neb. 484; *Beaver v. Blind Asylum Trustees*, 19 Ohio St. 97; *Boren v. Darke County*, 21 Ohio St. 311.

² *Inge v. Mobile Board of Public Works*, 135 Ala. 187; *Montgomery v. Barnett*, 149 Ala. 119; 43 So. Rep. 92; *Reid v. Clay*, 134 Cal. 207; *Manly Building Co. v. Newton*, 114 Ga. 245; *Pells v. Paxton*, 176 Ill. 318; *Wickwire v. Elkhart*, 144 Ind. 305; *Chicago Bridge & Iron Co. v. West Bay City*, 129 Mich. 65; *Nash v. St. Paul*, 11 Minn. 174; *Diamond v. Mankato*, 89 Minn. 48; *Le Tourneau v. Hugo*, 90 Minn. 420; *Patterson v. Barber Asphalt Pav. Co.*, 96 Minn. 9; *Dunn v. McNeely*, 75 Mo. App. 217; *Paving Co. v. Ullman*, 137 Mo. 543; *Turner v. Springfield*, 117 Mo. App. 418; *Fairbanks Morse & Co. v. North Bend*, 68 Neb. 560; *Murphy v. Plattsmouth*, 78 Neb. 163; 110 N. W. Rep. 749; *Shaw v. Trenton*, 49 N. J. L. 339; *McDermott v. Jersey City*, 56 N. J. L. 273; *Moreland v. Passaic*, 63 N. J. L. 208; *Dickinson v. Poughkeepsie*, 75 N. Y. 65; *Cotter v. Casteel* (Tex. Civ. App.), 37 S. W. Rep. 791; *Chippewa Bridge Co. v. Durand*, 122 Wis. 85.

A change in the time of completion of the work beyond that specified in the original ordinance, held to be a material variance from the letting and to invalidate the contract. *Osburn v. Lyons*, 104 Iowa, 160. Where bids for water works were invited upon the express condition that the contractor should provide reservoirs capable of

conform to the plan, specification, bid, and advertisement applies, although but one bid was made, and although there is no allegation or suggestion of fraud,¹ and although the change made in the contract is to the advantage of the city.²

§ 808. **Stipulations as to Hours of Labor, Wages, and the Employment of Union Labor.** — Under a statute or charter which requires the letting of the contract by competition to the lowest bidder, we have seen that it is an essential element that all the steps taken be so framed as to invite competition and to assure a fair award to the person entitled to the contract on the bids submitted. We have elsewhere discussed³ the power of the legislature to impose mandatory conditions upon the municipality as to the hours of labor, the wages paid to laborers, and the employment of union labor, &c., and have seen that in some jurisdictions at least statutes specifying the number of hours which shall constitute a day's labor, requiring the payment of a specified rate or the prevailing rate of wages, and limiting the employment of persons upon public contracts, either by the municipality or by contractors under the municipality, to members of labor unions, are *unconstitutional* as depriving the municipality and the contractor of liberty and property without due process of law, or as class legislation, or as tending to create a monopoly. The *same principles* render invalid provisions in ordinances and resolutions providing for improvements, or in the specifications upon which bids are invited, or in the contracts, requiring the employment of *union labor only*, or limiting the contracts to such persons as are able to show the *union label*,⁴ or restricting the hours of labor on the part of

storing a water supply for one hundred days' delivery at the rate of fifty million gallons per day, the contract cannot be awarded to a bidder for the reason that he offered to provide a storage capacity sufficient for two hundred and fifty days. *Van Reipen v. Jersey City*, 58 N. J. L. 262. Where proposals advertised required bidders to guarantee rubber hose for six years, a contract given to a bidder other than the lowest for the reason that he offered to warrant the hose for nine years is void. *Shaw v. Trenton*, 49 N. J. L. 339. See also *McDermott v. Jersey City*, 56 N. J. L. 273. But in *Wells v. People*, 201 Ill. 435, it was held that a contract for a street improvement was not invalid because it provided for the deposit of a sum necessary to do the work at prices specified, where it did not appear that a lower bid for the

work could have been obtained, or that the bidding of the contractor was influenced by knowledge of the contract provision.

¹ *Le Tourneau v. Hugo*, 90 Minn. 420.

² *Inge v. Mobile Board of Public Works*, 135 Ala. 187. See also *Louchheim v. Philadelphia*, 218 Pa. 100. But see *Mankato v. Barber Asphalt Pav. Co.*, 142 Fed. Rep. 329, where it was held that changes which did not confer any benefit on the contractor and did not prejudice the city did not vitiate the contract.

³ *Ante*, § 118.

⁴ *Atlanta v. Stein*, 111 Ga. 789; *Adams v. Brenan*, 177 Ill. 194; *Holden v. Alton*, 179 Ill. 318; *Chicago v. Hulbert*, 205 Ill. 346, 364; *Lewis v. Detroit Board of Education*, 133 Mich. 306; *Paterson Chronicle Co. v. Pater-*

the employees of the contractor to eight hours a day, and providing that the contract should be forfeited for a breach of the condition,¹ or prohibiting the employment of any person or persons other than native-born or naturalized citizens of the United States,² or specifying or controlling the wages to be paid by the contractor on the job,³ or requiring all the stone used in the improvement to be cut within the limits of the State.⁴ If a *taxpayer acts promptly, he may enjoin* the city from entering into or carrying out such a contract, and the fact that he was a competitor in the bidding does not affect his right to relief.⁵ To obtain relief after the contract has been entered into and at a time when the party complaining is resisting the payment of an assessment upon his property, the *property owner must show* that provisions restricting competition and injurious to the public actually entered into the competition in some way, but he need not show that such provisions increased the cost of the work.⁶ But inasmuch as these provisions are contrary to law, they may be dis-

son, 66 N. J. L. 129; *Elliott v. Pittsburgh*, 6 Pa. Dist. Rep. 455; *Marshall & Bruce Co. v. Nashville*, 109 Tenn. 495; *Jacobs v. Cohen*, 99 N. Y. App. Div. 481. See also *Mills v. U. S. Printing Co.*, 99 N. Y. App. Div. 605. An ordinance providing that after its passage all city printing should be awarded and let only to those printing houses and shops employing union labor or which could show the union label, was held to be illegal, and a contract awarded to a bidder whose bid was not the lowest, passing over a bidder whose bid was the lowest, but who did not employ union labor, and could not show the union label, was held to be invalid. *Holden v. Alton*, 179 Ill. 318. An ordinance requiring the employment of union labor is invalid although the charter does not require contracts to be let to the lowest bidder. *Atlanta v. Stein*, 111 Ga. 789.

¹ *Fiske v. People*, 188 Ill. 206; *McChesney v. People*, 200 Ill. 146; *Sweet v. People*, 200 Ill. 536; *Glover v. People*, 201 Ill. 545; *People v. Coler*, 166 N. Y. 1; *People v. Featherstonhaugh*, 172 N. Y. 112; *Cleveland v. Clement Bros. Const. Co.*, 67 Ohio St. 197; *ante*, § 118.

² *Inge v. Mobile Board of Public Works*, 135 Ala. 187; *McChesney v. People*, 200 Ill. 146; *Sweet v. People*, 200 Ill. 536; *Glover v. People*, 201 Ill. 545; *Chicago v. Hulbert*, 205 Ill. 346, 364; *Frame v. Felix*, 167 Pa. 47; *Philadelphia v. McLinden*, 205 Pa. 172.

The bid of the *lowest responsible bidder cannot be rejected* and a higher bid accepted on the ground that the latter bidder employs home labor in the performance of the contract. *McDonough v. Washington Boro*, 20 Pa. County Ct. Rep. 345.

³ A provision in specifications requiring the contractor to pay no man a less sum for his labor than that stipulated therein is inconsistent with a statute requiring the work to be let to the lowest responsible bidder. *Frame v. Felix*, 167 Pa. 47. See also *State v. Norton*, 7 Ohio Dec. 354. Statutes requiring contracts for public work to stipulate for the payment of laborers at not less than the prevailing rate of wages in the locality held unconstitutional. *People v. Coler*, 166 N. Y. 144, *aff'g* 56 N. Y. App. Div. 98; *Knowles v. New York*, 37 N. Y. Misc. 195; *Meyers v. Pennsylvania Steel Co.*, 77 N. Y. App. Div. 307; *People v. Featherstonhaugh*, 172 N. Y. 112.

⁴ *People v. Coler*, 166 N. Y. 1. *Contra*: *Allen v. Labsap*, 188 Mo. 692. See also *St. Louis Quarry & Const. Co. v. Von Versen*, 81 Mo. App. 519.

⁵ *Fishburn v. Chicago*, 171 Ill. 338; *Adams v. Brennan*, 177 Ill. 194; *Holden v. Alton*, 179 Ill. 318; *Lewis v. Detroit Board of Education*, 139 Mich. 306; *Marshall & Bruce Co. v. Nashville*, 109 Tenn. 495.

⁶ *McChesney v. People*, 200 Ill. 146; *Wells v. People*, 201 Ill. 435. See also *Allen v. Labsap*, 188 Mo. 692.

regarded by the parties contracting under the principle that every person is presumed to know the law and to obey it.¹ If the facts disclose that the unlawful provisions were in fact ignored by the competitors and did not affect the bidding, or tend to injure the municipality or the property owners liable for the cost of the improvement in any way, the validity of the contract is not affected thereby, or the right of the municipality to enforce a special assessment destroyed.² The harmlessness of such an illegal provision is

¹ *Marshall & Bruce Co. v. Nashville*, 109 Tenn. 495; *Chicago v. Hulbert*, 205 Ill. 346, 364.

² In *Hamilton v. People*, 194 Ill. 133, there was a clause in the specifications by which it was agreed that the contractor should not employ or permit to be employed other than native born or naturalized citizens of the United States. The clause was not found in the ordinance providing for the improvement, nor in any general or special ordinance of the city, and it was not shown that there was any such requirement in the advertisements for bids, or that the bidders knew of it. It was held that the mere fact that such a clause was found among the specifications was not sufficient evidence that it entered into the bidding in any way. In *Givins v. People*, 194 Ill. 150, a like provision in the contract was made the basis of an objection, but it was not shown that it was a requirement in bidding for the work, and the fact that it was engrafted on the contract was not considered sufficient to prove that it could have affected the cost of the improvement. In *Grey v. People*, 194 Ill. 486, it was shown that the general ordinance of the city required that all bids for public work in Chicago should contain a clause binding the bidder to hire only members of labor unions. It was not shown, however, that the ordinance was enforced, or that the provision entered into the competition so as to exclude bidders who employed or desired to employ persons not members of labor unions. The ordinance was regarded as unconstitutional and void, but it was held that the proof was not sufficient to connect it with the bidding for the work. In *Treat v. People*, 195 Ill. 196, provisions of a general ordinance and of the contract limiting the hours of labor and prohibiting the employment of alien laborers were made the basis of an objection. It was not shown that the requirements of the

ordinance were enforced in the bidding, or that bidders were required or invited to bid upon such specification, or with notice that it would be inserted in the contract. It was held that the objection was unavailing. To the same effect, *McChesney v. People*, 200 Ill. 146; *Sweet v. People*, 200 Ill. 536; *Doyle v. People*, 207 Ill. 75; *Wells v. People*, 201 Ill. 435. But an allegation that provisions in the specifications for a local improvement upon which the contractors were obliged to base their bids limited the hours of labor under a penalty of forfeiture of the contract by reason of which the competition in bidding was unduly restricted, is a sufficient allegation of the illegality of the letting. *Glover v. People*, 201 Ill. 545. In *DeWolf v. People*, 202 Ill. 73, it was held that illegal provisions in the contract for a public improvement limiting the hours of labor and prohibiting the employment of alien labor did not vitiate the assessment, if they were not to be found in the specifications upon which the bids were based. In *Gage v. People*, 207 Ill. 61, it was, however, held that where the specifications for a local improvement contained provisions for an eight-hour day and against employing alien labor, and such provisions are referred to in the advertisement for the bid, and made a part of the contract, the presumption arises that they entered into the competitive bidding, although this presumption may be rebutted. See also *Gage v. People*, 207 Ill. 73; *Ryan v. People*, 207 Ill. 74. The contract for a street improvement stipulating for an eight-hour day and that no Chinese should be employed upon the work, held not to be invalid where it did not appear that the contract price was affected by the stipulation. *Hellman v. Shoulters*, 114 Cal. 136. In *St. Louis Quarry & Const. Co. v. Frost*, 90 Mo. App. 677, an ordinance requiring all stone to be dressed within the State was

peculiarly apparent when it is inserted in the contract pursuant to a statutory requirement *after* the statute has been held to be invalid by the court of last resort of the State. Under such circumstances it cannot be regarded as affecting the letting of the contract in any way, or its validity.¹ After a contract has been entered into by a contractor containing one of these illegal stipulations, and if the work has been performed, payment of the contract price cannot be resisted on the ground that he violated such provision. Such a stipulation is not binding on the contractor and may be ignored by him.²

held not to invalidate a contract when the evidence showed that it did not either restrict bidding or increase the cost of the improvement.

¹ In *People v. Featherstonhaugh*, 172 N. Y. 112, specifications were prepared prior to decision of the Court of Appeals of New York holding the provision of the *New York Labor Law requiring the payment of the prevailing rate of wages* to be unconstitutional and void. The bids, however, were not made and handed up until after its decision to that effect. Before the bids were made, notice was given to the contractors that the commission would not enforce the provisions of the Labor Law, which has been declared unconstitutional, and that the commission would not enforce any of the provisions of that law which might thereafter be declared unconstitutional. The contract entered into only provided that the contractor should satisfactorily comply with all the provisions of the labor law of the State which "may now be in force." It was held that inasmuch as the court had held the provisions of the labor law relating to the prevailing rate of wages to be invalid prior to the making of the contract, it was not in force at the time the bids were made or the contract executed; that at that time contractors must be presumed to have known the law, and consequently to have known that the provision with respect to the rate of wages was unconstitutional; that they were deemed to have made their bids with this understanding, independently of any notice which was given to them by the commissioners; and that inasmuch as it appeared that their bid was not increased by the provisions of the Labor Law which were held to be invalid, these provisions might be eliminated, and the contract might stand unimpaired and in full force and effect.

² An advertisement contained a notice that all work, before acceptance, *must bear the union label*. The contractor specified in his bid the goods to be furnished, item by item, and offered to furnish them, but made no express stipulation to attach the union label. The court held that the provision of the contract and advertisement that the goods should bear the union label was invalid and void; that the bidder was not bound by the provision, and might ignore it in making his bid, and refuse to comply with it in executing his contract. The majority of the court was further of the opinion that the insertion of the provision in the contract and advertisement could not, in the absence of proof, be presumed to have interfered with competitive bidding, since all bidders must have been assumed to have known that the condition was illegal and could not be enforced; and therefore the contract and bid should be treated as though no such condition had been attached to them. The contractor having performed the contract according to the specifications except as to the illegal requirements as to the label, the city was bound to accept and pay for the goods, and the contractor was entitled to recover the contract price. *Marshall & Bruce Co. v. Nashville*, 109 Tenn. 495. In *People v. Coler*, 166 N. Y. 1, a municipal contract for grading a public street contained an invalid stipulation that he would pay the prevailing rate of wages in the locality, and that if he failed to pay such rate of wages the contract should be void. It was held that the fact that the contractors stipulated that the contract should be void in the event of a violation of the statute was no defence to a proceeding to compel payment by the city, since the obligation and legal effect of a promise or engagement imported into a contract

§ 809. *Necessity and Sufficiency of Advertisement.* — The purpose of a statute requiring the letting of bids to the lowest bidder is to invite competition, and to that end publicity of the intention to let the contract is of the essence of the proceeding. Hence, any *statutory provisions requiring advertisement*, or specifying its nature, are usually to be regarded as *mandatory*, and a failure substantially to comply with their requirements is sufficient to avoid the contract.¹ When the *statute* does not prescribe the time or the method of advertisement, these matters are left to the discretion of the city council or of the board entrusted with the duty of making the contract.²

by force of a statute depends upon the validity of the law, and such a stipulation cannot survive the statute upon which it is founded, but falls with it. A similar decision was rendered in *People v. Coler*, 166 N. Y. 144, where the contract contained an invalid provision limiting the contractor to the use of *stone cut and dressed within the State*. To the same effect, see *Cleveland v. Clement Bros. Const. Co.*, 67 Ohio St. 197. In proceeding to improve a street, a city council entered into a contract with a railroad company providing that in consideration that the city pave the street with brick on each side of the railroad track to a width not less than thirteen feet and otherwise improve said street, and binding the contractors for the improvement to ship all material for the improvement over the railroad, the railroad company was also to make certain improvements on the street. The ordinance and contract for the improvement made no reference to this agreement, but left the contractors entirely free to purchase the material for the improvement from whom they pleased, and to transport the same over whatever railroad they might select. It was held that the agreement with the railroad company was invalid so far as it provided that the council should bind the contractors to ship the material over the railway; that the city evidently regarded it as invalid; and that the ordinance and contract to improve the street being entirely independent of and making no reference to said agreement, their validity did not depend thereon in any way, and therefore the ordinance and contract were not illegal and void on account of said agreement. *Cason v. Lebanon*, 153 Ind. 567.

¹ *Bozarth v. McGillicuddy*, 19 Ind.

App. 26; *Windsor v. Des Moines*, 101 Iowa, 343; *Osborn v. Lyons*, 104 Iowa, 160; *Polk v. McCartney*, 104 Iowa, 567; *State v. King*, 109 La. 799; *Bowditch v. Boston*, 164 Mass. 107; *Heidelberg v. St. Francois County*, 100 Mo. 69; *People v. Buffalo County*, 4 Neb. 150; *Fulton v. Lincoln*, 9 Neb. 358; *State v. York County*, 13 Neb. 57; *State v. Saline County*, 19 Neb. 253; *State v. Cornell*, 52 Neb. 25, 37; *Fairbanks, Morse & Co. v. North Bend*, 68 Neb. 560; *Van Reipen v. Jersey City*, 58 N. J. L. 262; *Jersey City Board of Finance v. Jersey City*, 57 N. J. L. 452; *Schumm v. Seymour*, 24 N. J. Eq. 143; *La France Engine Co. v. Syracuse*, 33 N. Y. Misc. 516; *McCloud v. Columbus*, 54 Ohio St. 439; *Lancaster v. Miller*, 58 Ohio St. 558; *Breath v. Galveston*, 92 Tex. 454.

Although it may be the duty of the council to itself award the contract, it may authorize a committee to advertise for bids. *Fayette v. Rich*, 122 Mo. App. 145. Although, under a general denial, proof might be competent that no advertisement for proposals had been made, evidence that the advertisement had not been published a sufficient number of times was held inadmissible under a general denial, under the rule that where a contract is valid on its face, its illegality on account of extraneous facts must be specially pleaded. *Hunt v. New York*, 47 N. Y. App. Div. 295. See also *Taber v. Ferguson*, 109 Ind. 227. *Sufficiency of advertisement* under statute, see *Bradley v. Van Wyck*, 65 N. Y. App. Div. 293. *Sufficiency of order for re-advertisement* under statute, see *Ellis v. Witmer*, 134 Cal. 249.

² *Duffy v. Saginaw*, 106 Mich. 335. Receipt of the bids by a board of public works raises a presumption that the board ratifies the act of its clerk in

§ 810. **Opening Bids; Awarding the Contract.** — *Statutory provisions* regulating the time and manner of opening the bids, *e. g.*, that they be opened in open session of the council, or in the presence of designated officials, are intended for the protection of the public interests and are mandatory. A failure substantially to comply therewith is sufficient to avoid the contract.¹ After the bids have been opened, the officers of a city are entitled to reasonable time for comparison and the calculation necessary to enable them to ascertain who is the lowest or most favorable bidder.² After the opening of

making the advertisement, and also determines that the advertisement by the clerk was for a sufficient period. *Duffy v. Saginaw*, 106 Mich. 335; *Beniteau v. Detroit*, 41 Mich. 116. Where no provision of the statute prescribes the time or method of advertisement, failure of a committee to comply with a city ordinance does not invalidate the contract, if the city council should see fit to enter into it. The whole matter of notice rests in the discretion of the council, and it may dispense with the requirements which it has imposed. Accordingly held that a contract made by the city council was valid, although only nine days' notice was given, where the council had directed that ten days' notice should be given. *Augusta v. McKibben*, 22 Ky. Law Rep. 1224; 60 S. W. Rep. 291. Where the engineer under authority from the council advertised for bids and fixed the date when the bids would be received and opened without being authorized to fix such date, it was held that it was, under the statute, the duty of the council to fix the date or expressly authorize the engineer to do so, and that the advertisement was invalid, and did not sustain any contract based upon it. *Pennsylvania Co. v. Cole*, 132 Fed. Rep. 668. Where a statute directs the council "to cause notice" of work to be posted and advertised, but does not direct that the council itself shall fix the time within which the proposals shall be presented, it is not a valid objection to the advertisement that the time of presentation of the bids is fixed, not by the council, but by the clerk. *Belser v. Allman*, 134 Cal. 399. If advertisement is had for the prescribed period, it is sufficient, although the notice did not fix a time or place for receiving proposals. *Becket v. Morse*, 4 Cal. App. 228.

¹ *Edwards v. Berlin*, 123 Cal. 544;

City Street Imp. Co. v. Laird, 133 Cal. 27; *People v. Coler*, 35 N. Y. App. Div. 401. Where the ordinance provided that advertisements for bids should specify the time when and place where such bids should be opened, but the advertisement contained no such statement, and the proof showed that the bids were opened at the expiration of the time for receiving them in public in presence of the bidders, and that it had always been the custom of the board to open bids at such time, it was held that no one was deprived of any right, and that the proceedings were not invalidated by the technical departure from the provisions of the ordinance. *Cass Farm Co. v. Detroit*, 124 Mich. 433. Requirements of the rules and regulations of a city department that bids shall be opened immediately on the expiration of the time limited for receiving them do not render the proceedings invalid, merely because the opening of the bids is delayed for a day to bring together all the officers charged with the duty of examining the bids. *McCord v. Lauterbach*, 91 N. Y. App. Div. 315.

² A charter provision requiring bids to be opened in the presence of the common council on a day named in the notice or upon such subsequent day as the common council may adjourn to, and that "the common council shall then determine which proposal is most favorable," does not require that the determination shall be made immediately upon the opening of the bids and before the council adjourns. *Lilienthal v. Yonkers*, 6 N. Y. App. Div. 138, aff'd 154 N. Y. 766; *Tingue v. Port Chester*, 101 N. Y. 294. The presumption that official duty was regularly performed attaches to the opening of bids, and it will be presumed that the bids considered were received within the time prescribed in the advertise-

the bids, the ascertainment of the lowest or most favorable bidder, and the adoption of a resolution that the contract be awarded to him, *does not make a completed contract* between the municipality and the bidder when the *charter* requires that all contracts relating to city affairs shall be in writing, or when the advertisement so specifies, or when some further step remains to be taken, and some discretion is still left in the officers of the municipality to ascertain the responsibility of the bidder, or to satisfy themselves of the expediency and desirability of contracting with him.¹ When the contract *has once been awarded* under a proviso that the bidder should furnish a satisfactory bond and sign the contract, it has been held that the adoption of a resolution rescinding the award for failure of the bidder to comply with the conditions and awarding the contract to the next lowest bidder is the exercise of a quasi-judicial function, and it is necessary to its validity that the lowest bidder should have an opportunity afforded him of being heard before such action is taken.²

nent, although they were not opened and considered until after that time had elapsed. *Williams v. Bergin*, 129 Md. 461.

¹ *Peoples Passenger R. Co. v. Memphis City R. Co.*, 10 Wall. (U. S.) 18; *Mann v. Rochester*, 29 Ind. App. 2; *Dunham v. Boston*, 12 Allen (Mass.), 375; *Edge Moor Bridge Works v. Bristol County*, 170 Mass. 28; *Starkey v. Minneapolis*, 19 Minn. 103; *Eads v. Carondelet*, 42 Mo. 113; *Jersey City Water Com'rs v. Brown*, 32 N. J. L. 504; *Erving v. Mayor, &c. of New York*, 131 N. Y. 133; *State v. Joyce*, 25 Nev. 31; *Hepburn v. Philadelphia*, 149 Pa. St. 335; *McManus v. Philadelphia*, 201 Pa. St. 619; *Smart v. Philadelphia*, 205 Pa. St. 329; *Hamilton v. Chopard*, 9 Wash. 352. *Contra*: *Ft. Madison v. Moore*, 109 Iowa, 476. In *Erving v. Mayor, &c. of New York*, 131 N. Y. 133, the city charter required that the contract should be let to the lowest bidder, but the court held that the mere fact that a party who has made proposals for public work is the lowest bidder and knows that fact does not necessarily entitle him to the contract, and does not constitute an award to him of such contract within the meaning of the law requiring the letting of work upon competitive bids. The officer awarding the contract may determine that the interests of the city will be best served by rejecting the bidder's proposal, or that all bids should be re-

jected, and the work readvertised. The awarding of the contract on the part of the officer to one of several bidders requires the exercise of judgment and discretion, and the duty to examine the proposals and award the contract is judicial in its nature and character and the award is the result of a judicial act.

Plaintiff offered to sell land to the city at a definite price and the city authorities voted to purchase it. It was held that *the contract was complete*, and that the seller might enforce the same specifically against the city. The existence of the contract was sustained in this case upon the ground that the vote of the city authorities imported a contract and needed no further act on the part of the city. *McManus v. Boston*, 171 Mass. 152. But where plaintiff offered to sell a plot of land, or any part thereof, to a board of trustees of a public fund, and the trustees voted that the chairman of the board be authorized to purchase on the terms stated five acres of the land offered, and be authorized to make the necessary draft on the city treasury for the purchase price, it was held that *there was no contract*, but merely an expression of a determination to buy the land and an authorization to an agent to make the purchase. *Madden v. Boston*, 177 Mass. 350.

² *Stanley v. Passaic*, 60 N. J. L. 392. But see *Barrett v. Ocean City*, 62 N. J. L. 588.

Where a bidder accompanies his bid for the performance of a public work with the *deposit of a certain sum under an agreement to forfeit* the sum deposited in case of his neglect or refusal to enter into the contract for the work, and, without default on the part of the board, he fails to execute the contract, he cannot recover back his deposit, and the board may declare the same forfeited.¹

§ 811. **Acceptance and Rejection of Bids.** — In the *absence of any statutory restriction* upon the power to contract, the selection of a contracting party rests within the discretion of the municipality, and if the charter does not expressly require that contracts shall be let to the lowest bidder, the action of the municipality acting through its officers in accepting a bid, whether it be the lowest or not, rests within the discretion of the designated officials, and their determination will not be interfered with so long as they act in good faith.² If, however, the *statute* requires that the contract *shall be awarded to the lowest bidder*, no contract can be let to any person other than to the lowest bidder.³ But, even under such a statutory provision, the municipality is not *compelled to make a contract with the lowest bidder*; while no contract can be let to any other person, the body or officers awarding the contract, acting in good faith, may refuse to award it to the lowest bidder if they deem it for the best interests of the city to do so, and they may reject all the bids

¹ Robinson v. Board of Education, 98 Ill. App. 100; Morgan Park v. Gahan, 136 Ill. 515. Under the *Mississippi* constitution, a municipality cannot refund *money deposited* with it, forfeited by the depositor's breach of contract to perform the public work, nor can it donate the money to another contractor who has completed the work. The money becomes the property of the municipality for general purposes, and can only be expended under a specific appropriation. Electric Railway Co. v. Adams, 79 Miss. 408. When the proceedings upon which a contract is based are illegal, the contractor's deposit is recoverable at law. Perine Contracting Co. v. Pasadena, 116 Cal. 6.

² Riehl v. San Jose, 101 Cal. 442; Kundinger v. Saginaw, 132 Mich. 395; Elliot v. Minneapolis, 59 Minn. 111; Warren v. Barber Pav. Co., 115 Mo. 572; Schefbauer v. Kearney, 57 N. J. L. 588; Howell v. Millville, 60 N. J. L. 95; Oakley v. Atlantic City, 63 N. J. L. 127; Ryan v. Paterson, 66 N. J. L. 533; Coward v. Bayonne, 67 N. J. L. 470; Kraft v. Weehawken Board of Education, 67 N. J. L. 512; Middle Valley Trap Rock Co. v. Freeholders of Morris, 70 N. J. L. 625; Murray v. Bayonne, 73 N. J. L. 313; 63 Atl. Rep. 81; Terrell v. Strong, 14 N. Y. Misc. 258; Walter v. McClellan, 113 N. Y. App. Div. 295, 303; Philadelphia v. Pemberton, 208 Pa. 214, 218; Waco v. Chamberlain, 92 Tex. 207; North Yakima v. Scudder, 41 Wash. 15. See also Santa Rosa Lighting Co. v. Woodward, 119 Cal. 30. Where a charter does not require a contract to be let to the lowest bidder after advertising for proposals at the expense of abutters, although such contracts may be made by private agreement with the city, *they must be fairly made* at reasonable prices, with due regard to the lot-owners' interests, or equity will relieve against them. Cook v. Racine, 49 Wis. 243.

³ Dickinson v. Poughkeepsie, 75 N. Y. 65; Walsh v. Mayor, &c. of New York, 113 N. Y. 142; Boren v. Darks County Com'rs, 21 Ohio St. 311.

and readvertise.¹ Even when the provision of the statute is that the contract shall be let to the "lowest responsible bidder" or "lowest and best bidder," the body or officer awarding the contract cannot exercise *the discretion entrusted arbitrarily*, and without reason eject the lowest bid and accept a higher one.²

In determining who is the lowest responsible bidder, or the lowest and best bidder, the duty of the board or officer is not merely ministerial, but *partakes of a judicial character*, requiring the exercise of discretion and judgment. Consideration must be given not only to the pecuniary ability of the bidders to perform the contract, but also to the skill, ability, and integrity necessary to do faithful, conscientious work, and to fulfill the terms of the contract.³ In the absence of fraud,

¹ *Walsh v. Mayor, &c. of New York*, 13 N. Y. 142; *State v. New Orleans*, 8 La. An. 643; *People v. Willis*, 6 N. Y. App. Div. 231; *Howard v. Industrial School*, 78 Me. 230; *Reservation of right to reject bids: State v. Holt*, 132 Wis. 131; 111 N. W. Rep. 1106; *Anderson v. Public Schools*, 22 Mo. 61. See also *Leskie v. Haseltine*, 155 Pa. 98. Express statutory provision authorizing rejection of bid on ground that party has been delinquent in a former contract; *Girvin v. Simon*, 116 Cal. 604. A board need not make a record of its reason for rejecting a bid, and the fact that it fails to do so does not preclude it from showing what in fact occasioned the rejection. *Rice v. Haywards*, 107 Cal. 98. Under the provisions of the *New York Consolidation Act*, requiring bids to be made upon advertisement, and that if the head of the department should not deem it for the interests of the city to reject all bids, he should award the contract to the lowest bidder, the duty of a commissioner was to determine whether or not it was for the interest of the city to reject all bids; if he determined not to reject all bids, he was then obliged to award the contract to the lowest bidder, who thereupon became bound to execute the contract. *Lynch v. Mayor, &c. of New York*, 2 N. Y. App. Div. 213. After the contract has been awarded, the official cannot reject the bid. *Pennell v. New York*, 17 N. Y. App. Div. 455. And upon the refusal of the official to execute the contract after he has awarded it, the successful bidder can recover his damages from the city. *Beckwith v. New York*, 121 N. Y. App. Div. 462. When the city

has power to reject any and all bids, the lowest bidder cannot complain of its action in so doing. *Trapp v. Newport*, 115 Ky. 840; *Riehl v. San Jose*, 101 Cal. 442. In *Illinois*, it is held that an ordinance for the construction of an improvement which contains a provision that the commissioner of public works shall have the reserved right to reject any proposal conflicts with a statute requiring all contracts to be let to the lowest responsible bidder, and is invalid. *Lake Shore & M. S. R. Co. v. Chicago*, 144 Ill. 391. See also *Hyde Park v. Carton*, 132 Ill. 100.

² *McGovern v. Trenton*, 57 N. J. L. 580; *Faist v. Hoboken*, 72 N. J. L. 361; *People v. Buffalo*, 84 N. Y. Supp. 434; *People v. Gleason*, 121 N. Y. 631; *Berry v. Tacoma*, 12 Wash. 3; *Times Publishing Co. v. Everett*, 9 Wash. 518. If it is asserted that the lowest bidder is not responsible, it has been held that he is entitled to be heard on that question, and there must be a distinct finding against him upon proper facts to justify it. *McGovern v. Trenton*, 57 N. J. L. 508; *Faist v. Hoboken*, 72 N. J. L. 361.

³ *Inge v. Mobile*, 135 Ala. 187; *Denver v. Dumars*, 33 Colo. 94; *People v. Kent*, 160 Ill. 655; *Johnson v. Sanitary Dist. of Chicago*, 163 Ill. 285; *Madison v. Baltimore Harbor Board*, 76 Md. 395; *Gilmore v. Utica*, 131 N. Y. 26, 35; *People v. Buffalo*, 84 N. Y. Supp. 434; *Yaryan v. Toledo*, 28 Ohio Cir. Ct. 259, aff'd 76 Ohio St. 584; *State v. Shelby County Com'rs*, 36 Ohio St. 326; *State v. Hermann*, 63 Ohio St. 440; *Scott v. Hamilton*, 29 Ohio Cir. Ct. 652; *Commonwealth v. Mitchell*, 82 Pa. St. 343; *Findley v. Pittsburgh*, 82 Pa. St. 351; *Douglass*

or manifest abuse, the courts will not interfere with the exercise of the official discretion of an officer or board entrusted with the duty of awarding a contract.¹ But in order to give to the action of the board or officer any legal effect, he or it must exercise jurisdiction, and make a determination based upon some facts. If the board entrusted with the duty of awarding the contract refuses to accept the lowest bid for work or supplies, there must be some facts tending to show that it is not that of a responsible bidder, or there must be at least some claim to that effect. An *arbitrary determination* by such a body to accept the highest bid without any facts justifying it, cannot have the effect of a judicial determination and must be designated as a palpable violation of the law.² The provisions of the statute requiring the letting of bids to the lowest responsible bidder are enacted as a *protection to the public and not for the benefit of the bidder*, and hence the lowest bidder has no right of action to recover profits which he might have made had his bid been accepted,³ nor can he enjoin a violation of the charter provision.⁴

v. Commonwealth, 108 Pa. 559; *Interstate Vitriified Brick & Pav. Co. v. Philadelphia*, 164 Pa. 477; *Reuting v. Titusville*, 175 Pa. 512; *In re McCain*, 9 S. Dak. 57; *Brown v. Houston* (Tex. Civ. App.), 48 S. W. Rep. 760; *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 97. The fact that a bid is the lowest in amount is not conclusive that it is the *lowest and best bid*. *Trapp v. Newport*, 115 Ky. 840. The fact that a contract was not awarded to the lowest bidder is not of itself evidence of fraud or illegality, where the municipality is required to let to the "*most favorable*" bidder, *Gilmore v. Utica*, 131 N. Y. 26, 27; or where the statute authorizes the municipality to *reject any bid*; *Peckham v. Watsonville*, 138 Cal. 242; or where there is no requirement that the contract shall be let to the lowest bidder. *Santa Rosa Lighting Co. v. Woodward*, 119 Cal. 30. Under a statute requiring contracts to be let by competition to the lowest responsible bidder, the city officers cannot, by private negotiation, so modify the terms of a bid that the successful bidder becomes the lowest bidder. *Louchheim v. Philadelphia*, 218 Pa. 100.

¹ *Girvin v. Simon*, 116 Cal. 604; *Greenwood v. Morrison*, 128 Cal. 350; *Denver v. Dumars*, 33 Colo. 94, 103; *People v. Kent*, 160 Ill. 655; *Johnson v. Sanitary Dist. of Chicago*, 163 Ill.

285; *Madison v. Baltimore Harbor Board*, 76 Md. 395; *Wilson v. Trenton*, 60 N. J. L. 394; *Ryan v. Paterson*, 66 N. J. L. 533; *Barber Asphalt Pav. Co. v. Trenton*, 74 N. J. L. 430; 65 Atl. Rep. 873; *State v. Hermann*, 63 Ohio St. 440; *In re McCain*, 9 S. Dak. 57.

² *People v. Gleason*, 121 N. Y. 631. Where the contract is not let to the actual lowest bidder, the city, in order to protect itself from interference by injunction, should judicially find the facts which in its judgment render the apparently lowest bidder not the lowest bidder in fact. *Times Publishing Co. v. Everett*, 9 Wash. 518.

³ *Talbot Pav. Co. v. Detroit*, 100 Mich. 657; *East River Gas Light Co. v. Donnelly*, 93 N. Y. 557; *Molloy v. New Rochelle*, 123 N. Y. App. Div. 642.

⁴ *Colorado Pav. Co. v. Murphy*, 78 Fed. Rep. 28. But a *taxpayer who is also the lowest bidder* may enjoin the arbitrary letting of the contract to a higher bidder, notwithstanding his ulterior motive of desiring to obtain the contract himself. *Times Pub. Co. v. Everett*, 9 Wash. 519; *Maset v. Pittsburgh*, 137 Pa. 548. The *defenses* that the contract is void because the city charter required that all work should be let to the lowest bidder and that course was not followed is *not available to the contractor or his surety* in an action by the city to recover

§ 812 (470). **When Contract completed.** — Although notice has been published inviting proposals to do public work, yet the contract is incomplete until the proposal is actually accepted, and the corporation inviting the proposal is not, it seems, liable to damages for refusing to accept an offer, even though it be the lowest regular offer made. It is certainly not thus liable where the notice and the proposals with respect to the amount and form of the security do not comply with the requirements of the ordinances of the city, and where these provided that contracts should not be executed until laid before the common council.¹

§ 813. **Extra Work.** — If a municipal corporation by its own act causes the work to be done by a contractor under a contract for an improvement to be more expensive than it otherwise would have been according to the terms of the original contract, or if the municipality orders and directs the contractor to perform work or furnish material or labor which is not within the contemplation of the

damages for its breach. *Madison v. American Sanitary Engineering Co.*, 118 Wis. 480.

¹ *Smith v. Mayor, &c. of New York*, 10 N. Y. 504, aff'g s. c. 4 Sandf. S. C. R. 221. "The notice inviting proposals to do the work," says *Willard, J.*, delivering the opinion of the Court of Appeals (10 N. Y. 504), "did not, in my judgment, bind the street commissioner of the corporation to accept, at all events, the lowest bid, even though in all respects formal. Until the bid is accepted by some act on the part of the corporation, no obligatory contract was created." See also *People v. Croton Aqueduct Board*, 26 Barb. (N. Y.) 240; *Greene v. Mayor, &c. of New York*, 60 N. Y. 303; *State v. Directors & W. of Penitentiary*, 5 Ohio St. 234; *Altemus v. Mayor, &c.*, 8 Duer (N. Y.), 446; *Argenti v. San Francisco*, 16 Cal. 255; *Wiggins v. Philadelphia*, 2 Brews. (Pa.) 444; *Ib.* 443; *Keogh v. Wilmington*, 4 Del. Ch. 491.

A board of commissioners charged with the duty of contracting for a public work need not call for bids or proposals unless expressly required. But if they choose to invite competition, they may, after accepting a bid, alter the specifications furnished by the bidder before executing the contract; and this without the knowledge of competing bidders. *Kingsley v. Brooklyn*, 5 Abb. N. Cas. (N. Y.) 1. The duties and liabilities of

a city and its officers under a contract for the building of extensive water-works, considered. A provision in the act authorizing the work, for the preliminary adoption of a "plan" therefor by the city, does not prevent subsequent changes in the details of the work. And where, after alterations had been made and extra work directed during the progress of the undertaking, the contractors were stopped by the city before completing it, — held, that they could recover for work done up to the limits of the appropriation authorized by the act, though the work was incomplete, the legislature having recognized the necessity of further outlay by an act authorizing an additional appropriation. Where a public work is, under a statute, to be contracted for by city officers according to a plan to be adopted by the city, with a proviso that the whole expense shall not exceed a certain sum, to be raised by issuing city bonds, a contract for doing the work for a sum within that amount is valid, although it reserves authority to the officers directing the work to make such changes of detail as may be necessary, and fix the price of whatever extra work may be required. *Ib.*

Further as to *lowest bidder*, see *supra*, §§ 801 *et seq.*, of this chapter; also chapter on *Mandamus*, *post*, § 1489, note; § 1494, note. Index—*Highest Bidder*; *Lowest Bidder*.

original contract, it is liable to him, in the absence of stipulations to the contrary, for the increased cost or for the extra work.¹ But to justify a recovery for extra work, the claim must not be inconsistent with the provisions of the contract when fairly and reasonably construed. If upon such a construction it appears that the work was intended to be compensated by the compensation provided thereby, there can be no recovery, or if it is within a provision of the contract specifying the rate to be charged for extra work of that nature, then the recovery, if any, is under the contract, and the amount is limited to the rates specified by the contract.² The stipu-

¹ Chicago v. Duffy, 218 Ill. 242, aff'g 117 Ill. App. 261; Hamilton County v. Newlin, 132 Ind. 27; Messenger v. Buffalo, 21 N. Y. 196; Mulholland v. Mayor, &c. of New York, 113 N. Y. 631; Brady v. Mayor, &c. of New York, 132 N. Y. 415; Horgan v. Mayor, &c. of New York, 160 N. Y. 516; McCann v. Albany, 11 N. Y. App. Div. 378; Murphy v. Yonkers, 45 N. Y. App. Div. 621; Dwyer v. Mayor, &c. of New York, 77 N. Y. App. Div. 224; Thilemann v. New York, 82 N. Y. App. Div. 136; O'Neill v. Milwaukee, 121 Wis. 32.

The contract for paving a street required the contractor to put beneath the pavement eighteen inches of lake sand. The contractor had nothing to do with the forming or grading of the street. The city formed and graded the street in such a way that it required twenty-two inches of sand to comply with the provisions of the contract in regard to the established grade, and plaintiff, by direction of the street commissioner, furnished the excess of sand required. It was held that *the city was liable* for the extra material so furnished. Messenger v. Buffalo, 21 N. Y. 196. A contract for grading and flagging a street permitted changes of the grade without additional compensation. Through an error of the city's engineer and without any intention to change the plan more work was required of the contractor than would have been necessary under the contract. It was held that the contractor was entitled to recover for the additional labor and expense according to its value and amount. Mulholland v. Mayor, &c. of New York, 113 N. Y. 631. See also Brady v. Mayor, &c. of New York, 132 N. Y. 415. A contract with a city to clear and concrete the bottom of a park lake required the contractor to provide all

materials necessary for conducting the flow of water "to the outlet," or for draining the water, and all pumping and bailing required for the proper prosecution of the work. There was an outlet pipe at the bottom of the lake, the gate of which only was visible on the examination of the proposed work. When the contractor attempted to draw off the water by the outlet in the progress of the work, it was found that the underground pipe or sewer was obstructed and failed to remove the water for a considerable depth. The contractor was consequently compelled to pump out the water, and for so doing it was held that *he was entitled to recover as for extra work* the cost of pumping necessitated by the failure of the city to have the outlet pipe in working order. Horgan v. Mayor, &c. of New York, 160 N. Y. 516, rev'g 21 App. Div. 405. It has been said that under a stipulation in a contract providing for extra work to be performed on the order of the engineer of the city and paid at prices fixed by him, a subsequent agreement for the doing of such extra work, or for doing any work that may be considered necessary by reason of permissible changes in the contract, does not come within the provisions of the charter requiring contracts to be advertised and let to the lowest bidder. Smith v. Chicago Sanitary District, 108 Ill. App. 69; Clark v. Pittsburgh, 217 Pa. 46. See also Chicago v. McKeebrey, 205 Ill. 372. But see McBrien v. Grand Rapids, 56 Mich. 95; Fly v. Grand Rapids, 84 Mich. 336.

² Costa v. Cranford, 75 N. J. L. 542; 68 Atl. Rep. 160. A contract for macadamizing highways in a town in accordance with plans and specifications provided that *the contractor should make no claim for extra work*

ation common to many corporation contracts, that contractors may be required to perform extra work at the price named in the agree-

nless ordered by resolution of the own board. The engineer in charge of the work changed the plans so as to necessitate the furnishing of additional labor, and the contractor complied with the order of the engineer under protest. It was held that the additional material so furnished was "extra work" within the meaning of the contract; that the term "extra work" as used therein was intended by the parties to include all work required by change of plan; and that the contractor could not recover for the additional material either upon the theory of an express or implied contract, or upon the theory of damages for a breach of the original contract. *People v. Snedeker*, 106 N. Y. App. Div. 89. A provision in a specification attached to a contract that when the tunnel is partly in earth and partly in rock the contractor will be paid an additional price per cubic yard for rock excavation, applies where the excavation is in the all-rock portion of the tunnel. *Chicago v. Duffy*, 179 Ill. 447; *Chicago v. Weir*, 65 Ill. 582.

A city advertised for proposals for furnishing the cement required by it for general purposes during a year, the proposal giving the estimate of quantity required as five thousand barrels, and the specifications providing that such approximate quantity was only given as a guide to the bidder, but in no way to bind or limit the city as to the amount which was to be ordered. The bidder furnished and delivered five thousand barrels, which were accepted and paid for at the contract price; but, cement having advanced in price, refused to deliver any more cement under the contract. Subsequently, by agreement between the parties, he furnished 483 additional barrels, without prejudice, however, to the rights of the parties. It was held that the city was entitled to all the cement which it required during the year at the price specified in the bid. *National Bldg. Supply Co. v. Baltimore*, 100 Md. 188. Where a contractor expressly agrees in his contract to take all risk from the influx of water into the work, he cannot claim additional remuneration because the work proved to be greater than he anticipated. *Burnham v. Milwaukee*, 100 Wis. 55. Where a sewer con-

tractor binds himself to withdraw certain sheet-piling which has been placed to uphold the bank of the sewer while the same was being built, he is not entitled to an allowance for increased cost caused by the withdrawal injuring the work already done. He is bound by the terms of his contract, and the court cannot take into consideration his wisdom in entering into such a contract. *Slattery v. Mayor*, 31 N. Y. App. Div. 127. A provision that any loss or damage arising from any unforeseen obstruction or difficulty which may be encountered in the prosecution of the work, or other incumbrances on the line of the work, shall be sustained by the contractor, covers extra work occasioned by the discovery of the location of a pipe on the line of work, although the location of the pipe was such that the city officers might have known of it, where it was clear that they did not know of it any more than the contractor did, and the difficulty arose from the incumbrance of the pipe which was discovered after the work had been begun. *Mairs v. New York*, 52 N. Y. App. Div. 343.

Where the contractor was required by his contract to keep an excavation clear of water from whatever source while a pipe was being laid therein and surrounded by concrete, and was held responsible for any injury which the work might sustain from any source or cause whatsoever before the final acceptance thereof, he was not entitled to compensation for recleaning and repainting part of the pipe made necessary by reason of a freshet in the adjoining river by which a bulk-head erected by him was destroyed and muddy water forced into the conduit. *Johnson v. Albany*, 86 N. Y. App. Div. 567. A contract for a sewer was made with the expectation of tunnelling. It provided that the contractor should be paid for extra work caused by changes in the sewer at the direction of the city. In attempting to tunnel, sand was encountered, rendering additional work necessary in digging a trench. Held, that the contractor could not recover under the extra work provision, the city having ordered and requested no addition or change on the work. *Gartner v. Detroit*, 131 Mich. 21. Where an advertisement for proposals

ment or fixed by an engineer, is *limited by the subject matter of the contract* to such proportionally small amounts of extra work as may become necessary to the completion of the undertaking contemplated by the parties when the contract was made; and work which does not fall within this limitation is new and different from that covered by the agreement, and the contractor may recover the reasonable value thereof notwithstanding the contract.¹ The customary provisions in such contracts that the corporation or its engineer may make any necessary or desirable alterations in the work, and that

for the construction of a sewer contained estimates of the amount of excavation at various depths, but expressly stated that these estimates were to be considered as approximate only, and the bidder offered to do excavation at a given price according to the various depths, an alteration of the contract by lowering the grade of the sewer so as to increase the amount of work was not such a radical departure as to entitle the contractor to extra compensation outside of the contract price, there being no excavation below a depth for which prices were provided for by the advertisement. *Allen v. Melrose*, 184 Mass. 1.

¹ *Wood v. Ft. Wayne*, 119 U. S. 312; *Salt Lake City v. Smith*, 104 Fed. Rep. 457; *Chicago & G. E. R. Co. v. Vosburgh*, 45 Ill. 311; *Cook County v. Harms*, 108 Ill. 151, 158; *Chicago v. Sexton*, 115 Ill. 230; *Elgin v. Joslyn*, 136 Ill. 525; *Chicago v. McKechney*, 205 Ill. 372, rev'g 91 Ill. App. 442; *Roemheld v. Chicago*, 231 Ill. 467; *Smith v. Chicago Sanitary District*, 108 Ill. App. 69; *Stubbings Co. v. World's Col. Ex. Co.*, 110 Ill. App. 210; *O'Neill v. Milwaukee*, 121 Wis. 32.

In *McMaster v. State*, 108 N. Y. 542, 551, *Earl, J.*, speaking of a reserved power on the part of the State to make changes in a contract for the construction of certain asylum buildings, said, "What change did the State reserve the right to make? It certainly had no right to omit entirely the construction of all or any of the buildings. The asylum buildings referred to in the contract were the central or administration building, the five connecting wards on each side, and the out-buildings. These were all to be built. The size and height of them were fixed and the material to be put in the walls was determined. The general character of the buildings could not be changed so

that the buildings would not be the same contracted for; if it could be, then a public letting in such a case would not be a useful and might be an idle ceremony. Under such a reservation could a building planned for five stories be reduced to two? Could a stone building let to a stone mason be changed to wood or brick? Could the five connecting wards be reduced to two or three or four? We are clear that authority for such extensive changes could not be found in such language. . . . It is difficult, probably impossible, to draw in advance a precise line between what is authorized by such a reservation and what is not. It authorizes such changes as frequently occur in the process of constructing buildings, in matters of taste, arrangements, and details; but it does not authorize a change in the general character of the building. If it does, a contract carefully entered into could be mainly if not entirely frustrated."

The distinction between "extra work" and "additional work" is that the former is work arising outside and entirely independent of the contract and is something not required in its performance, while the latter is something necessarily required in the performance of the contract and without which it cannot be carried out. Where a contract provides that the inspector may order an addition to the work as laid down in the specification at any time, a fair allowance to be made therefor, and that no extra work shall be allowed unless the same is done upon the written order of the inspector, it is not necessary in order to entitle the contractor to recover for additional work ordered by the inspector that such order should have been given in writing. *Shields v. New York*, 84 N. Y. App. Div. 502.

the contractors shall receive the contract price or a price fixed by the engineer for the work or materials required by the alteration, is limited in the same way, by the intention of the parties when the contract was made, to such modifications of the work described in the contract as do *not radically change* its nature or its cost.¹ Material quantities of work required by such alteration, that are substantially variant in character and cost from that contemplated by the parties when they made their agreement, constitute new and different work, not governed by the agreement, for which the contractors may recover the reasonable value.²

Not only must the claim for compensation for extra work be consistent with the terms of the contract, but *the statute* pursuant to which the improvement is made *must not contain provisions which prohibit* the imposition of additional expense upon the city.³ A compliance with provisions of the contract *limiting the time within which claims for extra work* shall be asserted is also essential to a recovery therefor.⁴ The extra work must also have been done at

¹ Salt Lake City v. Smith, 104 Fed. Rep. 457.

² Salt Lake City v. Smith, 104 Fed. Rep. 457. The term "extra work" as used in a contract construed to include all work caused by change of plan. People v. Snedeker, 106 N. Y. App. Div. 89, aff'd 182 N. Y. 558.

³ A contract was made for the construction of a portion of the Croton Aqueduct. The statute authorizing the improvement, after providing for the direction and supervision of the work by the engineer and other subordinates of the department of public works, provided that in no event should the city be held in any action brought under any contract made pursuant to the statute to any greater or other liability than that expressed in the contract. The contractor claimed to recover damages for extra work done caused by erroneous grade lines, &c., given them by the engineer. It was held that the action, so far as it sought to recover such extra cost, was an action under the contract within the meaning of the statute; that a recovery for such extra cost was prohibited; that the statute contemplated a liability on the part of the city to be specifically set forth in the contract; and that beyond its terms there could be no liability. O'Brien v. Mayor, &c. of New York, 139 N. Y. 543. See also O'Rourke v. Philadelphia, 211 Pa. 79.

⁴ Johnson v. Albany, 86 N. Y. App. Div. 567. Capital City Brick & Pipe Co. v. Des Moines, 136 Iowa, 243; 113 N. W. Rep. 835. Where there is a provision in a contract calling for delivery to the Board of Public Works of a written statement of extra work and materials, it must be complied with, and the contractor cannot, after having monthly bills for extras paid, present a final bill including extras for work already settled for. Burnham v. Milwaukee, 100 Wis. 55. A contract may provide for the arbitration of the contractor's claim for extras by the Board of Public Works or other public board, and in such a case their finding upon the matter submitted to them is final. Burnham v. Milwaukee, 100 Wis. 55. Stipulations in contracts with municipal corporations that all questions which may arise between the corporation and the contractor in reference to the agreement and the specifications, or the performance or non-performance of the work to which they relate, shall be referred to the engineer, and that his decision shall be final and conclusive upon both parties, do not give the engineer jurisdiction to determine that work which is not done under the contract or specifications and which is not governed by them, was performed under the agreement, and is controlled by it, and his decision to that effect is not

the request of an officer of the municipal corporation *who has authority to order* and direct it to be performed. If performed without the request of the municipality, acting through an authorized agent or officer, there can be no recovery therefor.¹ If the contract requires that extra work shall only be done pursuant to *an order in writing* given by a designated official, no compensation can be recovered for extra work done without such order.²

conclusive upon the parties. *Salt Lake City v. Smith*, 104 Fed. Rep. 457.

¹ *Griffith Co. v. Los Angeles* (Cal.), 54 Pac. Rep. 383; *West Chicago Park Com'rs v. Kincade*, 64 Ill. App. 113; *O'Hara v. New Orleans*, 30 La. An. 152; *Boston El. Co. v. Cambridge*, 163 Mass. 64; *Wormstead v. Lynn*, 184 Mass. 425; *Leathers v. Springfield*, 65 Mo. 504; *Bonesteel v. Mayor, &c. of New York*, 22 N. Y. 162; *People v. Snedeker*, 106 N. Y. App. Div. 89, aff'd 182 N. Y. 558; *Hague v. Philadelphia*, 48 Pa. 527; *Addis v. Pittsburgh*, 85 Pa. 389. A contract for regulating and grading a street provided that the city surveyor would at the request of the contractor designate and fix the grades for the contractor's guidance, but that the city should not be liable for any errors of the surveyor in giving such grades and the surveyor should be considered as the agent of the contractor therefor. The contract specifically required that the work should be completed in conformity with the profile furnished by the city. The surveyor made mistakes in furnishing grades to the contractor. Upon discovery of the mistakes the contractor notified the superintendent of street improvement of them, and proceeded only after the positive direction of the superintendent to conform the avenue to the grades given. As a consequence the contractor was obliged to excavate a greater amount of rock than was required by the contract and then compelled to fill in the excavation so as to conform the grade to the specifications. It was held that the contract controlled the obligation of the contractor and that the direction of the superintendent of streets was a material modification of the contract which he had no power to make in the absence of an express authorization by the city, and that the contractor could not recover as for extra work. *Becker v. New York*, 176 N. Y. 441.

A contract by S. to erect a building for a city stipulated that the work

should be done according to certain plans and specifications; that a certain committee, or the architect, might direct in writing any deviations therefrom, in which case such sums of money should be added to or deducted from the agreed price as the parties should judge the increase or diminution to be worth, and that no alterations should be paid for unless directed in writing. In excavating, the soil was found by the architect to require piles to be driven to secure a firm foundation; whereupon he furnished piling plans, directed S. to do the work, and orally promised him that he should be paid for it. Held, that the city was not bound by the architect's oral promise. *Stuart v. Cambridge*, 125 Mass. 102. The authority of the officer to order and request that extra work may be performed may be founded upon an authority from the municipal corporation authorizing the officer to make the contract and a provision of the contract that the work should be done under his direction. *Messenger v. Buffalo*, 21 N. Y. 196. See also *Brady v. Mayor, &c. of New York*, 132 N. Y. 415; *Dwyer v. Mayor, &c. of New York*, 77 N. Y. App. Div. 224. The acceptance and use of a building by a city do not bind it to pay for extra or unauthorized work done upon it, though the same is heretofore. The city could not reject and decline to use the building on this ground, and it was not bound to take out such extra or unauthorized work. *Boston El. L. Co. v. Cambridge*, 163 Mass. 64.

² *Griffith Co. v. Los Angeles* (Cal.), 54 Pac. Rep. 383; *Duluth v. McDonnell*, 61 Minn. 288; *King v. Duluth*, 78 Minn. 155; s. c. 81 Minn. 182; *McLaughlin v. Bayonne*, 75 N. J. L. 106; 66 Atl. Rep. 1070; *Johnson v. Albany*, 86 N. Y. App. Div. 567; *McManus v. Philadelphia*, 201 Pa. 619; *Watterson v. Nashville*, 106 Tenn. 410. See also *Campbell v. Dist. of Columbia*, 117 U. S. 615.

But the provision in a contract that

A provision in the contract that work shall be done to the satisfaction of the city officials under whose direction it is to be performed, and that work not done to their satisfaction shall be made good by the contractor, does *not justify the city officials in acting arbitrarily*, or improperly exercising the power conferred upon them by the contract. If these powers are exercised arbitrarily, or improperly, the *contractor has either of two remedies*. He may stop work upon receiving an order to remove a portion of his work and to do it over again, and stand upon his contention that the work is properly done, and bring an action to recover for labor and materials furnished and performed, under the contract and for the loss of his prospective profits;¹ or he may do the work over as required and sue to recover damages on the ground that he has been unlawfully compelled to do the work a second time.² But if he follows this course, he must make his position clear and assert his right to extra compensation *before* complying with the directions of the officer. He will not be permitted apparently to accept the decision of the officer as correct, proceed to do the work in compliance therewith, and assert his claim to additional compensation for the first time after the work is completed.³

An action to recover for the *cost of doing the work over* is not an action to recover extra compensation under the contract, but is an action to recover damages for breach of the contract and does not come within the provisions of the contract requiring the production of a certificate of performance as a condition to the right to recover.⁴ The contractor is entitled to *recover for extra work* performed, when it is of an entirely different character from that contracted for by the contract, and is not merely a change in the details thereof contemplated to be made for the city at its discretion according to the reasonable value and amount of work performed, and is not confined to the compensation provided for

the contractor *shall have no claim for extra work* unless the same was agreed upon between the parties in writing, will not prevent him from recovering for work done pursuant to the directions of the architect of the board, entirely outside of the contract, and to which the contract provision could not have been intended to apply. *Dwyer v. New York*, 77 N. Y. App. Div. 224. The provision *requiring a written order* may be waived, and a verbal order of the city authorities may be ratified after the execution of the work by a certificate in writing, or payment of part of the price. *Abells v. Syracuse*, 7 N. Y. App. Div. 501.

¹ *Smith v. Wetmore*, 167 N. Y. 234; *Gearty v. Mayor, &c. of New York*, 171 N. Y. 61; *Roehm v. Horst*, 178 U. S. 1.

² *Gearty v. Mayor, &c. of New York*, 171 N. Y. 61; *Lentilhon v. New York*, 102 N. Y. App. Div. 548, aff'd 185 N. Y. 549; *O'Neill v. Milwaukee*, 121 Wis. 32.

³ *Bowe v. United States*, 42 Fed. Rep. 761.

⁴ *Gearty v. Mayor, &c. of New York*, 171 N. Y. 61.

general work of the same character by his contract with the municipality.¹

§ 814 (471). **Contracts of Suretyship.** — A municipal corporation *cannot, without legislative authority*, become surety for another corporation or an individual; cannot guarantee the bonds or obligations of another, or make accommodation indorsements. Such an authority cannot be implied or deduced from the general and usual powers conferred upon such corporations. Although such a corporation may have power directly to accomplish a certain object, and itself expend its revenues or money therefor, yet this does not give or include the power to lend its credit to another who may be empowered to effect the same object.² Expending money by a city council, as agents or administrators of their constituents, is a very different thing from binding their constituents by a contract of suretyship, — “a contract which carries with it a lesion by its very nature.” Thus, the indorsement of the bonds of a street railroad company in a city, by the city authorities, is not within the ordinary administrative powers of the corporation, and requires express legislative grant.³

¹ Henderson Bridge Co. v. McGrath, 134 U. S. 260; Chicago v. McKechney, 91 Ill. App. 442; Elgin v. Joslyn, 136 Ill. 525; Mulholland v. Mayor, &c. of New York, 113 N. Y. 631. In *Illinois*, where extra work and material of a different character from those specified in the original contract are furnished, the rules named in the contract will not apply, and the contractor will be entitled to recover for the same according to the value fixed by the evidence. Chicago v. McKechney, 91 Ill. App. 442; s. c. 205 Ill. 372; Elgin v. Joslyn, 136 Ill. 525.

² Text cited and approved; Lynchburg & R. St. Ry. Co. v. Dameron, 95 Va. 545.

³ Louisiana State Bank v. Orleans Navigation Co., 3 La. An. 294. In this case the municipal corporation was sought to be made liable upon its guarantee of bonds issued by the Navigation Company, which the mayor, in the name of the municipality, was authorized, by certain resolutions of the council, to indorse. It was held that the council transcended its powers, and the guarantee did not impose any legal obligation upon the municipality. The disability of such corporations, without express power, to enter into

contracts of suretyship is shown in the masterly and exhaustive opinion delivered by *Eustes*, C. J. See also Blake v. Mayor, &c. of Macon, 53 Ga. 172. In this case *McCay*, J., says: “The objects of a municipal corporation are, in the main, the preservation of order, and the doing of such acts for the public good as cannot well be done by private enterprise. But here is a private enterprise; and it is insisted that it is within the scope of municipal power, not to build a street road, but to aid, by a donation of the credit of the city, a private corporation to build it, and to take the profits of it. We do not think this is within the ordinary scope of municipal authority, nor can any authorities, as we believe, be found carrying the objects of a corporation that far. We are clear that the proposed indorsement is *ultra vires*.”

A municipal corporation has no implied power to lend its credit or make accommodation paper for the benefit of citizens, to enable them to execute private enterprises. Clark v. Des Moines, 19 Iowa, 199; 1 Parsons N. & B. 166; Smead v. Indianapolis, P. & C. R. Co., 11 Ind. 104.

The power to borrow money for any

§ 815 (472). **Authorized Contracts; Rights and Liabilities.** — But with respect to *authorized contracts* a municipal corporation has the same rights and remedies, and is bound thereby, and may be sued thereon in the same manner as individuals.¹ Thus, if such a corporation, duly empowered, enters into a partnership relation with private individuals with respect to the profits to be derived from a market-house, its rights, especially as regards the copartners and the financial administration of the partnership property, are not different from those of an ordinary partner.²

public purpose does not authorize the loan of the credit of the city. *Chamberlain v. Burlington*, 19 Iowa, 395; *contra*, *Rogers v. Burlington*, 3 Wall. 654, four judges dissenting. *Rogers v. Burlington* overruled in *Brenham v. German Am. Bank*, 144 U. S. 173. Index, *Borrowing Money*. In *Dutton v. Aurora*, 114 Ill. 138, *Schofield, J.*, said: "Having power to borrow money, the power to issue bonds therefor results as a necessary incident." *Ante*, § 278. And see *Meyer v. Muscatine*, 1 Wall. 384. The author can but think that power to a corporation to borrow money should not be construed to give the power to loan its credit, but only to borrow money for legitimate and proper municipal objects, as shown by the charter or constituent act of the corporation. See *Payne v. Brecon*, 3 Hurl. & Nor. 572; *ante*, § 278; *Bateman v. Mid-Wales Railway Co.*, Law Rep. 1 C. P. C. 510. Power to guarantee payment of authorized contracts. *Memphis v. Brown*, 20 Wall. 289. If city pays its unauthorized guarantee, it is subrogated to the rights and lien of the creditor. *Supra*, § 792, note. Private corporations cannot without legislative sanction loan guarantee obligations which are beyond the scope of their chartered powers. *Davis v. Old Colony R. Co.*, 131 Mass. 258. *Morawetz on Corp.* (2d ed.) 423. *Verbal promise by mayor to pay for lumber furnished to contractor with city held invalid under statute of frauds.* *Willoughby v. Florence*, 51 S. Car. 462. An agreement by a city whereby, in order to obtain materials necessary to its contract for the completion of his contract, it agreed to pay to a dealer for materials furnished to the contractor a portion of the amount which would be due to him on the completion of his contract, not to exceed a certain amount was held *not to be a contract of guarantee*

or suretyship and therefore not in contravention of the statute. *Albany v. Cameron & Barkley Co.*, 121 Ga. 794. In *Vaughtman v. Waterloo*, 14 Ind. App. 649, the court held that a municipal corporation was not liable for the acts of a police officer in making an arrest of a person charged with a violation of an ordinance. The court doubted whether a case could arise where a municipal corporation could be held liable to a public officer upon an agreement *on its part to indemnify* such officer for loss which was the result of the performance of his duties. The duty being imposed by law, the law requires the officer to perform it without being indemnified, and the municipal corporation has no right or power to agree to indemnify an officer for the performance of his duty. Index, *Indemnification of Officers; Office and Officer*.

¹ Corporations may make contracts within the powers expressly granted by the acts of their creation and the implied powers incidental and necessary to the execution of such expressed powers and the performance of the duties enjoined upon them. For these purposes it will be bound to perform them the same as individuals. *Hight v. Monroe Co.*, 68 Ind. 576; *Seibrecht v. New Orleans*, 12 La. An. 491; *Strauss v. Eagle Ins. Co.*, 5 Ohio St. 59; *Douglass v. Virginia City*, 5 Nev. 147; *Hayward v. Davidson*, 41 Ind. 212; *McCabe v. Fountain Co.*, 46 Ind. 380; *Burnett v. Abbott*, 51 Ind. 254; *Gordon v. Dearborn Co.*, 52 Ind. 322; *Jackson Co. v. Applewhite*, 62 Ind. 464; *Jennings Co. v. Verbarg*, 63 Ind. 107; *Indianapolis v. Indianapolis Gas Co.*, 66 Ind. 396, citing and approving text.

² *New Orleans v. Guilloite*, 12 La. An. 818. In *New Orleans v. St. Louis Church*, 11 La. An. 244, it was contended by the counsel for the city that

§ 816 (473). **Power to Contract illustrated.**— A city incorporated under the general law of Indiana *has power, with respect to the lighting of its streets and public buildings, &c., to contract with a gas company on that subject, and may exercise such power within the limits of its franchise according to its own discretion.* Such a contract, when made, must be regarded as made by such city in the exercise of its power to contract and not in its power to legislate, although the power to make the contract be authorized by an ordinance. And when, by the terms of such contract, the city is not restricted from the legitimate exercise of its public power touching the subject matter thereof, but expressly reserves its administrative authority to keep the posts, lamps, and burners in good repair if the company should fail to do so, and also reserves the right to test the quality of the gas furnished by said company, and the capacity of the burners at all times, and is not restricted from extending its streets, establishing an additional number of lamps, obtaining gas from other sources, or establishing its own gas-works as the public interests may require, such contract, not being a restriction upon its legislative power nor fraudulent nor against public policy, is valid and binding upon such city, and may be enforced in the same manner as the contract of a person or business corporation, and cannot be repealed, impaired, or changed by the city, by ordinance, or otherwise.¹

§ 817 (474). **Same Subject.**— So where a municipal corporation, acting within the scope of its powers, *in order to secure the erection of gas-works, passed an ordinance whereby the gas-works and their income were placed in the hands of trustees for the benefit of those who loaned money to execute the undertaking, such ordinance is a contract,* and cannot be violated by the city, although it may deem it for the interest of its citizens to do so; nor is it in the power of the legislature to authorize its violation.²

even if certain resolutions, in favor of the defendants, allowing them to establish a cemetery within the city, amounted to a contract, and though their repeal be not justified by the facts, and be a violation of the contract by the city, yet that the latter has the power to violate its contracts, and the defendants have no redress except in an action for damages. But this doctrine was rejected by the court, which declared it to be as "unsound as it is novel," since a liability for damages is "the very opposite of a recognition of a right to violate the contract." *Per Buchanan, J.*

¹ *Indianapolis v. Indianapolis Gas Co.*, 66 Ind. 396; *Valparaiso v. Gardner*, 97 Ind. 1.

² *Western Savings Fund Society v. Philadelphia*, 31 Pa. St. 175; *Same v. Same*, 31 Pa. St. 185; *Indianapolis v. Indianapolis Gas Co.*, 66 Ind. 396, citing and approving text; *ante*, chap. iv. § 113.

§ 818 (475). **Same Subject.** — So where the mayor and council have, by the charter, power to make, in their corporate capacity, all such contracts as they may deem necessary for the welfare of the corporation, they *may contract to sell stock owned by the city* in a private corporation, to enable the city to pay its debts; and the discretionary power with which the mayor and council are invested cannot, when *bona fide* exercised, be controlled by a court of equity at the instance of property owners and taxpayers.¹

§ 819 (476). **Same Subject.** — Power to a city corporation to *pave streets at the expense of the owners* and recover the amount from them if they fail themselves to pay when required by ordinance, gives the corporation the power to *purchase paving materials* and incur a debt for that purpose; and in a suit by the vendor of such materials against the corporation, it is no defence that the council had not passed an ordinance before they purchased the materials, requiring the owners to pave: this is a matter to which a creditor is not bound to look. The question would be different if the city had sought to make the lot-owner liable for the cost of paving; in such case it must show a strict compliance with the requirements of its charter.²

§ 820 (451). **Modification of Contracts.** — A city or other municipal corporation having the power to make a contract can deal with the contract in the same manner as if it were a natural person, and may, in the absence of a statutory limitation upon its powers, or conformably with such limitation, *change, modify it, or cancel it* in the same manner as it might originally contract.³ But the

¹ *Semmes v. Columbus*, 19 Ga. 471; *having found quicksand* which unduly increased the expense of construction, followed and text approved, *Shannon v. O'Boyle*, 51 Ind. 565; *Athens v. Carnak*, 75 Ga. 429; *Adams v. Rome*, 59 Ga. 765; *ante*, § 242; *post*, chapter on Corporate Property, § 991; *post*, chap. xxvi.; *Bush v. Carbondale*, 78 Ill. 74; *Cox v. Jones*, 73 N. H. 504, citing text.

² *Bigelow v. Perth Amboy*, 25 N. J. L. 297; *post*, chap. xxviii.; *supra*, §§ 777, 782, 783.

³ *Doland v. Clark*, 143 Cal. 176; *Meech v. Buffalo*, 29 N. Y. 198; *Moore v. Albany*, 98 N. Y. 396; *Voght v. Buffalo*, 133 N. Y. 463, 471; *Weston v. Syracuse*, 158 N. Y. 274, rev'g 82 Hun, 67; *Fitzgerald v. Walker*, 55 Ark. 148, 154. In *Meech v. Buffalo*, 29 N. Y. 198, a contractor for a sewer increased the expense of construction, stopped work on the sewer and petitioned the common council to increase the contract price for building the same to indemnify him for the loss which he would sustain by the reason of the existence of the quicksand, if he should go on and complete the sewer for the contract price. Thereupon the common council determined to allow him an additional sum. It was held that this modification of the contract was within the power of the common council, *Wright, J.*, saying: "Having made a contract for the construction of the sewer in this case it (the city) could have afterwards cancelled or modified it by increasing the contract price. In short, it could deal

modification must be made by officers of the municipality having authority to act in that respect. If the officers are without authority, the modification is not binding on the municipality.¹ But the

with it in the same manner as if it were a natural person. . . . It is not pretended that the defendant might not have released Randolph (the contractor) altogether from his contract notwithstanding he had given security for its performance or rescinded it and entered into a new engagement to secure the completion of the work. So the city could agree to pay an additional compensation in consideration that he would go on and complete the sewer." In *Massachusetts*, a committee chosen by a town to erect a building has authority to change the specifications in order to remedy defects in them and to improve them in minor details and within reasonable limitations. *Shea v. Milford*, 145 Mass. 528. A committee authorized by the city council to provide a water supply and having power to contract therefor, has the same power to make changes in the contract that it has to enter into the original agreement. But the committee must be called together and act as a body, otherwise its action in attempting to modify the contract is void. *Burge v. Rockwell*, 120 Iowa, 495. The city council may by express provision inserted in the contract, delegate the power to change a contract to the head of the department charged with the execution of the contract so long as the changes permitted do not radically change the general character of the work and concern only the terms of construction, although without such delegation the head of the department would not have authority to enter into a contract, or alter or change the same. *Filbert v. Philadelphia*, 181 Pa. 530. If the original contract makes provision for changes and additions to or deductions from the work, any changes made pursuant to its provisions become a part of the contract. *Sherman v. Connor* (Tex. Civ. App.), 72 S. W. Rep. 238. In *California Improvement Co. v. Reynolds*, 123 Cal. 88, it was held that a contract for street paving which reserved to the superintendent of streets the power to determine or vary the amount of material to be used was invalid, because made upon a basis which was not susceptible to competitive bidding as required by the

statute. The determination of what materials shall be used in paving streets is a legislative function belonging to the city council which cannot be delegated to the city engineer. *King Hill Brick Mfg. Co. v. Hamilton*, 51 Mo. App. 120.

¹ *Smith v. Salt Lake City*, 83 Fed. Rep. 784; *O'Hara v. New Orleans*, 30 La. An. 152; *Bonesteel v. Mayor, &c. of New York*, 22 N. Y. 162; *Becker v. New York*, 176 N. Y. 441, 445; *Hague v. Philadelphia*, 48 Pa. 527; *Chicago v. McKechney*, 205 Ill. 372, rev'g 91 Ill. App. 442. Although the engineer and his assistants are, by the terms of the contract, given authority to direct the contractor in the performance of the work, that does not confer upon them general authority to modify the contract. *Lamson v. Marshall*, 133 Mich. 250. When the construction of a sewer should have been ordered by the city council, the board of public works was required to advertise for proposals to execute the work according to plans and specifications and was authorized to contract with the lowest bidder. The city charter also provided that all contracts for any public work should be approved by the council and that all contracts should be let to the lowest responsible bidder. Held, that the board of public works had no authority without the approval of the council to make any substantial change in the terms of an existing sewer contract; and that the contractor could not recover for a variation from the plan of the work made by the direction of the board without the approval of the council. *Campau v. Detroit*, 108 Mich. 414. By the charter, the city council determined when a public building should be erected. The board of public works then prepared plans and specifications and submitted them, with an estimate of the cost, to the council. Bids were advertised for and were reported by the board with recommendations to the council, which alone had authority to direct the execution of a contract. Held, that in a contract made pursuant to such provisions, a stipulation that in case of alterations a fair valuation of the work added or omitted should be made by

of a municipal corporation to the variation or modification of a contract need not necessarily be expressed by the formal action or resolution of the common council; it may be implied from acts relating to the contract work subsequent to the date of the contract;¹ where the contract is made by ordinance in the prescribed statutory mode, it can only be repealed or annulled in the same manner.² If, however, under the legislation referred to in the note, a contract for a street improvement to be assessed against the abutter be made with reference to the official grade as previously existing, and thereafter, but before completion of the work, the local authorities having control over the grade of the street change the official grade, the jurisdiction to make the improvement which had been conferred under the resolution fixing the original grade is lost by the change of the official grade of the street, and the contract for doing the work ceases to be operative as against the abutter. The contract is not modified to meet the changed circumstances.³

board of public works and the sum to be paid for the work according to the original specifications increased or diminished accordingly, did confer authority on the board to order the city for alterations in amount exceeding the contract price. *Anderson v. Lansing*, 120 Mich. 539. *Messenger v. Buffalo*, 21 N. Y. 196; *Fort News v. Potter*, 122 Fed. 321, citing text. See also *Whitworth v. Webb City*, 204 Mo. 579. Where the time for work is stipulated to be done in the direction of a street commissioner of a city, this officer has authority, without a vote of the council, to authorize extra work to be done, or materials to be furnished, where these are rendered necessary by the action of the local authorities subsequent to the making of the contract, and where, without such extra work or materials, it would be impossible to fulfil the requirements of the contract. *Messenger v. Buffalo*, 21 N. Y. 196. As to changes in contracts by parol, see *Hasbrouck v. Sauklee*, 21 Wis. 217; compare *Alimento v. Kirk*, 7 Cal. 419; *infra*, § 1. Acceptance by city of proposals, see *Springfield v. Harris*, 107 Ill. 532. Where a city made a contract with gas company for a year, and renewed to observe its terms in subsequent years without renewing it, and then made a new contract for a year, which was likewise observed in subsequent years without being formally renewed, it was held that the city was

under an implied obligation to pay for gas for an entire year, when it had accepted gas for a considerable portion of that year. *Taylor v. Lambertville*, 43 N. J. Eq. 107.

Defendant's council passed a resolution ordering a public square to be graded, and plaintiff, under an agreement with defendant's officers, advanced the money for the work, which was done in a satisfactory manner. Held, that a subsequent resolution, of which plaintiff had no notice, limiting the expenditure, would not defeat recovery of an amount expended in excess of that limit. *Duncombe v. Fort Dodge*, 38 Iowa, 281.

¹ *Terre Haute v. Lake*, 43 Ind. 480. See also *North Pacific L. & M. Co. v. East Portland*, 14 Oreg. 3. Where the contract, though made by ordinance, is not required to be so made by statute, it does not require to be repealed by ordinance. *State v. Cowgill, &c. Milling Co.*, 156 Mo. 620, citing text. When the contract itself provides that the chief engineer of the city may make an extension of time in writing, a verbal extension for an indefinite period is invalid. *Malone v. Philadelphia*, 147 Pa. 416. See also *Dougherty v. Norwood Borough*, 196 Pa. 92; *Johnson v. Albany*, 86 N. Y. App. Div. 567. If a statute requires that all municipal contracts shall be in writing, all variations of such contracts must also be in writing. *Malone v. Philadelphia*, 147 Pa. 416.

² In *Warren v. Chandos*, 115 Cal.

§ 821 (477). **Settlement of Disputed Claims, &c.** — Growing out of its authority to create debts and to incur liabilities, a municipal corporation has power to *settle* disputed claims against it, and an agreement to pay these is not void for want of consideration.¹ If

382, the plaintiff sued upon a street assessment. By statute, before the improvement could be ordered, a resolution of intention describing the work was required to be adopted by the city council and posted and published. Before the contract was awarded, notice, with specifications, inviting proposals for doing the work, was also required to be posted and published, and the contract was directed to be awarded to the lowest responsible bidder. The privilege was then given to the owners to do the work themselves at the price at which it was awarded, and thus be relieved from all burden except its actual cost. A contract for grading the street to the grade as then officially fixed was let at a fixed price per cubic yard. After the contract was let the official grade of the street was changed. The court held that whether the amount of the assessment was increased or diminished by the change was immaterial; that although the grading was awarded at a price per cubic yard, if proposals had been asked for grading the street to the line as changed, the contract might have resulted in a still smaller assessment, and that although the contractor might have a right of action against the city for whatever damage he should sustain from being prevented from carrying out his contract by the subsequent change of the grade of the street, as in the case of any other breach of contract, yet if the contract had been made inoperative, he did not have the right to proceed with its performance and make the expense a charge upon the adjacent lands. A similar decision was made in *Argentine v. Daggett*, 53 Kan. 491.

¹ *Onslow County v. Tollman*, 145 Fed. Rep. 753, 772, citing text; *Augusta v. Leadbetter*, 16 Me. 45; *Bean v. Jay*, 23 Me. 117, 121; *People v. San Francisco Supervisors*, 27 Cal. 655; *People v. Coon*, 25 Cal. 635. *Infra*, § 822. A municipal corporation has power to settle disputed claims. In this case the acceptance by a city council of \$100 in payment of a judgment for \$200 obtained before a justice

of the peace, from which the defendant was about to appeal, was held a proper exercise of corporate power. *Agnew v. Brall*, 124 Ill. 312. A town board of supervisors held to have no power, unless expressly conferred, to discharge a judgment in favor of the town except upon full payment thereof, nor to allow credits upon it of sums not allowed by the court. *Butternut v. O'Malley*, 50 Wis. 329. It may annex conditions to a proposal of settlement, and is not liable unless the conditions are met. *Merrill v. Dixfield*, 30 Me. 157.

As to power to *settle and refund existing debts and issue refunding bonds*, see chapter on Municipal Bonds. The cases establish the general proposition that where municipal officials are authorized by statute to issue funding bonds to pay existing indebtedness, they are thereby invested with authority to ascertain whether there is an existing indebtedness, and if so the amount thereof. Being invested with such authority, a recital in such bonds of their finding on such questions is authorized and may be relied upon by the purchaser of the bonds. *Waite v. Santa Cruz*, 184 U. S. 302, 314; *Hughes Co. v. Livingston*, 104 Fed. Rep. 306, 311; 43 C. C. A. 541; *Chaffee Co. v. Potter*, 142 U. S. 355; *Gunnison Co. v. Rollins*, 173 U. S. 255; *Sioux City School District v. Rew*, 111 Fed. Rep. 1; *Huron v. Second Ward Sav. Bank*, 86 Fed. Rep. 272, 278; 30 C. C. A. 38, 45; *Pierre v. Dunscomb*, 45 C. C. A. 499; 106 Fed. Rep. 611, 616; *certiorari denied*, 181 U. S. 621; *Ashley v. Presque Isle Board*, 60 Fed. Rep. 55, 66; *West Plains Tp. v. Sage*, 16 C. C. A. 553, 557; 69 Fed. Rep. 943, 946; *Cadillac v. Woonsocket Sav. Institution*, 58 Fed. Rep. 935, 939; 7 C. C. A. 574, 578; *Seward Co. v. Aetna Life Ins. Co.*, 90 Fed. Rep. 222, 224; *Kiowa Co. v. Howard*, 83 Fed. Rep. 296; 27 C. C. A. 531; *Haskell Co. v. National Life Ins. Co.*, 90 Fed. Rep. 228; *Hamilton County v. Montpelier, &c. Trust Co.*, 157 Fed. Rep. 19; in this case the Supreme Court of the United States refused the county's application for a writ of *certiorari*, 208 U. S. 617. The

it has obtained a contract which, by mistake or a change of circumstances, it deems to operate oppressively upon the other party, an agreement to make an *additional compensation*, or to modify or annul it, is not in the absence of special restriction invalid for want of consideration.¹ A town may make a contract with a creditor whereby the latter agrees to discount or throw off a portion of his debt, and such an agreement, if founded on a sufficient consideration, will be enforced.²

board of supervisors have authority to compromise and settle a judgment in favor of the county, pending an appeal therefrom. *Orleans County v. Bowen*, 4 Lans. 24. Also to settle and adjust the county treasurer's account and waive interest thereon. *Chenango County v. Birdsall*, 1 Wend. (N. Y.) 453. Also to settle and adjust the claims arising between the county and another county upon the creation of the latter out of the territory of the former. *Hall v. Baker*, 74 Wis. 118. See also *Collins v. Welch*, 58 Iowa, 72. The corporation counsel has not, by virtue of his office, implied power to audit and adjust, or settle and compromise, claims against the city, although they may be the subject of pending lawsuits. *Bush v. O'Brien*, 164 N. Y. 205, rev'g 47 App. Div. 581 (distinguishing *O'Brien v. Mayor, &c. of New York*, 160 N. Y. 691, aff'g 40 App. Div. 331); *People v. Mayor, &c. of New York*, 11 Abb. Pr. (N. Y.) 66; *McGinness v. Mayor, &c. of New York*, 26 Hun (N. Y.), 142.

¹ *Bean v. Jay*, 23 Me. 117, 121; *Meech v. Buffalo*, 29 N. Y. 198. Further, as to consideration, *Baileyville v. Lowell*, 20 Me. 178; *Nelson v. Milford*, 7 Pick. (Mass.) 18, valuable opinion of Parker, C. J.; see *People v. Stout*, 23 Barb. (N. Y.) 338; *ante*, chap. iv. § 123. The power to sue and be sued gives to a corporation the right to settle or compromise claims. Where a city has a judgment, from which an appeal is about to be taken, the council may, if done in good faith, cancel the judgment on the payment of costs; and such an agreement, when executed, is binding upon the corporation. *Petersburg v. Mappin*, 14 Ill. 193; *Orleans Co. Sup. v. Bowen*, 4 Lansing (N. Y.), 24. The cases above cited in this note are reviewed by *Richardson, C. J.*, in *Barnes v. District of Columbia*, 22 Court of Claims Rep. 366, and the conclusion reached that the doctrine of the text did not apply to the case before the

court, under the legislation of Congress as to the power of the Board of Public Works of the District of Columbia to make contracts, under which it is held that such legislation provides how contracts by the Board for public improvements shall be made, and that if there is material departure from the requirements of the statute the contract is not binding. *South Boston Iron Co. v. U. S.*, 118 U. S. 37, aff'g 18 Court of Claims, 165; *Brown v. District of Columbia*, 127 U. S. 579. In *Louisiana* the president of a police jury has no power to institute a suit in its behalf without special authority conferred by ordinance or resolution, and parol testimony is not admissible to prove either. *Police Jury of Ouachita v. Monroe*, 38 La. An. 630. The legislature may authorize municipal corporations to sue, without payment of costs or complying with other requirements imposed upon natural persons or private corporations. In this case an appeal by a city without having given a *supersedeas* bond was sustained. *Holmes v. Mattoon*, 111 Ill. 37.

² *Baileyville v. Lowell*, 20 Me. 178. In this case the town, against which the creditor had an execution, had the option, and was authorized, to raise the money by loan or by assessment; and if in the latter mode, either at once or by instalments. If not raised and paid, the creditor was authorized to cause the property of the inhabitants to be distrained upon his writ. It was held under these circumstances, that an agreement by the creditor, which was accepted and complied with by the town, that if the town would at once assess the amount required, and collect the same, he would abate a portion of his debt, was founded upon a sufficient consideration, and was binding upon him. A statute which allows a debtor of a municipal corporation to procure its obligations and set them off against his debt is not unconstitutional.

§ 822 (478). **Power to arbitrate Claims.** — As a general proposition, municipal corporations have, unless specially restricted, the same powers to liquidate claims and indebtedness that natural persons have, and from that source proceeds *power to adjust all disputed claims*, and when the amount is ascertained to pay the same as other indebtedness. It would seem to follow therefrom that a municipal corporation, unless disabled by positive law, *could submit to arbitration* all unsettled claims with the same liability to perform the award as would rest upon a natural person, provided, of course, that such power be exercised by ordinance or resolution of the corporate authorities.¹ It is no objection to the validity of such ordinance that it was passed at a meeting of the city council at which all members were not notified to be present, provided that the ordinance be approved at a subsequent regular meeting. Nor is the ordinance an act *ultra vires* the corporation, although the work for which damages are claimed was done outside of the city limits, provided it is a part of a work which the corporation has power to perform.² In some cases it is held that a city has no power

as depriving creditors of their vested rights, or as impairing the obligations of contracts. *Amy v. Shelby County Taxing District*, 114 U. S. 387.

¹ Text approved, *Springfield v. Walker*, 42 Ohio St. 543, holding also that municipal corporations are "persons" within the meaning of the statute of Ohio — R. S. § 4947 — concerning arbitrations. See also *Hartup v. Pittsburgh*, 131 Pa. 535. Evidence that the award was known to a city officer to whom all disputes were referred by the contract to be grossly unjust when made, that he was hostile to the contractor and that he was receiving a salary from the city, held *insufficient to connect the city with any fraud* in the award. *Hartup v. Pittsburgh*, 131 Pa. 535. See also *Hostetter v. Pittsburgh*, 107 Pa. 419.

² *Shawneetown v. Baker*, 85 Ill. 563; *Dix v. Dummerston*, 19 Vt. 263; *Griswold v. Stonington*, 5 Conn. 367; *Alexandria Canal Co. v. Swann*, 5 How. (U. S.) 83; *District Township of Walnut v. Rankin*, 70 Iowa, 65; *Remington v. Harrison County Court*, 12 Bush (Ky.), 148; *Kane v. Fond du Lac*, 40 Wis. 495; *Hall v. Baker*, 74 Wis. 118, 124; *supra*, § 821. Power exists unless the corporation be disabled. *Eldon Tp., In re*, 6 Upper Can. Law Jour. 207; *Brant County, In re*, 19 Upper Can. Q. B. 450. The city

council may entrust the *city attorney with the selection* of the arbitrators. *Kane v. Fond du Lac*, 40 Wis. 495. In *District of Columbia v. Bailey*, 171 U. S. 161, it was held that the commissioners of the District of Columbia had, under their limited statutory authority *no power to agree to a common-law arbitration of a claim against the District* growing out of a contract for the paving of a street. Mr. Justice White said: "The mere fact that the District is a municipal corporation is not decisive of the question whether or not the Commissioners of the District had power to make a contract to submit to an award, for, as we have seen, it is not the mere existence of a municipal corporate being from which the power to make a submission to arbitration is deduced, but that the municipal corporation by which such an agreement is entered into has power to contract, to settle and adjust debts; in other words, all the general attributes which normally attach to and result from municipal corporate existence. Recurring to the statutes relating to the Commissioners of the District of Columbia, it is clear from their *line* that these officers are without general power to contract debts, or to adjust and pay the same; that, on the contrary, the statutes expressly deprive them of such power, and limit the

to submit to arbitration claims for damages arising under the power of eminent domain.¹

§ 823. **Performance of Work to Satisfaction of Engineer.** — Contracts for public improvement usually provide that the work shall be performed and the materials furnished under the direction and subject to the control of an engineer appointed by the city and the officer of the city having charge of the improvement. It is also usual to insert provisions referring to the engineer all questions in relation to the work and the construction thereof, and the money is made payable to the contractor *upon the performance of the work to the satisfaction of the engineer and the officer* and upon the production of the certificate or estimate of the engineer. When the work has been performed pursuant to such a contract and the engineer passes upon the quantity and quality of the work, and issues his certificate of performance, such certificate is binding upon both parties, and can only be impeached for fraud or palpable mistake.² But *contracts sometimes qualify this provision* by declaring

scope of their authority to the mere execution of contracts previously sanctioned by Congress, or which they are authorized to make by express statutory authority. The necessary operation of these provisions of the statutes is to cause the District Commissioners to be merely administrative officers with ministerial powers only. The sum of the municipal powers of the District of Columbia is neither vested in nor exercised by the District Commissioners. They are, on the contrary, vested in the Congress of the United States, acting *pro hac vice* as the legislative body of the District, and the Commissioners of the District discharge the functions of administrative officials. There is no authority for holding that a mere administrative officer of a municipal corporation, simply because of the absence of a statutory inhibition, has the power, without the consent of the corporation, speaking through its municipal legislative body, to bind the corporation by a common-law submission. And this being true, with how much less reason can it be contended that the administrative officers of the District have such power without the consent of Congress, when the acts defining the powers of the commissioners, by clear and necessary implication, contain an express prohibition to the contrary? Nor is it in reason sound

to say that because the district commissioners have the power to sue and be sued, they have therefore the authority to enter into a contract to submit a claim preferred against the District to arbitration, and thus to oust the courts of jurisdiction, when no authority is conferred upon the commissioners to contract to pay a claim of the character embraced in the arbitration, and no appropriation had been made by Congress for the payment of any such claim." Concerning corporate character and legal status of the District, see Index, *District of Columbia*.

¹ *Post*, chapter on Eminent Domain.

² *Guild v. Andrews*, 137 Fed. Rep. 369; *Mobile v. Shea*, 127 Fed. Rep. 521; *McCormick v. St. Louis*, 166 Mo. 315; *Brady v. Mayor, &c. of New York*, 132 N. Y. 415; *People v. Syracuse*, 144 N. Y. 63; *Matter of Freel*, 148 N. Y. 165; *Burke v. Mayor, &c. of New York*, 7 N. Y. App. Div. 128; *Smith v. Mayor, &c. of New York*, 12 N. Y. App. Div. 391; *Quinn v. Mayor, &c. of New York*, 16 N. Y. App. Div. 408; *Jones v. Mayor, &c. of New York*, 60 N. Y. App. Div. 161, *aff'd* 174 N. Y. 517; *Thilemann v. Mayor, &c. of New York*, 66 N. Y. App. Div. 455; *Sicilian Asphalt Pav. Co. v. Williamsport*, 186 Pa. 256; *McManus v. Philadelphia*, 201 Pa. 632; *Commonwealth v. Pitts-*

that neither the municipality nor any department or officer thereof shall be precluded or estopped by any certificate made or given by the engineer, inspector, or other officer from at any time showing the true and correct amount and character of the work which shall have been done and materials which shall have been furnished by the contractor; and under such a qualification of the clause making the engineer's certificate final, the city may show that the work done was not of the general kind required by the contract, that the materials used were different from those required, or were less in amount than the city was apparently entitled to under the certificate. It cannot show, in spite of the certificate, that the materials which were put into the work and accepted were not proper because of some defect in them, or in the way in which the work was done so long as they comply in description and kind with those called for under the contract.¹ When the contract expressly reserves to the municipality the right to show the amount and character of the work done and materials furnished, the production of a certificate thereof pursuant to the contract places *the burden of the proof* upon the municipality to show by a preponderance of evidence that the certificate was in fact erroneous, and that the work actually done was less than that shown in the certificate.² Until a certificate has been given as required by the contract, the contractor cannot enforce

burg, 206 Pa. 379; San Antonio v. Marshall Co. (Tex. Civ. App.), 85 S. W. Rep. 315.

Where the contract for the work has been modified by agreement of the parties, a certificate by the engineer that the work was done in compliance with the contract as modified is sufficient to justify a recovery. *Weston v. Syracuse*, 158 N. Y. 274. Acceptance of work by *deputy engineer* held to be sufficient under peculiar provisions of statute. *Richardson v. Mehler*, 111 Ky. 408. Where a contract called for *vitrified brick according to sample*, and the contractor substituted brick not according to sample but just as good, the fact that the city inspected the brick before they were laid did not take the risk from the contractor. As the complete work had not been accepted by the city engineer, the contractor was liable for loss from the use of brick not thoroughly vitrified, although the defects only became discoverable after use. *Gosnell v. Louisville* (Ky.), 57 S. W. Rep. 476. *Sufficiency of certificate*, see *Leeson v. New York*, 65 N. Y. App. Div. 105; San Francisco

Pav. Co. v. Egan, 146 Cal. 635. When, pursuant to contract, the officer designated thereby has accepted the work and passed upon the claim of the contractor, the city comptroller has no discretion to refuse to pay the claim on the ground that the work was not done according to contract, or that it was improperly done in some respect. *Commonwealth v. Pittsburg*, 206 Pa. 379; s. c. 204 Pa. 219; *Matter of Freel*, 148 N. Y. 165.

¹ *Brady v. Mayor, &c. of New York*, 132 N. Y. 415; *Quinn v. Mayor, &c. of New York*, 16 N. Y. App. Div. 408.

² *Dean v. Mayor, &c. of New York*, 45 N. Y. App. Div. 605. See also *People v. Coler*, 58 N. Y. App. Div. 131. Mistakes in the work so numerous, so serious, so readily observable, and so generally favorable to one of the parties, and therefore so gross as to imply bad faith in the supervision and acceptance of the work, are sufficient to avoid the decision of the engineer. *Guild v. Andrews*, 137 Fed. Rep. 369.

his claim to payment.¹ But the necessity for a certificate only exists in the case of a claim under the contract. If the contractor sues the city for damages on the ground that he was compelled to perform a second time work called for by his contract with the city, he need not obtain any certificate pursuant to the terms of his contract since the action is founded on a breach of the contract, and the provision requiring a certificate has no application.² If the municipality wrongfully prevents the contractor from completing the work, he is also entitled to recover without the production of a certificate.³

The production of a certificate may be excused by showing that it was refused by the engineer or officer unreasonably and in bad faith,⁴ and it is unreasonable to refuse the certificate if it ought, in the contemplation of the contract, to have been given. In such contemplation it ought to have been given when in very fact and beyond all pretence of dispute the order of things existed to which the engineer or officer is to certify, viz.: the full completion of the contract and each and every one of its stipulations.⁵

§ 824 (479). *Contracts with Attorneys.*—Resulting also from the power to make contracts, to own property, to incur liabilities, and to sue and be sued, is the authority in a municipal corporation, in the absence of express or implied restriction, to employ an attorney.⁶

¹ Phelan v. Mayor, &c. of New York, 119 N. Y. 86. See also Hartup v. Pittsburgh, 131 Pa. St. 535.

² Gearty v. Mayor, &c. of New York, 171 N. Y. 61, rev'g 62 N. Y. App. Div. 72.

³ Kingsley v. Brooklyn, 78 N. Y. 200.

⁴ Elizabeth v. Fitzgerald, 114 Fed. Rep. 547; Parlin v. Greenville, 127 Fed. Rep. 55; Bowery Nat. Bank v. Mayor, &c. of New York, 63 N. Y. 336; Ross v. New York, 85 N. Y. App. Div. 611. The engineer's certificate cannot be attacked on the ground that he was negligent, careless, and made mistakes. Bowman v. Stewart, 165 Pa. 394.

⁵ Bowery Nat. Bank v. Mayor, &c. of New York, 63 N. Y. 336; MacKnight Flintic Stone Co. v. Mayor, &c. of New York, 160 N. Y. 72. If the engineer passes the work from day to day as it proceeds and directs the manner of performance, he cannot, upon the completion of the work, re-examine his own conclusions as to the proper per-

formance of the work and then refuse a certificate, thereby precluding the contractor from recovering. Wildey v. School District, 25 Mich. 419; Schliess v. Grand Rapids, 131 Mich. 52; Lamson v. Marshall, 133 Mich. 250.

⁶ Smith v. Sacramento, 13 Cal. 531; State v. Paterson, 40 N. J. L. 186; Memphis v. Brown, 20 Wall. 289, 321; Memphis v. Adams, 9 Heisk. (Tenn.) 518; Clarke v. Lyon Co., 8 Nev. 181; Ellis v. Washoe Co., 7 Nev. 291; Butternut v. O'Malley, 50 Wis. 333 (to make substitution); Roper v. Lawrinburg, 90 N. C. 427 (counsel employed to defend police officers in actions for false imprisonment); Waterbury v. Laredo, 68 Tex. 565; Scollay v. Butte County, 67 Cal. 249; Hamilton County v. Webb, 47 Kan. 104; Simrall v. Covington, 29 S. W. Rep. 880; 16 Ky. Law Rep. 770. Power to establish ferries held, on demurrer, to imply power to employ counsel to represent the city in a matter involving their establishment, and to agree to pay him a contingent

to conduct or defend suits in which the corporation is interested in its corporate capacity; and the corporation is bound to pay for services rendered by him on due employment, without an express vote to that effect.¹

If the scheme of municipal government *provides a corporation counsel or city attorney or other legal officer* for the municipality whose duty

is dependent upon the success of the suit and consisting of a part of the receipts from the ferry. *Waterbury v. Laredo*, 68 Tex. 565. After trial and on appeal from judgment, doubt was expressed as to the power of the city to give the attorney an interest in ferry property which is subject to a public trust. See *Waterbury v. Laredo*, 68 Tex. 565.

Unless there is some special restriction the corporation may incur liability to compensate an attorney employed by it to conduct or defend suits which relate to the due performance of the duties or trusts with which, in its corporate capacity, it is charged by law. *Attorney-General v. Mayor, &c. of Norwich*, 2 Myl. & Cr. 406; *Lewis v. Mayor, &c. of Rochester*, 9 Com. B. (N. S.) 401; *ante*, § 307. A city owning stock in a railroad company in another State may, in virtue of such ownership, unless specially restricted, employ counsel to attend to its interests in such State. *Memphis v. Adams*, 9 Heisk. (Tenn.) 518. In Iowa, the board of supervisors may employ special agent or attorney to assist in the collection of taxes not collectible by county treasurer in the discharge of his duty. *Withelm v. Cedar Co.*, 50 Iowa, 254. Compare *ante*, § 299, and cases there cited, as to power to offer rewards for offenders. *Buttrick v. Lowell*, 1 Allen (Mass.), 172. A city is liable for the expense of photographs ordered by the corporation counsel which he deemed necessary to prepare for the defence of an action against the city. *Chicago v. Berger*, 100 Ill. App. 158. A city is not liable for counsel employed by a municipal board when the act creating the municipal board is unconstitutional. *Findlay v. Pendleton*, 62 Ohio St. 80. Municipality held not liable for legal services rendered not at the request or on the initiative of the board of aldermen or city council, but at the request or suggestion of individual members thereof. *Burkett v. Athens* (Tenn. Ch. App.), 59 S. W. Rep. 667; *Root v. Topeka*, 63 Kan. 129; *Butler*

v. Charleston, 7 Gray (Mass.), 12. See also *Cass County v. Ross*, 46 Ind. 404.

Although the mayor of the city has usually no authority by virtue of his office to employ counsel, yet cases of emergency may arise when the power must necessarily exist, and in such cases the city becomes liable for the compensation of the counsel. Liability of city sustained under this principle where the city officials were proceeding to collect a tax without any ordinance of the city council and the mayor employed counsel to institute suit to restrain the collection of the tax; *Louisville v. Murphy*, 86 Ky. 53; also where mayor employed counsel to defend him in mandamus proceedings to require him to sign an illegal issue of bonds, the legal officers and the legislative body of the city refusing to assist him or to procure counsel for the purpose. *Wiley v. Seattle*, 7 Wash. 576; *Barnert v. Paterson*, 48 N. J. L. 395. But the emergency must be serious and the necessity grave and impending. The mayor cannot employ counsel to bring suit in the name of the city to enjoin the county from enclosing grounds belonging to the city or to assist in the prosecution of the suit. The nature of the action does not disclose any real emergency. *Owensboro v. Weir*, 95 Ky. 158. Employment of an attorney by the mayor of a city held to have been ratified by the act of the common council in permitting the attorney to proceed with the litigation without protest or repudiation and accepting the fruit of his services. *Mound City v. Snoddy*, 53 Kan. 126. City held bound to pay reasonable value of legal services performed under an invalid contract where the city had received the benefit of the services. *Brand v. San Antonio* (Tex. Civ. App.), 37 S. W. Rep. 340.

¹ *Langdon v. Castleton*, 30 Vt. 285; *ante*, § 307. Where no term is specified in the contract of employment of an attorney, it is terminable at will. *Wilmington v. Bryan*, 141 N. Car. 666.

it is to appear on behalf of the municipality *in all suits* by or against the corporation, and to conduct all the law business of the corporation, the municipality is deprived of its power to employ another attorney to take the place of and perform the duties which naturally belong to its law officer.¹ But the fact that an official attorney is provided for the municipality by law does *not preclude the municipality* from employing *other or additional attorneys to assist him* in prosecuting or defending suits against the municipality;² nor does it deprive the municipality of power to employ counsel to defend or prosecute actions which do not fall *within the duties* of the official

¹ *Modoc County v. Spencer*, 103 Cal. 498; *Merriam v. Barnum*, 116 Cal. 619; *Hope v. Alton*, 214 Ill. 102, aff'd 116 Ill. App. 116; *Clough v. Hart*, 8 Kan. 487; *Horsey v. Patterson*, 40 N. J. L. 186; *Lyddy v. Long Island City*, 104 N. Y. 218; *People v. Town*, 1 N. Y. App. Div. 127; *Collins v. Saratoga Springs*, 70 Hun (N. Y.), 583, aff'd 140 N. Y. 637; *Ransom v. Mayor, &c. of New York*, 24 Barb. (N. Y.) 226; *Orton v. State*, 12 Wis. 509. See also *Hugg v. Camden*, 29 N. J. Eq. 6; *Memphis v. Brown*, 20 Wall. (U. S.) 289. In *Clough v. Hart*, 8 Kan. 487, the plaintiffs sued a city and a county to compel the specific performance of contracts employing them as counsel for the city and county in a certain matter. The court conceded the power of either the city or the county to employ an attorney in the following cases: (1) when no counsel had been otherwise provided by law; (2) in States where no county attorney is elected but where a district attorney is elected for several counties whose principal duty is to attend to State cases (to prosecute criminal actions) in his district, but whose duty it is also, secondarily, to appear and prosecute or defend for the several counties within his district, such counties are not bound to depend on such district attorney, but may employ counsel of their own to take more special care of the interests of the county; (3) in any case other counsel than the city or county attorney may appear and prosecute or defend for a city or county under or for the city or county attorney or to assist him, looking of course to the city or county attorney, if to any one, for compensation; (4) a city or county may employ other counsel to perform such of its legal business as the law does not

authorize or require the county attorney to perform; (5) a city or county may with the consent of the city or county attorney employ such assistance for the city or county attorney as the latter may actually need. A statute providing for the appointment of a city attorney and the formation of a law department which should have charge of and conduct all law business of the corporation, repeals by implication an earlier statute giving to the common council power to employ and pay an attorney. *Lyddy v. Long Island City*, 104 N. Y. 218.

² *Reclamation Dist. v. Hagar*, 4 Fed. Rep. 366, 371; *Smith v. Sacramento*, 13 Cal. 531; *Hornblower v. Dunden*, 35 Cal. 664; *Kelley v. Seranus* (Cal.), 46 Pac. Rep. 299; *Lassen County v. Shinn*, 88 Cal. 510, 512; *Hart v. Clough*, 8 Kan. 487; *Ellis v. Washoe County*, 7 Nev. 291; *Clarke v. Lyon County*, 8 Nev. 181; *Mayor, &c. of New York v. Exchange F. Ins. Co.*, 9 Bosw. (N. Y.) 424, 433; *Mayor, &c. of New York v. Hamilton F. Ins. Co.*, 10 Bosw. (N. Y.) 537, 544; *Sharp v. Mayor, &c. of New York*, 9 Abb. Pr. (N. Y.) 426; *Huron v. Campbell*, 3 S. Dak. 309, 321; *Martin v. Whitman County*, 1 Wash. 533, 536. The city council cannot delegate to an attorney employed by it the power or authority to retain another attorney not named by them, if in his judgment it becomes necessary. *Knight v. Eureka*, 123 Cal. 192. The commencement of a lawsuit, the selection and employment of attorneys to commence and prosecute it, and the compromise or settlement of the same, are acts which involve the exercise of judgment and discretion, and power conferred upon a municipal corporation to do such acts *cannot be delegated* to others. *Scollay v. Butte County*, 67 Cal. 249.

attorney as prescribed or defined by statute or ordinance;¹ or if for disability or other reason, it is impossible for the city attorney to discharge the required duty.²

If a corporation attorney, *after his term of office has expired*, continues in the management of suits in which the corporation is interested, without objection from, and with the knowledge of, the corporation and of his successor, he may, it has been held, recover for such services.³ An attorney was *employed upon a quantum meruit* by the city to conduct a case to a final termination, and pending the litigation was appointed city counsellor, when it became his official duty to act for the city; and it was held that, in the absence of an express contract, he could not recover for the value of such services as were rendered after his appointment. It might be otherwise if the original employment had been to carry the suit through for an agreed sum.⁴ But the power of the municipality or its appropriate officers to employ an attorney is *limited to those matters* in which the municipality has some official duty or which may properly be said to affect its interests. An attempted employment of an attorney in a matter in connection with which the municipality has no official duty, or which does not fall within the duties of the board or officer making the

¹ County commissioners, when *sued beyond the limits of their own county*, where the county attorney is not bound to go, may employ other counsel to defend the action, although by statute the county attorney is made the official adviser and representative of the county. *Thacher v. Jefferson County*, 13 Kan. 182. *Brown*, 20 Wall. 289, 321; *Memphis v. Adams*, 9 Heisk. (Tenn.) 518; *a. c.* 24 Am. Rep. 331; *Cass County v. Ross*, 46 Ind. 404; *McCabe v. Fountain County*, 46 Ind. 380.

² *Smith v. Sacramento*, 13 Cal. 531. ³ *Langdon v. Castleton*, 30 Vt. 285. See *Harrington v. Berkshire School District*, 30 Vt. 155; *supra*, § 793, as to implied contracts. Compare *Clough v. Hart*, 8 Kan. 487, *supra*. Compensation of city attorney. See *Carroll v. St. Louis*, 12 Mo. 44; also, chapter on Corporate Officers, *ante*. Liability for attorney's fee under charter or special statutes, see *Brady v. New York Supervisors*, 2 Sandf. S. Car. R. 460, *aff'd* 10 N. Y. 260, for reasons given by *Oakley, C. J.*, in 2 Sandf. 460; *Halstead v. Mayor, &c. of New York*, 3 N. Y. 430; *Memphis v. Brown*, 20 Wall. 289; *State v. New Orleans*, 20 La. An. 172; *Bright v. Hewes*, 19 La. An. 666; *Parker v. Williamsburg*, 13 How. Pr. (N. Y.) 250; *Clough v. Hart*, *supra*, and cases cited by *Valentine, J.* *Proof of employment.* *Butler v. Charlestown*, 7 Gray (Mass.), 12, 14; *Memphis v. Brown*, 20 Wall. 289, 321; *Memphis v. Adams*, 9 Heisk. (Tenn.) 518; *a. c.* 24 Am. Rep. 331; *Cass County v. Ross*, 46 Ind. 404; *McCabe v. Fountain County*, 46 Ind. 380. ⁴ *Detroit v. Whittemore*, 27 Mich. 281. Construction of power to employ private counsel. *Ib.* In employing counsel the board of county commissioners acts as a corporation, and like other corporations, may, unless the statute otherwise requires, employ agents and attorneys without making such employment a matter of record; but this must be done by the concurrent act of a majority of the board at a legal session. Such attorney may recover compensation for his services. *McCabe v. Fountain County*, 46 Ind. 380. The city council under the laws of Iowa, while acting as a board of equalization, is discharging a corporate function and acting as a representative of the city, and if its action is appealed from, the city solicitor is justified in defending it in the appellate court; for which service he is entitled to reasonable compensation, even though the service or the compensation be not provided for by city ordinance. *Kinnie v. Waverly*, 42 Iowa, 437. *Extra compensation.* *Ante*, § 426.

contract of employment, does not render the municipality liable to the attorney for his compensation.¹

§ 825 (480). **Contracts for Local Improvements.** — A municipal corporation contracted with a paver to do certain work at a fixed

¹ *Colusa County v. Welch*, 122 Cal. 428 (employment of special counsel to influence pending legislation affecting the county). As to power of municipality to indemnify officers against legal expenses, &c., see *ante*, § 307. A municipal corporation which has employed an attorney to file a bill seeking to destroy by suit the existence of the corporation itself, cannot apply the corporate funds in payment of such services. *Daniel v. Memphis*, 11 Humph. (Tenn.) 585. A municipal corporation has no power to employ counsel to defend a suit exclusively directed against its officers, though its object be to enjoin them from performing their official functions and to appoint a receiver of its corporate property. *Smith v. Nashville*, 4 Lea (Tenn.), 69. When suit is brought in the name of a municipal corporation without authority, it may be dismissed, on motion of the defendant, or by the court of its own motion when attention is called to the fact. *Kankakee v. Kankakee & I. R. R. Co.*, 115 Ill. 88.

The Supreme Court of Wisconsin holds that no action will lie against a city having "the general powers of municipal corporations at common law," to recover compensation for services of counsel to aid in criminal prosecutions against persons who had lately been officers of the city, for offences committed under color of their official duties, resulting in pecuniary injury to the city. *Butler v. Milwaukee*, 15 Wis. 493. In *Indiana*, a county board has no power to employ counsel to conduct criminal prosecutions and cannot be compelled to pay for services rendered. *Hight v. Monroe Co.*, 68 Ind. 575; *Ripley Co. v. Ward*, 69 Ind. 441; *Grant Co. v. Bradford*, 72 Ind. 455.

Under the provision of the *New York Constitution* prohibiting any county or city, &c., from loaning its money or credit to or in aid of any individual, and from incurring indebtedness except for county, city, &c., purposes, the legislature cannot authorize or direct the payment from the funds of

a county or city of expenses incurred by a police officer in successfully defending charges preferred against him for official misconduct. *Chapman v. New York*, 168 N. Y. 80, aff'g 57 App. Div. 583. See also *Matter of Straus*, 44 N. Y. App. Div. 425; *Matter of Jensen*, 44 N. Y. App. Div. 509, aff'g 28 N. Y. Misc. 379; *Matter of Fallon*, 28 N. Y. Misc. 748; *Matter of Labrake*, 29 N. Y. Misc. 87. See Index, *City Purpose: County*.

A city cannot assume the expense of defending an action against police officers to recover damages for false imprisonment. *Chicago v. Williams*, 182 Ill. 135, rev'g 80 Ill. App. 33. But in *Cullen v. Carthage*, 103 Ind. 196, it was held that the trustees of a town have incidental power to employ counsel to defend the town marshal against an action for false imprisonment brought by one arrested by him for the violation of a town ordinance, and that counsel so employed might recover therefor in an action against the town, citing and approving § 307, *ante*, and relying on the cases there cited. To the same effect, *Roper v. Lawrinburg*, 90 N. Car. 427. Index, *Indemnification of Officers: Office and Officer*. The common council cannot authorize the employment of counsel at the expense of the corporation to defend a suit brought against the acting mayor to test the validity of the latter's election. *Peck v. Spencer*, 26 Fla. 23. Claim for services alleged to have been rendered by an attorney in an action of *quo warranto* brought in the name of the State upon the relation of the county attorney against a water company to forfeit its franchise, held, not to be recoverable where it appeared that no resolution was adopted or action taken by the city council employing the plaintiff or recognizing his services as an obligation to the city. *Root v. Topeka*, 63 Kan. 129. Attorney appointed by court to defend accused persons who are unable to employ counsel cannot recover for services so rendered in an action against the county. *Posey v. Mobile County*, 50 Ala. 6.

price, of which it was to pay one-third, and the owners of the abutting property two-thirds. It was judicially determined that the proprietors were, in law, liable to pay only one-third; and it was held, in an action by the paver against the corporation, that it was a *warrantor* for the remaining one-third; and it was held liable accordingly.¹ But where the charter or constituent act in reference to improving streets provides that the *city shall be liable to the contractor for so much only of the improvement as is occupied by streets and alleys crossing the same*, and that the owners of adjacent lots shall be liable for the rest, the city is not liable for the deficiency in case the adjacent property does not sell for enough to pay the assessment, and though the owner be a non-resident.²

¹ *Tounier v. Municipality*, 5 La. An. 298. So where a city by ordinance directed that a sewer be constructed, reciting that the action was taken upon petition of a majority of property owners, and the work was discontinued because it appeared that a majority had not petitioned, the city was held to be liable to pay for the *services of an inspector employed by it for the work*, on the ground that there was an implied guarantee that the petition was sufficient. *Bill v. Denver*, 29 Fed. Rep. 344. See also *Cronan v. Municipality*, 5 La. An. 537, where by the construction of the contract the city was held liable for the whole expense, the proprietors having refused to make payment. A contractor failing, for *want of power* in a city, to be able to get his pay from special assessments, the city was held liable to him, it being regarded as guaranteeing that it possessed the specific powers relied on by the contractor for his compensation. *Maher v. Chicago*, 38 Ill. 266; *Scofield v. Council Bluffs*, 68 Iowa, 695; *Bucroft v. Council Bluffs*, 63 Iowa, 646. But see *Chicago v. People*, 48 Ill. 416, where the first case is explained and distinguished. See also *Reilly v. Philadelphia*, 60 Pa. St. 467; *Sleeper v. Bullen*, 6 Kan. 300; *Chicago v. People*, 56 Ill. 327; *Lowden v. Cincinnati*, 2 Disney (Ohio), 203. Right of contractor to sue the corporation where, in consequence of its neglect, it would be nugatory to proceed against the owners of the property. See *Michel v. Terribonne Police Jury*, 9 La. An. 67; *Newcomb v. E. Baton Rouge*, 4 Rob. (La.) 233; *Michel v. W. Baton Rouge*, 3 La. An. 123; *Leavenworth v. Mills*, 6 Kan. 288;

distinguished. *Casey v. Leavenworth*, 17 Kan. 189. Compare *Reock v. Newark*, 33 N. J. L. 129. Further, as to *local improvements*, see chap. xix; *post*, § 1465; *supra*, §§ 793, 803. See further, Index—*Local Improvements. Municipal Bonds; Streets; Taration*. In *Memphis v. Brown*, 20 Wall. 289, it was held that under its charter the city had *full power to make paving contracts*, and to pay either in cash or in bonds, or both, and to guarantee payment of the assessment bills against abutters. See also *Saxton v. St. Joseph*, 60 Mo. 153. *Towers for electric lights* held not "local improvements," where the lighting system is not owned by the city. *Putnam v. Grand Rapids*, 58 Mich. 416.

² *New Albany v. Sweeney*, 13 Ind. 245; *Lucas v. San Francisco*, 7 Cal. 463; *Lovell v. St. Paul*, 10 Minn. 290. Contracts with municipal corporations are construed with reference to the chartered or corporate powers of the city. 13 Ind. 245, *supra*.

If the *municipal corporation agrees with the contractor to collect the assessments from the abutting owners*, a failure to do so was held to render it liable. *Morgan v. Dubuque*, 28 Iowa, 575. See, however, *Beard v. Brooklyn*, 31 Barb. (N. Y.) 142; *Saxton v. St. Joseph*, 60 Mo. 153; *Saxton v. Beach*, 50 Mo. 488. A creditor of a municipality is not obliged to wait, before he sues, until the money can be collected from the land-owners benefited, and on whom the charter imposes the expense of the improvement whence his claim accrued. *Little v. Union Township Committee*, 40 N. J. L. 397.

§ 826 (481). **Consent of Property-Owners.** — A city charter required the *consent of a majority of property-owners* to make certain improvements, which, when made, were chargeable upon the *adjacent property*. An ordinance provided that contractors doing such work should look to the adjacent property, and not to the city, for their pay. Under these circumstances the city entered into a contract with the plaintiff to grade a certain street, the plaintiff agreeing that he should receive his pay from the adjoining property. The plaintiff performed the work; and, inasmuch as the adjacent owners had never given their consent to the making of the improvement, he sued the city on the *contract*, to recover for the work done; and it was held that the action could not be maintained.¹

¹ *Leavenworth v. Rankin*, 2 Kan. 357; *Swift v. Williamsburg*, 24 Barb. (N. Y.) 427; *Goodrich v. Detroit*, 12 Mich. 279; *Johnson v. Indianapolis*, 16 Ind. 227; *New Albany v. Sweeney*, 13 Ind. 245; *Moylan v. New Orleans*, 32 La. An. 673; *infra*, § 827.

A city advertised for proposals to do certain public work, and the plaintiff made proposals, which were accepted, without qualification, by an entry on city records; and it was decided that the statement in the published notice, "the expense of the work to be assessed," &c., was part of the contract, no other provision for payment having been made, and that the plaintiff could not maintain an action against the city until after the assessment and collection of his compensation, or until it or its officers failed to proceed with reasonable diligence, after the expense of the work was ascertained, to make and collect an assessment, and to pay over money thus collected. *Hunt v. Utica*, 18 N. Y. 442.

Extent of recovery by contractor against abutter where the work is done in a manner inferior to that stipulated for in the contract. *Creamer v. Bates*, 49 Mo. 523.

Further as to the *rights and remedies of the contractor*, of the property-owner, and the liabilities of the municipal corporation. *Foote v. Milwaukee*, 18 Wis. 270; *Bond v. Newark*, 19 N. J. Eq. 376; *Palmer v. Strumpf*, 27 Ind. 329; *McSpedon v. New York*, 7 Bosw. (N. Y.) 601; *Flournoy v. Jeffersonville*, 17 Ind. 169; *Sleeper v. Bullen*, 6 Kan. 300; *post*, chapter on Taxation and Local Improvements; *supra*, § 794; *infra*, § 1465; *Mayer v. Mayor, &c.*

of New York, 63 N. Y. 455; (recovery back of assessment paid in error); *Tone v. Mayor, &c. of New York*, 70 N. Y. 157. Assignment of contract. *McCubbin v. Atchison*, 12 Kan. 166 (liability of city to assignee of contract without objection by city); *McGlue v. Philadelphia*, 10 Phil. (Pa.) 348; *Perkinson v. St. Louis*, 4 Mo. App. 322 (where charter provides for specific appropriation contractor cannot recover from the city for work ordered by city engineer which he might have known was in excess of the appropriation). Where a contractor receives assessment bills in payment, with the right to use the name of the city in filing liens against the abutting owners, such owners may defend by questioning the character of the work though they are not nominal parties to the contract. *Erie City v. Butler*, 120 Pa. St. 374.

An ordinance of the city of Louisville ordained "that no contract should be binding on the city until it is approved by *both* boards of the general council, and this shall be necessary to make a contract complete and binding upon the city." A contract was made for a certain street improvement, which was signed by the mayor, but was *never approved by both boards*, but by one of them only. If the contract had been executed as required by the ordinance, the contractor would have been entitled to recover against the adjacent property-holders the agreed price. It was conceded that he could not recover against them, because the contract had not been thus executed. He thereupon sought to make the city liable for the work done; but the Court of Appeals, distinguishing the case

§ 827 (482). **Liability of City if Contract Price is payable from Assessment.** — When the *charter or statute* authorizing the improvement, or an *express stipulation in the contract*, provides that the *contractor shall be remunerated from the proceeds of an assessment* on the property benefited and shall look only to the assessment as the source for payment, or when the *city charter provides* no other means to pay the contractor than the proceeds of the assessment as it is collected, there is *no liability on the city to the contractor* other than to make and collect the assessment and pay it over, *unless the city fails in some duty* it owes to the contractor connected with the levy and collection of the assessment.¹ Upon the *receipt* of the assessment the

from *Kearney v. Covington*, 1 Met. (Ky.) 339, held that no contract binding on the city was ever made, and that he could not recover, there having been no ratification of the contract. *Murphy v. Louisville*, 9 Bush (Ky.), 189. *Quantum meruit* will not lie against a city for materials furnished for a public work under a contract which is void as not in conformity with statutes requiring such contracts to be made in a particular manner. *Bigler v. New York*, 5 Abb. (N. Y.) N. Cas. 51. When city not liable on contracts of police and school boards, see *Swift v. New York*, 17 Hun (N. Y.), 518 (not city, but police department liable on contracts for removing garbage); *Utica v. Miller*, 62 Ind. 230; *Jarvis v. Shelby*, 62 Ind. 257; *Crane v. Urbanna*, 2 Ill. App. 559.

As to *implied municipal liability*, see the important opinion of the United States Supreme Court in *Louisiana (City of) v. Wood*, 102 U. S. 294; compare *Litchfield v. Ballou*, 114 U. S. 190. *Supra*, §§ 794, 795, and notes. Index, *Assumpsit*; *Contracts*; *Municipal Bonds*.

Where the selection of a paving contractor by a majority of the lot-owners was a *condition precedent* to his right to do the work, his selection must be shown before he can recover either from the city or from the owners. *Reilly v. Philadelphia*, 60 Pa. St. 467.

¹ *Memphis v. Brown* (an important case), 20 Wall. (U. S.) 289; *Memphis v. Brown*, 97 U. S. 300; *Jacks v. Phillips County*, 25 Ark. 64; *Chicago v. People*, 48 Ill. 416; *Dolese v. McDougall*, 78 Ill. App. 629; *New Albany v. Sweeney*, 13 Ind. 245; *Johnson v. Indianapolis*, 16 Ind. 227; *Ruppert v. Baltimore*, 23 Ind. 184;

Montgomery County Board v. Fullen, 111 Ind. 410; *Quill v. Indianapolis*, 124 Ind. 292; *Robinson v. Valparaiso*, 136 Ind. 616; *Dowell v. Talbot Pav. Co.*, 138 Ind. 675; *Porter v. Tipton*, 141 Ind. 347; *Huntington v. Force*, 152 Ind. 368; *Leavenworth v. Rankin*, 2 Kan. 357; *Leavenworth v. Mills*, 6 Kan. 288; *Casey v. Leavenworth*, 17 Kan. 189; *Kearney v. Covington*, 1 Metc. (Ky.) 339; *Louisville v. Henderson*, 5 Bush (Ky.), 515; *Catlettsburg v. Self*, 115 Ky. 669; *Terrell v. Paducah*, 122 Ky. 331; 92 S. W. Rep. 310; *Moylan v. New Orleans*, 32 La. An. 673; *Hendrick v. West Springfield*, 107 Mass. 541; *Goodrich v. Detroit*, 12 Mich. 279; *Lansing v. Van Gorder*, 24 Mich. 456; *Second Nat. Bank v. Lansing*, 25 Mich. 207; *Paret v. Bayonne*, 40 N. J. L. 333; *Baker v. Utica*, 19 N. Y. 326; *Swift v. Williamsburgh*, 24 Barb. (N. Y.) 427; *Beard v. Brooklyn*, 31 Barb. (N. Y.) 142; *McCullough v. Mayor &c. of Brooklyn*, 23 Wend. (N. Y.) 458; *Lake v. Williamsburgh*, 4 Denio (N. Y.), 520; *Creighton v. Toledo*, 18 Ohio St. 447; *Arment v. Yamhill County*, 28 Ore. 474; *Northwestern Lumber Co. v. Aberdeen*, 20 Wash. 102; *Tacoma, &c. Pav. Co. v. Sternberg*, 26 Wash. 84; *Whalen v. La Crosse*, 16 Wis. 270, 271; *Smith v. Milwaukee*, 18 Wis. 63; *Finney v. Oshkosh*, 18 Wis. 220; *Fletcher v. Oshkosh*, 18 Wis. 223; *State v. Hobe*, 106 Wis. 411.

Power to contract for a public improvement gives the city by implication power to stipulate in the contract that the contractor shall look only to the proceeds of an assessment for his compensation. *Park Ridge v. Robinson*, 198 Ill. 571. When the *charter pro-*

city becomes liable to the contractor as for money received to his use.¹ But where the contract price is payable from assessments, the courts, having regard to *the duty of the municipality* to cause the assessment to be made and collected in a proper manner and without unreasonable delay after the work is done, have laid down the princi-

vides no other means of payment than a special assessment for the cost of the improvement, a person contracting with the city is chargeable with notice of its provisions, and is deemed to contract with reference to the only source of payment provided by law. *Baker v. Utica*, 19 N. Y. 326. A statute which provides that the city shall not be liable for an improvement without the right to enforce it against the property receiving the benefit thereof was held *not to apply to cases in which the city has no power to make the improvement at the cost of the owners of adjacent property.* When the city has authority to contract for the work, but no authority to charge it on abutting property, the city is liable to the contractor for the price of the work. *Caldwell v. Rupert*, 73 Ky. 179; *Louisville v. Nevin*, 73 Ky. 549; *Craycraft v. Selva*, 73 Ky. 696; *Louisville v. Leatherman*, 99 Ky. 213; *Gosnell v. Louisville*, 104 Ky. 201; *Louisville v. Bitzer*, 115 Ky. 359. See also *Terrell v. Paducah*, 122 Ky. 331; 92 S. W. Rep. 310; *Covington v. Noland* (Ky.), 89 S. W. Rep. 216. A city which has the power to construct an improvement either at the expense of the property benefited or at the expense of the general treasury, may make a contract therefor payable from an assessment with a stipulation that if the fund so provided is not available or sufficient at a specified date, payment will be made from the city treasury. *Garden City v. Trigg*, 57 Kan. 632.

¹ *Argenti v. San Francisco*, 16 Cal. 255, 282; *Pine Tree Lumber Co. v. Fargo*, 12 N. Dak. 360; *Wheeler v. Chicago*, 24 Ill. 105; *Sangamon Co. v. Springfield*, 63 Ill. 66.

The city is liable as for money received to the use of the contractor although the assessment is paid not in cash but in outstanding municipal warrants. *Argenti v. San Francisco*, 16 Cal. 255, 256. Where the city causes a lot to be sold for an unpaid assessment and bids it in at the tax sale in the absence of any other bidder, the city does not thereby become liable for the amount of the tax assessed, but

holds the tax certificate as trustee for the benefit of the contractor. *Finnney v. Oshkosh*, 18 Wis. 220; *Hoyt v. Fass*, 64 Wis. 273; *State v. Hobe*, 106 Wis. 411. Under the system in force in Wisconsin, special assessment liens and the moneys collected thereunder do not at any time become the property of the public represented by the municipality, but are private property owned by the holders of assessment certificates, and moneys received thereunder, are held in trust by the officers receiving them for the use and benefit of the certificate holders. *State v. Hobe*, 106 Wis. 411.

A statute authorizing the delegation to the contractor for an improvement of authority to collect the assessment is not unconstitutional as a delegation of a municipal function in violation of a constitutional provision prohibiting the legislature from delegating to any special commission or individual power to perform any municipal function whatever. *Banaz v. Smith*, 133 Cal. 102; *Davies v. Los Angeles*, 86 Cal. 37. When the assessment has been completed, the rights of the parties thereunder are fixed and the transaction is past and closed, and it is not within the power of the legislature to affect them by a statute subsequently enacted. *Merriam v. People*, 160 Ill. 555. But when the tax has not been determined, the contractor's vested right therein is not affected or impaired by a statute enacted subsequently to the contract, changing the method of apportioning the tax among the lots subject thereto. *Palmer v. Danville*, 166 Ill. 42. A statute authorizing a contractor to foreclose his lien only affects the remedy and does not impair any vested right. *Dowell v. Talbot Pav. Co.*, 138 Ind. 675. Where the property owners voluntarily pay to the city interest on their assessments which has been improperly imposed and confirmed, the city is liable to the contractor for the interest so received and cannot escape payment because of the alleged error in making the assessment. *Chicago v. McGovern*, 226 Ill. 403.

ple that the municipality is answerable in damages to the contractor *for a breach of its duty* in this respect, and in many cases have held that the failure of the municipality to discharge its duty by making the necessary assessment, or by its unreasonable delay in collecting and paying over the money, constitutes a breach of the contract or a liability *ex delicto*, giving to the contractor a right to recover his compensation or damages against the municipality generally.¹

¹ Barber Asphalt Pav. Co. v. Denver, 72 Fed. Rep. 336; Maher v. Chicago, 38 Ill. 266; Chicago v. People, 56 Ill. 327; Morgan v. Dubuque, 28 Iowa, 575; Bucroft v. Council Bluffs, 63 Iowa, 646; Scofield v. Council Bluffs, 68 Iowa, 695; Polk County Sav. Bank v. State, 69 Iowa, 24; Ft. Dodge Electric Light & Power Co. v. Ft. Dodge, 115 Iowa, 568; Leavenworth v. Stille, 13 Kan. 539; Atchison v. Byrnes, 22 Kan. 65; Louisville v. Nevin, 10 Bush (Ky.), 549; Louisville v. Leatherman, 99 Ky. 213; Louisville v. McNaughton, 19 Ky. Law Rep. 1695; 44 S. W. Rep. 380; Louisville v. McNaughton, 114 Ky. 333; Cole v. Shreveport, 41 La. Ann. 839; Fisher v. St. Louis, 44 Mo. 482; Steffen v. St. Louis, 135 Mo. 44; Oster v. Jefferson, 57 Mo. App. 485; Knapp v. Hoboken, 38 N. J. L. 371; Beard v. Brooklyn, 31 Barb. (N. Y.) 142; McCann v. Albany, 11 N. Y. App. Div. 378; Reilly v. Albany, 112 N. Y. 30; Cummings v. Mayor, &c. of Brooklyn, 11 Paige Ch. (N. Y.) 596; Frush v. East Portland, 6 Oreg. 281; Nor. Pac. Lumbering & Mfg. Co. v. East Portland, 14 Oreg. 3; Portland Lumbering & Mfg. Co. v. East Portland, 18 Oreg. 21; Commercial Nat. Bank v. Portland, 24 Oreg. 188; Little v. Portland, 26 Oreg. 235; Eilert v. Oshkosh, 14 Wis. 637.

Liability of the city for neglect or unreasonable delay to make an assessment presupposes that a valid contract has been entered into by the city. If the contract is invalid for failure to comply with the provisions of the charter, no duty to make the assessment arises and the contractor cannot recover on that ground. Saxton v. St. Joseph, 60 Mo. 153; Citizens Bank v. Spencer, 126 Iowa, 101. When the assessment has been vacated because of the failure of the contractor to perform his contract, there is no duty on the city to order a reassessment, and it cannot be held liable for its failure to do so. Crawford v. Mason, 123 Iowa,

301. Interest held not to be recoverable where payment of the contractor has been delayed by the neglect of the city to collect an assessment without unreasonable delay. *Vider v. Chicago*, 164 Ill. 354, aff'g 60 Ill. App. 595. See also *Chicago v. People*, 56 Ill. 327; *Hoblit v. Bloomington*, 87 Ill. App. 479.

The rule in *Oregon* is laid down thus in *Jones v. Portland*, 35 Oreg. 512: "Whatever confusion there may be in the authorities elsewhere, the holding of this court is that, where the expense of improving a street in a city is to be paid from a special fund to be raised by an assessment on the abutting property, a failure of the municipality to comply with any of the requirements of the charter essential to supply such fund (*Nor. Pac. Lumbering Co. v. East Portland*, 14 Oreg. 3; *Little v. Portland*, 26 Oreg. 235); or any unreasonable delay in enforcing such provisions or collecting and paying over the money (*Commercial Nat. Bank v. Portland*, 24 Oreg. 188), gives the contractor a right of action *ex delicto* against the corporation for damages in which he is entitled to recover the amount due under the contract, with interest, notwithstanding a provision in the contract that he shall look for payment only to the special fund and that he will not require the municipality by any legal process, or otherwise, to pay for the same out of any other fund (*Commercial Nat. Bank v. Portland*, 24 Oreg. 188)."

In *Bill v. Denver*, 29 Fed. Rep. 344, the ordinance directing the making of a sewer recited that it was in accordance with a petition of a majority of the property owners. The cost was to be paid by a special assessment. Held that the city by implication guaranteed to the contractor that the petition was sufficient, and that it was liable to him for the amount of the contract price on the failure of the assessment because it had not been signed by a majority of the property

in some cases have denied or qualified this doctrine so far as to hold that there is no general liability upon the city, so long, at least, as it remains within the power of the city to collect the assessment, or that a general liability does not attach if the city is proceeding with faith without unreasonable delay to make a new assessment;¹ but it has not had a reasonable opportunity to correct defects in the original assessment by reassessing the property benefited;² and the right to a general recovery against the city has been denied to the contractor in some instances so long as any method remained of making and collecting an assessment on the property benefited.³ In these cases the contractor has a remedy in *mandamus* to compel the city to assess,⁴ but this is not in all cases his exclusive remedy. Similar reasons some courts hold that if the substantial grievance to the contractor is *simply neglect* on the part of the municipality to proceed, or *delay* in completing the assessment, the appropriate remedy of the contractor is by *mandamus* to compel the municipality and its officers to perform their duty, and not by an action to recover damages for the breach of the contract.⁵ When the claim of the contractor to relief is not founded upon the impossibility of the city making an assessment, but upon the *express refusal* of the city to perform its duty in that respect, the appropriate remedy of the contractor has been held to be by *mandamus* to compel the city to act, not by an action to recover damages, or the contract price by way of damages, for a breach of the contract.⁶ But this view is not *unanimously accepted*, and other cases hold that a *simple refusal* of the city to levy an assessment subjects the city to a general liability to the contractor which may be enforced by an action for damages.⁷

¹ See also *Bucroft v. Council*, aff'g 74 Ill. App. 511; *Citizens Bank v. Spencer*, 126 Iowa, 101.

² *German American Savings Bank v. Spokane*, 17 Wash. 315 (overruling *McEwan v. Spokane*, 16 Wash. 212); *Stephens v. Spokane*, 14 Wash. 298.

³ *Farrell v. Chicago*, 198 Ill. 558; *Pontiac v. Talbot Pav. Co.*, 94 Fed. Rep. 65; s. c. 96 Fed. Rep. 679.

⁴ *Tipton v. Jones*, 77 Ind. 307; *Wren v. Indianapolis*, 96 Ind. 206; *People v. Mayor, &c. of Syracuse*, 144 N. Y. 63; *Weston v. Syracuse*, 158 N. Y. 274.

⁵ *Alton v. Foster*, 207 Ill. 150, rev'g 106 Ill. App. 475; *Greencastle v. Allen*, 43 Ind. 347; *Fletcher v. Oshkosh*, 18 Wis. 228. See also *Reock v. Newark*, 33 N. J. L. 129, referred to in chapter on Taxation, *post*.

⁶ *Weston v. Syracuse*, 158 N. Y. 274; *Heller v. Garden City*, 58 Kan. 587, 173 Ill. 587, 12 Wash. 465.

⁷ *Heller v. Garden City*, 58 Kan. 587, 173 Ill. 587, 12 Wash. 465.

It is also to be observed that in some recent cases, where the right of the contractor to recover has been sustained, the courts have laid particular emphasis upon the fact that it was no longer within the power of the city to make the assessment available to the contractor, and that has usually been assigned as one of the principal reasons for sustaining the liability, but without indicating any opinion on other and cognate questions. In other words, a disposition has been evinced on the part of some courts to limit the right of the contractor to enforce a general liability on the part of a city to those cases in which the contractor is absolutely without other remedy, although he has performed his contract with the municipality.¹

The author's opinion of the correct general principles to be deduced from the conflicting authorities, in cases where by charter or express contract the contractor has agreed that he shall be paid out of the proceeds of an assessment on the property benefited, may be summarized as follows:

(1) So long as it is within the power of the city to make an assessment to pay the contractor, the contractor may by *mandamus* compel the assessment, whether the failure to make the assessment arises from neglect or refusal of the city to proceed, or the invalidity of an assessment which has been made, if the same may be rectified by a new assessment; but *mandamus* may not be the only remedy of the contractor against the city if it has plainly violated its duty towards

263; *Atchison v. Brynes*, 22 Kan. 65. cause of illegality, *Scotfield v. Council*
In *Weston v. Syracuse*, 158 N. Y. Bluffs, 68 Iowa, 695; *Iowa Pipe &*
274, it is said that the case of *People* *Tile Co. v. Callanan*, 125 Iowa, 358;
v. Mayor, &c. of Syracuse, 144 N. Y. *Yunker v. Des Moines* (Iowa), 101
63, lays down the rule that prior to N. W. Rep. 1129; where the assess-
the breach of the contract by the ment was fatally and incurably de-
municipality the contractor's remedy fective, *Allen v. Janesville*, 35 Wis.
is to apply for a *mandamus* to hasten 403; where the assessment was void
municipal action in the absence of because made without the necessary
due diligence, while the case of *Reilly* petition of the property owners;
v. Albany, 112 N. Y. 30, requires that *Kearney v. Covington*, 1 Metc. (Ky.)
the contractor shall proceed against 339; *Louisville v. Hyatt*, 2 B. Mon.
the city by action for damages for the (Ky.) 177; where the city has dis-
breach of the contract where the city abled itself by its own act from
either designedly or accidentally puts making a valid assessment, *Weston*
itself in a position where it will not *v. Syracuse*, 158 N. Y. 274; *Chicago*
or cannot perform the contract on its *v. People*, 56 Ill. 327; where property
part. liable to the assessment has been re-
: The following are some of the leased from liability by the city's
instances where a general liability to neglect, *Ft. Dodge Electric Light &*
the contractor was enforced after his *Power Co. v. Ft. Dodge*, 115 Iowa,
remedy against an assessment had 568; and when by neglect to levy or
been irretrievably lost. Where the complete the assessment the right to
assessment was void for lack of power do so is barred, e. g. by the failure of
to make it, *Addyston Pipe & Steel Co.* the city solicitor to file liens within the
v. Corry, 197 Pa. 41; *Polk County* statutory period. *O'Hara v. Scranton*,
Savings Bank v. State, 69 Iowa, 24; 205 Pa. 142.
where the assessment was invalid be-

he contractor by unreasonably and persistently neglecting or refusing to make and collect the assessment or to make a new assessment if it has the power to do so, the power and duty in these respects being in and resting upon the city.

(2) The officers of the city charged with the duty of making the assessment being primarily if not exclusively agents of the city for that purpose and not of the contractor, where the assessment has not been made or having been made proves to be invalid without any fault on the part of the contractor, and where *through the act or neglect of these officers* subsequently to the making of the contract the city is without power to make an assessment for the purpose of paying the contractor, a general liability attaches to the city to answer to the contractor for the resulting damages, the loss to the contractor herefrom being usually measured by the stipulated price.

(3) Where the assessment fails because of *absolute want of statutory power* of the municipality to make it under any circumstances the right to recover against the city for a failure to make the assessment does not exist, in the absence of estoppel or other special and controlling equities. But what is *statutory power* in this sense and what are mere qualifications or conditions of the exercise of the power, who or what tribunal may determine whether such qualifications or conditions have been performed or exist, the effect by way of estoppel or otherwise of such determination when acted on by others, what is jurisdictional and what is not, the diverse views on these points between certain State courts and the Supreme Court of the United States, are subjects which are only adverted to by way of caution in this connection, since they have elsewhere been fully discussed, to which the reader is referred in considering the proposition in the text.¹

(4) Cases not embraced in the foregoing propositions must be determined upon the legislation, the contract, and their special circumstances.²

¹ See chapters on Municipal Bonds; Taxation and Local Assessments. Index, Abutter; Contractor; Estoppel; Mandamus; Streets; Ultra Vires.

² The distinctions pointed out by the author do not appear to have received in many cases adequate consideration by the courts. In *German Savings Bank v. Spokane*, 17 Wash. 115, the court lays down the general principle that where a contract is payable only from a special assessment and there is no power in the municipality to pay it out of the general fund, holders

of assessment warrants drawn upon the special fund must obtain their remedy by *mandamus* to compel the city officers to proceed with the levy and collection of the assessments. It also held that in case the remedy by *mandamus* proved inadequate, a court of equity had power to make it enforce the assessment. In that case, the power to levy the assessment still existed, and the general conclusion upon the facts of the case reached by the court was that there could be no recovery of the city at all while the

There are, as we think, just and sound reasons in many cases for not limiting the contractor to his remedy by *mandamus* to compel the levy and collection of the special assessment from the abutters, and for giving the contractor, where the city is plainly in the wrong, a remedy *in personam* for damages against the city which made the contract and which either refuses, or persistently and purposely neglects, to make or to collect the assessment. Local improvements, such as grading or paving streets, making sewers, and the like, are public improvements for the benefit of the city or public at large and are not the private improvements of the abutter. The mode of payment by a local assessment on the abutter for benefits is an exercise of the State's power of taxation, and the proceeding as to him is *in invitum*. The city alone has the *power* to make the assessment and to collect it, and the *duty* to exercise this power and to make and collect the assessment is a duty resting upon the city, in the per-

assessment plan could be enforced in any way. In arriving at this result the court made an elaborate examination of the authorities, and it reached the following conclusions, which if not on all points entirely satisfactory, are suggestive and worthy of consideration: "From our investigation of the cases and textbooks, we are of the opinion that the decided weight of authority is against allowing a recovery of the city upon such matters at all in the absence of an express lawful contract to that effect or in cases where the money has been collected on the assessment and is in the city treasury." In other words, the opinion of the court, resulting from its examination of the cases, was that, as the contractor was chargeable with notice of the powers of the municipality, the loss must fall upon him and not upon the general taxpayers. On this point the court said: "After all that can be said and done, however, as a matter of right and law, where one of two parties must suffer, the loss should fall upon the one who has had the best opportunity to protect himself and is the most at fault. [But is not the city the party most in fault?] It is apparent that if, by delay upon the part of the council to provide a special fund, the claim can become a general charge against the city, it would be directly to the interest of the warrant holder to have the proceedings delayed in order that he might obtain the greater security and avoid the possibility of loss through a failure of the property, or any of it, to bring the amount assessed against it, and such instances are not unheard of. It must also be borne in mind that he was a voluntary contractor and was not put in the helpless condition of the general taxpayer outside of the (assessment) district. While perhaps such general taxpayer might have compelled the city officers to act after the work was done, and the danger of loss to him imminent, the contractor or warrant holder had this same right, and the courts have all the time been open to him. By force of the contract such officers should be held to be more directly his agents or representatives than the agents of the general taxpayers for the purposes of the assessment, if they were such taxpayers' agents at all in the premises. [But *quare*?] By the contract the contractor has in effect adopted the machinery provided for raising his money through the acts of such officers." But he has not agreed to bear the consequences of their refusal to do their duty. On the contrary the contract assumes and presupposes that they will discharge their duty. In subsequent cases this court carried out its reasoning of this opinion to its logical result, and held that even where the remedy to enforce the assessments is no longer available, the city is not liable generally to the contractor for the contract price. *Wilson v. Aberdeen*, 19 Wash. 89; *Rhode Island Mortgage & Trust Co. v. Spokane*, 19 Wash. 616.

formance of which the contractor has a direct and immediate interest. It is an erroneous view that the city authorities in this matter are the agents of the contractors. They are agents, if agents at all, appointed by the law, and their failure to do their duty cannot be imputed to the contractor as a fault on his part. The city is, we repeat, under a *duty to the contractor* — the contractor is under no duty in this respect to the city, but has a *right* to have the city's duty faithfully performed. Time and time again has experience shown that when the contractor has completed his work the city finds it to be a disagreeable duty to enforce the assessments, and it either refuses or unreasonably neglects to do so. The abutters resist payment, and often succeed in defeating the assessment for want of power or of regularity on the part of the city. What right has the city to fold its hands and say to the contractor: "We are not liable in damages for neglect of duty; your only remedy is yourself to apply for a *mandamus* on the city to do its duty in making or collecting the assessment"? What right has the city to cast this expense and burden on the contractor? The city needs no *mandamus* if it wants to discharge its duty. The writ will not lie unless the city is in fault. It is a universal principle of law and justice that the neglect of a plain duty of this kind is actionable in damages in favor of one who has an interest in the performance of such duty. The practical effect of applying this doctrine to cases like those under consideration is salutary. As long as no assessment is being enforced, the abutter and the general tax-payer, and too often the city council, are satisfied. But if the city is held to be liable in damages for a refusal to act or for negligence in the discharge of its duty, then it becomes a question between the general tax-payer and the abutter, and the general tax-payer will be interested to see that the burden shall fall on the abutter where the scheme of the improvement and the law have placed it. Too often the city's sense of justice can be reached only by a stimulus, such as an action for damages communicated through the nerve that leads directly to the city's treasury or the tax-payers' pocket. Moreover, if the city has to respond, it can reimburse itself by collecting the assessment, if the right to do so has not been lost by its own fault or neglect.

In determining questions between the contractor who has performed his contract and has not been paid and the city which alone has the power to make and collect the assessment and is under a statutory and contract *duty* to exercise the power and enforce the assessment, the courts ought to apply the principles so often declared that corporations equally with individuals should be held to a care-

ful adherence to truth and good faith in their dealings with others, and cannot, by their representations or silence *or neglect of duty*, involve others in onerous engagements, and thus defeat the calculations and claims their own conduct has superinduced.¹

If, however, the *contract or the statute* in addition to requiring the contractor to obtain payment from the proceeds of an assessment expressly stipulates or provides that the *contractor takes all the risk* of the regularity of the proceedings and of the invalidity of the assessment and of the inability of the city to collect the same from any cause, or if the charter contains a general provision that in no event when work is ordered to be done at the expense of the property benefited is the city to be held responsible for or on account thereof or for any proceedings for the collection of the assessment to pay the same, the contractor can have no recourse to a general liability on the part of the city in respect of the risks thus assumed, for he takes upon himself all such risks incident to the validity of the assessment and its collection.² But such stipulations or provisions might not, and unless so expressly stipulated, ought not, to include exemption from liability on the part of the city for negligent failure to discharge its duty to take the proper steps to levy and collect the assessments.³

The fact that the city had power to *contract to pay from its general funds* does not enlarge the rights of the contractor. If the improvement is one which might properly be made at the expense of the property benefited, the decision of the city that it should be so paid is final, and controls the court in determining the rights and liabilities of the parties.⁴ But even under such circumstances the *city still owes some duty to the contractor*, for a breach of which it must answer in damages. It is still the duty of the city to place the contractor in a position to proceed with the work and perform the

¹ *Zabriskie v. Cleveland, C. & C. Railroad Co.*, 23 How. (U. S.) 381; *Bissell v. Jeffersonville*, 24 How. (U. S.) 287; *Montpelier National Life Ins. Co. v. Huron Board of Education*, 62 Fed. Rep. 778; *Hughes County v. Livingston*, 104 Fed. Rep. 306; *Hackett v. Ottawa*, 99 U. S. 86.

² *Pontiac v. Talbot Pav. Co.* 94 Fed. Rep. 65; s. c. 96 Fed. Rep. 679; *Park Ridge v. Robinson*, 198 Ill. 571; *Farrell v. Chicago*, 198 Ill. 558; *Bellevue v. Hohn*, 82 Ky. 1; *Louisville v. American Standard Asph. Co.*, 125 Ky. 496; 102 S. W. Rep. 806; *Keating v. Kansas City*, 84 Mo. 415; *Saxton v. St. Joseph*, 60 Mo. 153; *Wheeler v. Poplar Bluff*, 149 Mo. 36; *Thomas v. Olympia*,

12 Wash. 465; *Fletcher v. Oshkosh*, 18 Wis. 228; *Zwietusch v. Milwaukee*, 55 Wis. 369; *Hall v. Chippewa Falls*, 47 Wis. 267; *Heller v. Milwaukee*, 96 Wis. 134; *State v. La Crosse*, 101 Wis. 208; *Roter v. Superior*, 115 Wis. 243. See also *Craycraft v. Salvage*, 10 Bush (Ky.), 696.

³ If, under such stipulations, assessments are collected and received by the officers of the municipality, the contractor or the holder of assessment certificates may compel the officials to pay over the moneys so received by *mandamus*. *State v. Hobe*, 106 Wis. 411.

⁴ *Pontiac v. Talbot Pav. Co.* 96 Fed. Rep. 679; s. c. 94 Fed. Rep. 65.

conditions of his contract, and if there is a breach of this duty by the failure or neglect of the city, *e. g.*, by omission to acquire the necessary right of way, or by failure to compensate abutting owners for consequential damages, the city must respond in damages for the breach notwithstanding stipulations that the contractor shall be paid from the assessment and shall assume all the risks incident thereto, and shall have no recourse against the city.¹

§ 828 (483). **Corporate Control by Stipulation.** — An agreement by a contractor to execute a public improvement, *under the general direction and supervision* of a committee of a city, makes such committee — acting reasonably and honestly, not arbitrarily and capriciously — exclusively the judge, not only as to materials and manner, but also as to the time of doing the work.² But where a written contract has been entered into between a municipal corporation and a contractor, a general provision of an ordinance that the work shall be done under the directions of certain officers confers no authority upon them essentially to change or modify the provisions of the contract.³ If, in a contract for a public work, the *corpora-*

¹ *Ash v. Independence*, 79 Mo. App. 70. If a contractor has performed labor and expended money in an improvement and is prevented from completing the work by the act of the municipality so that assessments cannot be made by which he can be remunerated according to the terms of his contract, he can recover from the city for the work done and the money expended as for a breach of the contract. *Dunkirk v. Wallace*, 19 Ind. App. 298.

² *Chapman v. Lowell*, 4 Cush. (Mass.) 378, relating to drains in the streets of the city. Certain wells were, by contract, to be constructed under the supervision and to the satisfaction of a specific city officer; they were so constructed and approved, and it was held that the city was concluded by the action of the officer. *Omaha v. Hammond*, 94 U. S. 98, *supra*, § 823. As to power of chancery to correct mistakes of the engineer or other person whose decision both parties to the contract have agreed to abide by, see *Mansfield & S. R. Co. v. Veeder*, 17 Ohio, 385. Where there is a condition precedent that contractor shall have certificate of performance by corporation, see *Bowery National Bank v. Mayor, &c. of New York*, 63 N. Y. 336; *Cameron, In re*, 50 N. Y. 502. Condi-

tion precedent that payment was not to be made to contractor until confirmation of the assessment, and whose duty to have confirmation made, construed. *Tone v. Mayor, &c.*, 70 N. Y. 157. The contract between the contractor and the city provided that the contractor should be entitled to payment when the work was accepted by the board of public works, and it was held that the contractor, who had, in fact, completed his work, might recover of the abutter, although a majority of the board refused or neglected to examine or accept the work. *Neenan v. Donoghue*, 50 Mo. 493. It is held that the acceptance by the city authorities of work done under a contract for a street improvement is only *prima facie* evidence that the work has been done in substantial compliance with the terms of the contract. *Gulick v. Connely*, 42 Ind. 134; but see *Omaha v. Hammond*, 94 U. S. 98, *supra*.

³ *Bonesteel v. Mayor, &c. of New York*, 22 N. Y. 162; *Bond v. Newark*, 19 N. J. Eq. 376; compare *Omaha v. Hammond*, 94 U. S. 98. But the authority of the corporation may be implied from its having by its own act rendered extra materials necessary to conform the work to the conditions of the contract. *Messenger v. Buffalo*, 21 N. Y. 196. See also *Stuart v. Cam-*

*tion employer reserves the right to make alterations in the form, dimensions, or materials of the work, the contractor is bound by any such alterations made in good faith; but such a clause does not authorize the employer to annul the agreement, or to stop the work in an unfinished state.*¹

§ 829. Stipulations by Contractor to maintain Pavements in Repair.

— A common, if not the general, method of improving and maintaining streets imposes upon abutting proprietors the cost of paving, whilst the cost of ordinary repairs is imposed upon the city at large. Contractors for street paving, in their endeavor to induce municipal governments to adopt their pavements, make representations as to its character and durability, and it is proper that some remedy should be reserved to the municipality by which it can enforce their contracts and representations in this regard. Hence, it has been a common custom to require from a contractor for paving a street a *guarantee that he will maintain it in repair* for a term of years. When such a stipulation is exacted, does it throw the cost of the repairs upon the abutting proprietors, who are to be assessed for the cost of the paving, contrary to the general scheme of the city's government; or is it a mere provision for the protection of the city against imperfect work? In pavements, particularly in asphalt, the durability depends very largely upon the character of the work, the condition of the foundation, and the mixture of the material used; and it is not difficult for contractors to deceive the inspectors in regard thereto. A guarantee on the part of the company as to the durability of the pavement affords a simple and complete remedy which fully protects the public, and when the time for which the guarantee continues is no longer than the ordinary durability of the pavement when laid with the best workmanship and material, it does not impose any unreasonable burden on the contractor. One view declares that such guarantee does not contravene the provisions of a municipal charter requiring repairs to be made

bridge, 125 Mass. 102. Effect of certificate of approval of a city officer where, by the contract, the work is to be done to his approval. *Bond v. Newark*, 19 N. J. Eq. 376; *supra*, § 823.

As to reserved right to *discontinue work* and annul contract. *Bietry v. New Orleans*, 24 La. An. 21.

¹ *Clark v. Mayor, &c. of New York*, 4 N. Y. 338. Remedy of contractor, and measure of damages in such a case, considered. *Ib.* It is held, in *Vermont*, that a person who has contracted with

the proper town officers to build a road cannot proceed with his contract after notice of an appeal, and recover of a town therefor. This decision is based upon a construction of the statute of that State by which the appeal is intended to stay or suspend all proceedings toward building the road, and the contractor was bound to take his contract subject to the contingency of the appeal allowed by law. *Taft v. Pittsford*, 28 Vt. 286.

in the expense of the city at large. If the *repairs are limited to the making good imperfect work, or the defective material used*, no additional burden is imposed upon the abutting property owners, by reason of a requirement of a guarantee for a term of years.¹ But some courts appear to *adopt a contrary view*, and hold that such a guarantee of necessity tends to increase the cost of the improvement and to impose upon an abutting proprietor the expense of repairs contrary to the charter provisions, and that a contract containing such a stipulation is invalid.²

¹ *Cole v. People*, 161 Ill. 16; *Latham v. Wilmette*, 168 Ill. 153; *Shank v. Smith*, 157 Ind. 401; *Osburn v. Lyons*, 104 Iowa, 160; *Allen v. Davenport*, 107 Iowa, 90; *Diver v. Keokuk Sav. Bank*, 126 Iowa, 691; *Kansas City v. Hanson*, 60 Kan. 833; *Barber Asphalt Pav. Co. v. Watt*, 51 La. An. 1345; *Barber Asphalt Pav. Co. v. Gaar*, 73 S. W. Rep. 1106; 115 Ky. 334; *Barber Asphalt Pav. Co. v. Munn*, 185 Mo. 552; *Morse v. West Port*, 110 Mo. 502; *Barber Asphalt Pav. Co. v. Ullman*, 137 Mo. 543; *Seaboard Nat. Bank v. Woesten*, 147 Mo. 467; *Barber Asphalt Pav. Co. v. Hezel*, 155 Mo. 391, rev'g 76 Mo. App. 135; *Barber Asphalt Pav. Co. v. French*, 158 Mo. 534; *Allen v. Labsap*, 188 Mo. 692; *Gilsonite Const. Co. v. Arkansas McAlester Coal Co.*, 205 Mo. 49; *Sedalia v. Smith*, 206 Mo. 346; *St. Louis Quarry & Con. Co. v. Frost*, 90 Mo. App. 677, 688; *Robertson v. Omaha*, 55 Neb. 718; *Wilson v. Trenton*, 60 N. J. L. 394, aff'd 61 N. J. L. 599; *People v. Featherstonhaugh*, 172 N. Y. 112; *McGlynn v. Toledo*, 22 Ohio Cir. Ct. 34; *Allen v. Portland*, 35 Oreg. 420 (distinguishing *Portland v. Bituminous Pav. Co.*, 33 Oreg. 307); *Williamsport v. Hughes*, 21 Pa. Sup. Ct. 443; *Philadelphia v. Pemberton*, 208 Pa. 214; *Erie City v. Grant*, 24 Pa. Sup. Ct. 109. See also *Gilmore v. Utica*, 131 N. Y. 26.

If, however, the terms of the contract show that the stipulation to maintain the pavement for a term of years includes decay from natural causes, it is inconsistent with a statutory or charter provision imposing the cost of maintenance and repair upon the city at large, and the contract is void. *Bradshaw v. Jamestown*, 125 N. Y. App. Div. 86; 109 N. Y. Supp. 618, distinguishing *People v. Featherstonhaugh*, 172 N. Y. 112, cited *supra*. Where under the laws in force at the

time of letting of the contract both the cost of construction and the cost of repairing the pavements are chargeable against the abutting owners, the provision requiring a contractor to keep it in repair for a stipulated period is no objection to its validity. *Gibson v. Owens*, 115 Mo. 258. Contract or guarantee of paving work held to require contractor to make only such repairs as he should be required to make pursuant to written notice served upon him in the manner provided in the contract. *O'Keeffe v. New York*, 173 N. Y. 474. See also *Southern Pav. Co. v. Chattanooga* (Tenn. Ch. App.), 48 S. W. Rep. 92. Construction of contract guaranteeing paving for the purpose of determining contractor's liability; *Warrenscharf Asphalt Pav. Co. v. St. Paul*, 69 Minn. 453. In *Massachusetts*, a town may lawfully receive from individuals an obligation to relieve it from the expense of keeping a piece of public way in repair for all time. *Brookfield v. Reed*, 152 Mass. 568. Contract to repave a street and keep it in repair for a fixed term of years made between municipality and pavement contractor held to relieve railroad company from obligation to repair streets and from liability for defects therein during the term of the contract. *Binninger v. New York*, 177 N. Y. 199. A stipulation in a contract that the contractor shall guarantee to keep the paving in repair for a period of one year, during which time a certain percentage of the contract price shall be retained, does not tend to prevent competitive bidding. *Dillingham v. Spartanburg*, 75 S. Car. 458, 459.

² *Montgomery v. Barnett*, 149 Ala. 119; 43 So. Rep. 92; *Brown v. Jenks*, 98 Cal. 10; *Alameda Macadamizing Co. v. Pringle*, 130 Cal. 226; *Excelsior Pav. Co. v. Leach* (Cal.), 34 Pac. Rep. 116; *Fehler v. Gosnell*, 99 Ky. 380;

It is to be observed of *these conflicting decisions that the difference in result* appears to arise rather from a difference of opinion as to the effect of the guarantee than from any disagreement as to the legal principle. The decisions which hold that such a guarantee is a proper provision for the protection of the municipality and does not impose the expense of repairs upon the abutting proprietors seem to recognize three features of the guarantee before the courts as controlling, *viz.*: that the contractor was not required to guarantee his work against any other defects than those for which he might properly be held responsible; that responsibility for defects arising from causes for which he was not responsible, as from acts of the city or its licensees in opening the street, was not imposed upon the contractor; and that the guarantee did not extend beyond such term of years as the pavement might naturally be expected to continue in good order. In some of the cases which have adopted the contrary view, the courts have relied upon the fact that the guarantee in question was in effect an agreement to keep the whole street in repair for a term of years, irrespective of the causes which might necessitate the repairs, or at least that it obligated the contractor to repair defects in the streets for which he was not responsible.¹

Portland v. Bituminous Pav. Co., 33 Oreg. 307; McAllister v. Tacoma, 9 Wash. 272; Boyd v. Milwaukee, 92 Wis. 456. See also Gosnell v. Louisville, 104 Ky. 201; Louisville v. Selva, 106 Ky. 730; Louisville v. Mehler, 108 Ky. 436; Lindsay v. Brawner (Ky.), 97 S. W. Rep. 1. The earlier New York case of People v. Maher, 56 Hun (N. Y.), 81, is either overruled or limited to the special and peculiar provisions under which it arose by the later case of People v. Featherstonhaugh, 172 N. Y. 112, cited *supra*. If the property owner has stood by and seen the work done under a contract containing a maintenance clause, he is estopped to object to the legality of the clause. Bacas v. Adler, 112 La. 806. In Blochman v. Spreckels, 135 Cal. 662, the *same principle* was extended to a provision in a contract for street work that "All loss or damage arising from the nature of the work to be done under these specifications shall be sustained by the contractor." This stipulation was held to look to damage which might arise out of the completed work and subsequently thereto, for which the city would be liable. It was held that the provision was void, and that the law does not authorize the city to attempt to escape its liability by shifting it to the shoulders of the contractor, and that in attempting to do so it imposed conditions naturally tending to increase the cost of the work. To the same effect, Mulberry v. O'Dea, 4 Cal. App. 385; Anderson v. Fuller, 51 Fla. 380. *Contra*: Diver v. Keokuk Sav. Bank, 126 Iowa, 691, 698. Although a stipulation that the contractor shall keep the pavement of a street in repair may be invalid as against a property owner subject to assessment, it is a valid stipulation when no question arises of payment from an assessment. Barber Asphalt Pav. Co. v. Louisville, 123 Ky. 687; 97 S. W. Rep. 31.

¹ Brown v. Jenks, 98 Cal. 10; Fehler v. Gosnell, 99 Ky. 380; Barber Asphalt Pav. Co. v. Ullman, 137 Mo. 543; Schenectady v. Union College, 66 Hun (N. Y.), 179; Boyd v. Milwaukee, 92 Wis. 456. In Portland v. Bituminous Pav. Co., 33 Oreg. 307, 314, the court construed the guarantee required of the contractor as binding him to keep the pavement in repair for a period of five years, although the defects might be due generally to traffic and disintegration and decay as well as to defects in materials and workmanship. It held that the provi-

§ 830 (485). **Bonds of Contractors — Statutory and Common Law.** — A *statutory requirement* that the city shall take a bond from the contractor for its protection is to be *regarded as mandatory* and must as a usual thing be complied with.¹ But when the statute merely requires that a bond shall be given and makes no provision as to the amount of the bond or its form or conditions, the regulation of such matters is left to the discretion of the officers representing the municipality.² The bond is incidental to the contract, and the obligations undertaken by *the surety* have reference thereto; and if the contract is void as *ultra vires* or unlawful, no liability arises on the bond for a breach.³

sion was *ultra vires* and rendered the contract invalid because the condition imposed an additional burden upon the abutting proprietors. In *Allen v. Portland*, 35 Oreg. 420, this case was distinguished on the ground that the undertaking of the contractor therein was simply to keep and maintain the street pavement in repair for a designated period of time regardless of the quality of the material stipulated to be furnished or supplied or the workmanship to be employed, and it held that a guarantee of the paving for a period of five years and an agreement that during that period all defects in the pavement due to its proper uses as a roadway should be repaired and made good by the contractor was plainly intended to be merely a guarantee of the quality of the workmanship and material and was not intended to place upon the contractor the burden of repairing irrespective of the causes of the decay.

¹ *Barker v. Southern Construction Co.*, 20 Ky. Law. Rep. 796; 47 S. W. Rep. 608; *Selpho v. Brooklyn*, 5 N. Y. App. Div. 529, aff'd 158 N. Y. 673.

² *Selpho v. Brooklyn*, 5 App. Div. 529, aff'd 158 N. Y. 673. See also *Baker v. Bryan*, 64 Iowa, 561.

³ *Kansas City v. O'Connor*, 82 Mo. App. 655; *Portland v. Bituminous Pav. & Imp. Co.*, 33 Oreg. 307. But see *Kiesig v. Allspaugh*, 91 Cal. 231, 234; *Kiesig v. Allspaugh*, 99 Cal. 452; *Blyth v. Robinson*, 104 Cal. 239; *McMenomy v. White*, 115 Cal. 339; *Summerton v. Hanson*, 117 Cal. 252; where a recovery on bonds given for the performance of a contract made with an individual was sustained although the contract was void for failure to record it as required by

statute. Ratification by a city of an irregular contract extends to the contract as an entirety and *validates a collateral bond* given by the contractor to the city for the protection of laborers and materialmen. *Devers v. Howard*, 88 Mo. App. 353. In *Bell v. Kirkland*, 102 Minn. 213, it was held that a *recital* in the contractor's bond that the contract is legal and valid *estops* the surety from attacking the validity of the contract. This decision was made in a case where the contract was within the scope of the corporate powers of the city, and the defence of *ultra vires* and consequent illegality was founded upon the omission of the city to comply with the requirements of the statute or charter as to the method of making the contract.

But in *Kansas* it has been held that if the contract is tainted with illegality, *e. g.*, if it is let under conditions which do not give an opportunity for competition as required by statute, the invalidity of the contract releases the surety from liability to a subcontractor or materialman who had *actual as distinguished from constructive notice of the illegality* before furnishing materials or performing labor. *National Surety Co. v. Kansas City, &c. Brick Co.*, 73 Kan. 196; *Atkin v. Wyandotte Coal & L. Co.*, 73 Kan. 768; *Kansas City, &c. Brick Co. v. National Surety Co.*, 157 Fed. Rep. 620. But see to the contrary, *Kansas City, &c. Brick Co. v. National Surety Co.*, 149 Fed. Rep. 507. But to defeat a recovery against the surety *anything short of actual notice* to the plaintiff of the illegality of the contract and of the fraudulent steps by which it was procured is not sufficient. *Nat'l Surety Co. v. Wyandotte C. & L. Co.*, 76

The *liability* on a contractor's bond to a municipality is governed by the same principles as are applied *in cases between individuals*. Upon a breach of the contract, the city can recover the damages sustained thereby against the contractor and his surety;¹ and the *surety may be released* by some positive act of the city to his prejudice in the same manner as in ordinary contracts of suretyship.² Under bonds given by contractors the most intricate and difficult questions have arisen where *third persons* who have furnished *labor and materials* in connection with the improvement have sought to *enforce the liability of the surety*. A bond conditioned *merely* for the performance of the work contracted for is intended to *indemnify the city*, and *not for the benefit of third parties*, and cannot be sued

Kan. 914; 92 Pac. Rep. 1111. See also *American Bonding Co. v. Dickey*, 74 Kan. 791.

A contract with a surety and a bond (which identifies the contract and makes it part of the bond) executed to the city to secure the performance of the contract are to be construed as one instrument. *Searles v. Flora*, 225 Ill. 167.

¹ *Winona v. Jackson*, 92 Minn. 453. A city took a bond from a contractor for an improvement which was payable by assessment. The contractor refused to do any work, and thereupon the city let the contract at an advanced price. The property owners were assessed for the increase. Held that the bond was intended for the protection of the city and not for the benefit of the property owners subject to assessment, and that the city could not recover thereon. *St. Louis v. Wright Cont. Co.*, 202 Mo. 451. Where the bond given by a contractor contains no provision for damages for delay, they cannot be recovered against the surety, although the contract provided that the work should be done within a specified time and that on failure to complete within the time the contractor should pay a certain sum as liquidated damages for each day whilst the work remained unfinished. *Winona v. Jackson*, 92 Minn. 453. As to nature and extent of liability of surety, see *New Haven v. Eastern Pav. Brick Co.*, 78 Conn. 689.

² *Newark v. N. J. Asphalt Co.*, 68 N. J. L. 458. When the contract provides that before the final payment shall be made by the city or be deemed to be due, the contractor shall present receipts in full for all labor and materials, and the city pays the contractors

in full without requiring the production of such receipts, the *surety is released* from the bond. *Electric Appliance Co. v. U. S. Fidelity & Guaranty Co.* 110 Wis. 434. The fact that the *work has been accepted by the city* does not prevent an action against the surety for defects arising subsequently to acceptance. *Newark v. N. J. Asphalt Co.*, 68 N. J. L. 458. Release by material changes in contract, see *United States v. Freel*, 186 U. S. 309; *Chester v. Leonard*, 68 Conn. 495, 508.

But *immaterial changes* and *departures* from the contract, or *changes* which are *not in matters of substance*, do not amount to a change in the identity of the contract, and do not release the surety. For example, payments to the contractor on account of work made at times other than those stipulated for in the contract, are an immaterial departure and do not affect the surety's liability. Similarly, payments on account made by the city in good faith on architect's certificates as provided in the contract do not release the surety, although it should ultimately prove that these payments were substantially in excess of the amount to which the contractor was entitled under the contract. *New Haven v. National Steam Economizer Co.*, 79 Conn. 482. *Changes in the plans and specifications* do not release the surety when the contract provides that they may be made without avoiding the contract. *Philadelphia v. Stewart*, 201 Pa. 526; *Chester v. Leonard*, 68 Conn. 495, 507. *Changes in the contract* will not release the surety from his liability under a statutory bond to materialmen, *et. United States v. National Surety Co.*, 92 Fed. Rep. 549.

on by persons who furnish labor and material,¹ even though the contract contain stipulations to the effect that the contractor will pay for labor and material, or will, before payment, produce receipts for labor and material furnished in connection with the work.²

It is, however, within the *power of the legislature* to enact that at the time of the letting of a contract the city shall require the contractor to give a bond with sufficient sureties, conditioned not only for the proper performance of the work, *but also that the contractor will pay all persons* such sums as may be due them for *labor and materials* furnished and supplied in and about the performance of the work.³ To *entitle a materialman to recover upon a bond given*

¹ *Sterling v. Wolf*, 163 Ill. 467, aff'g 61 Ill. App. 515; *Searles v. Flora*, 225 Ill. 167; *Noyes v. Granger*, 51 Iowa, 227; *Weller v. Goble*, 66 Iowa, 113; *Hunt v. King*, 97 Iowa, 88; *Green Bay Lumber Co. v. Odebolt School Dist.*, 121 Iowa, 663; *Buffalo Cement Co. v. McNaughton*, 90 Hun (N. Y.), 74, aff'd 156 N. Y. 702; *Parker v. Jeffery*, 26 Oreg. 186; *Puget Sound Brick & Tile Co. v. King County School Dist.*, 12 Wash. 118; *Electric Appliance Co. v. U. S. Fidelity & Guar. Co.*, 110 Wis. 434.

A bond which stipulates that the contractor shall be responsible for all unlawful damages to personal property from negligence and carelessness in doing the work or in not using proper precaution to prevent injury to persons and property from the work, and which indemnifies the city against all losses or claims on account of such negligence or carelessness, is *merely an indemnity in favor of the city and creates no liability in favor of third persons*. Hence, a person injured cannot maintain an action on the bond to recover damages for personal injuries sustained through the negligence of the contractor. *Kansas City v. O'Connell*, 99 Mo. 357. The taking of a bond from a railroad company to protect a city against any failure to comply with an ordinance authorizing a tunnel in a street, and to indemnify persons injured by the company's tort, does not impose on the city any liability which would not have otherwise existed. *Terry v. Richmond*, 94 Va. 537.

² *Lancaster v. Frescoln*, 192 Pa. 452. Although a contract provides that the improvement shall be completed and ready for acceptance free and clear of all claims by liens for labor performed or materials furnished, a *materialman*

cannot sue a surety on the bond given for the faithful performance of the contract, the engagement of the surety being with the city and for its indemnity and protection and not with third persons. *Electric Appliance Co. v. U. S. Fidelity & Guar. Co.*, 110 Wis. 434. See also *Spalding Lumber Co. v. Brown*, 171 Ill. 487. But in *Lyman v. Lincoln*, 38 Neb. 794, the contract contained a provision that the contractors should produce receipts of claims from all persons furnishing materials and labor before payment and acceptance of the work. The bond was merely conditioned that contractors should execute the stipulations made by them, or, in default thereof, the surety should pay the city all damages which might result from such default. The court held that the city intended the bond to protect from defaults of its contractors all those who might labor on or furnish materials for those buildings, and that they could maintain an action thereon. See, *contra*, *Parker v. Jeffery*, 26 Oreg. 186.

³ *Wilson v. Webber*, 92 Hun (N. Y.), 466, aff'd 157 N. Y. 693; *St. Paul v. Butler*, 30 Minn. 459.

The subject of *contractor's bonds* to secure the performance of contracts with a city and the payment of laborers and materialmen is *germane* to the subject of municipal legislation, and may be included in a *freeholders' charter* framed by a city for its own government; and when so included the charter supersedes provisions of the general statutes on that subject. *Grant v. Berrisford*, 94 Minn. 45. Index, *Freeholders' Charters*. Where a contract with the city for an improvement expressly stipulated that bond

by a contractor there must not only be an intent to secure some benefit to him, but a promise must be made for his benefit which is legally enforceable.¹

In the exercise of its general power to contract and without express statutory authority, a city may require a contractor to give a bond conditioned for the payment of such persons as shall supply materials or furnish labor. The exaction of this bond is within the ordinary administrative duties of the officers of the city, although there may be no statute expressly requiring it. By entering into the contract the city clothes the contractor with a certain degree of credit, and it is to its interest that those furnishing labor and material to the city should know that they are justified in relying upon the credit of the contractor. A reasonable certainty that materials and labor will be paid removes the temptation to furnish inferior work and materials which always exists when dealing with persons of uncertain credit. The bond therefore operates to protect the city and is for its interests. There is also a moral obligation which the city may recognize (although it is not bound to do so), that the city should so far as possible protect laborers and mechanics and see that they are not sufferers by the construction of the work. Laborers, mechanics, and materialmen are not permitted, in the absence of an express statutory provision, to file liens upon public property, and a bond conditioned for their payment is their only protection. Hence, the weight of authority is to the effect that a bond conditioned for their payment may be exacted without express statutory authority and that the person for whose benefit the bond is made, i. e., the materialman, mechanic, or subcontractor, may maintain an action upon it to recover any sums due them.¹

should be given by the contractor for the faithful performance thereof, and should be conditioned for the payment by the contractor of all claims for material and labor, the acceptance of such a bond without the latter condition is a waiver of the statutory requirement. *Electric Appliance Co. v. U. S. Fidelity & Guar. Co.*, 110 Wis. 434.

¹ *Electric Appliance Co. v. U. S. Fidelity & Guar. Co.*, 110 Wis. 434; *Hipwell v. National Surety Co.*, 130 Iowa, 656; See also *Parker v. Jeffery*, 26 Oreg. 186.

² *Union Sheet Metal Works v. Dodge*, 129 Cal. 390; *People's Lumber Co. v. Gillard*, 136 Cal. 55; *Williams v. Markland*, 15 Ind. App. 669; *Young v. Young*, 21 Ind. App. 509; *Am. Surety Co. v. Lauber*, 22 Ind. App. 326; *King v. Downey*, 24 Ind. App. 262; *Hins v. Consolidated Coal & Lime Co.*, 29 Ind. App. 563; *Baker v. Bryan*, 64 Iowa, 561; *Hipwell v. National Surety Co.*, 130 Iowa, 656; *Knapp v. Swaney*, 56 Mich. 345; *St. Louis v. Von Phul*, 133 Mo. 561 (overruling *Kansas City Sewer Pipe Co. v. Thompson*, 120 Mo. 218); *Devers v. Howard*, 144 Mo. 671; *Kansas City School Dist. v. Livers*, 147 Mo. 580; *Sample v. Hale*, 34 Neb. 230; *Lyman v. Lincoln*, 38 Neb. 794; *Dall v. Crume*, 41 Neb. 655; *Kaufmann v. Cooper*, 46 Neb. 644; *Hickman v. Layne*, 47 Neb. 177; *Fitzgerald v. McClay*, 47 Neb. 816; *Morton v. Harvey*, 57 Neb. 304; *Gastonia v. McEntee*, *Peterson Eng. Co.*, 131 N. Car. 363; *Philadelphia v. Stewart*, 195 Pa. 309;

The awarding of a contract by which the contractor agrees to pay for all labor and material is *sufficient consideration* to support the promise of such a bond both by the contractor and by his sureties.¹ If such bond is required *by statute*, but the bond actually given is not in the prescribed form, it may be enforced as a good and *valid common-law bond* made for the benefit of those with whom the contractor deals.²

198 Pa. 422; 201 Pa. 526; Bowditch v. Gourley, 24 Pa. Sup. Ct. 342; State v. Liebes, 19 Wash. 589 (overruling Sears v. Williams, 9 Wash. 428). *Contra*: Green v. Kelly, 45 Minn. 352; Park v. Sykes, 67 Minn. 153; Lyth v. Hingston, 14 N. Y. App. Div. 11.

In Philadelphia v. Stewart, 195 Pa. 309, the court said with reference to the right and power to exact a bond for the benefit of laborers and materialmen: "There is nothing *ultra vires* or contrary to public policy in this condition. It is the right as well as the interest of the city to secure good work upon its contracts for public improvements, and there is no better policy towards that end than to satisfy honest and competent workmen that they can rely on being paid. There being no right of mechanic's lien against public works, the work and materialmen are to that extent in the contractor's power as to pay, and that fact has a natural tendency to produce skimmed work and inferior materials by the class of men willing to run that risk. Against this risk the city is entitled to protect itself by exacting assurance from the contractor that he will pay his honest debts incurred in doing the city's work." In St. Louis v. Von Phul, 133 Mo. 561, the city charter required a bond to be taken from the contractors but did not specify the conditions of the bond, except that it should be for the faithful performance of the contract. The court said: "The question, then, is this: Is the requirement of the contract and the condition of the bond, that laborers and materialmen shall be paid, a proper and reasonable incident to the express power to improve the streets by contract and to require a bond of the contractor? We think it is, even aside from any moral obligation the city was under to protect the laborers and materialmen. Such a requirement gives credit to the contractor and enables him to secure labor and purchase material more

readily and on better terms than could be done without the credit. Thus the contractor can secure better labor and cheaper materials and is enabled to take the contract on lower terms than he could otherwise safely do. It also enables one with small means and limited credit to compete with those more advantageously circumstanced. The city is thus enabled to secure greater competition in bidding and to obtain better execution of the work on lower terms. It was not only to the interest of the city, but its plain business duty to secure those advantages." In Buffalo Cement Co. v. McNaughton, 90 Hun (N. Y.), 74, aff'd 156 N. Y. 702, a city, without statutory authority, took a bond containing a condition that if the contractor should fail to pay laborers and materialmen, they might sue upon the instrument in their own names in the same manner as if they had been named parties in the bond. The court held that there could be no recovery upon the bond by a materialman in the absence of proof that he knew of the condition of the bond before he furnished material and that he furnished the material to the contractor relying upon the bond.

¹ Williams v. Markland, 15 Ind. App. 669; Young v. Young, 21 Ind. App. 509; Lyman v. Lincoln, 38 Neb. 794; Doll v. Crume, 41 Neb. 655; Kaufmann v. Cooper, 46 Neb. 644; Gastonia v. McEntee Peterson Eng. Co., 131 N. Car. 363.

² Stephenson v. Monmouth Min. & Mfg. Co., 84 Fed. Rep. 114 (bond to city instead of to people of State); Union Sheet Metal Works v. Dodge, 129 Cal. 390; People's Lumber Co. v. Gillard, 136 Cal. 55; American Surety Co. v. Thorn, 9 Kan. App. 8; Detroit Board of Education v. Grant, 107 Mich. 151.

In Brown & Haywood Co. v. Ligon, 92 Fed. Rep. 851, the contractor gave to his sureties under a contract with a county an underwriting bond for their

A bond which is conditioned *not only for the protection of the municipality*, but also for the payment to *all persons who furnish labor or materials*, is *dual* in its nature, *i. e.*, it contains two promises, one to the city that the contractor should perform the work in the time and manner agreed, and one to the laborers and materialmen to pay them for the labor and material they should furnish or perform for the contractor. In other words, there are two contracts with one consideration to support both. The fact that the municipality without the consent or knowledge of the sureties and in violation of the contract has overpaid the contractors during the progress of the work does *not release the sureties* from their obligation to the *subcontractors, laborers, and materialmen*, whatever the effect may be upon the obligation of the sureties to the city. The work having been done and materials furnished before the overpayment was made, the right of action of the laborers or materialmen then ac-

protection, which was conditioned that the contractor should pay for all materials furnished for the improvement. Materialmen recovered judgments against the sureties on the bond to the county, but were unable to collect by reason of their insolvency. Their assignee thereupon sued upon the underwriting bond, and it was held that it was not a mere agreement to indemnify the sureties on the bond to the county; that there was a breach of the condition of the bond, and that the assignee was entitled to recover. In the absence of a prescribed statutory form and of a declaration that bonds not in accordance therewith shall be void, if a bond be taken from a contractor under a statute with a condition in part prescribed by statute and in part not so prescribed, and if it be clearly divisible, a recovery may be had upon it under the part prescribed by statute. *The superadded part may be rejected as surplusage.* *Detroit Board of Education v. Grant*, 107 Mich. 151. A recital that a bond is taken as a common law, and not as a statutory bond, does not vitiate it when it contains all the conditions required by statute for the protection of laborers and materialmen. *Baun v. Whatcom County*, 19 Wash. 626. The fact that the bond runs to the city instead of to the State as required by statute will not prevent a recovery. *Huggins v. Sutherland*, 39 Wash. 552. In *Costello v. Doherty*, 55 Minn. 77, it was held that under the charter the order in which the bond and contract were executed is

not material. If a bid is accepted and approved, the bond may be executed before the contract, or the contract before the bond. In *Red Wing Sewer Pipe Co. v. Donnelly*, 102 Minn. 192, it is held that the surety is estopped by a recital that the contract has been executed from showing the contrary to be the fact. In *Lancaster v. Frescoln*, 192 Pa. 452, a general ordinance of the city provided that contractors should be required to give additional bonds to the city for the use of any persons who might be aggrieved by the failure to pay for work done or materials furnished. The special ordinance authorizing the construction of the improvement and awarding the contract required the contractor to enter security for the faithful performance of the contract. The conditions of the bond were that the contractor should complete the work in a satisfactory manner, and that he should pay all wages of laborers and the price of materials. The court held that as the bond was given under the special ordinance awarding the contract and its conditions corresponded with the stipulations of the contract, it was given to the city primarily for its benefit, that the city was the only party entitled to sue, and that no recovery could be had except in its right. A judgment against the city in a suit by the contractor in which the city raises no question as to laborers and materialmen bars an action by the latter in the name of the city to their own use. *Lancaster v. Frescoln*, 203 Pa. 640.

crued, and is not affected by the subsequent action of the municipality without their consent, tacit or express.¹ The *dual character of the obligation* and the fact that the municipality and the laborers and materialmen are, under the bond, as independent of each other as if separate bonds had been given, relieves the city of all duty to laborers and materialmen. It must make payment to the contractor according to the terms of the contract, and cannot retain moneys due him for his default in paying for labor and material, even when requested to do so by the surety.² It has been held that the duty imposed by statute on the city officers to take a bond is, so far as it concerns those who *may furnish labor and material*, a duty imposed upon them as *agents of the State* for the public in general, and not for the *corporate benefit*; that the duty is imposed on the *officers* and not on the *corporation* as such; and the corporation in the cases cited was held not liable to laborers and materialmen if its officers failed to exact the necessary bond from the contractor.³

In the absence of an express stipulation or statutory provision the *application of moneys earned by the contractor* to purposes other than the payment of labor and material going into the improvement violates no right of the surety, and does not affect the right to enforce his undertaking.⁴ Under a bond given pursuant to a *statutory* re-

¹ *United States v. National Surety Co.*, 92 Fed. Rep. 549; *Kansas City School Dist. v. Livers*, 147 Mo. 580; *Doll v. Crume*, 41 Neb. 655; *Kaufmann v. Cooper*, 46 Neb. 644; *American Surety Co. v. Waseca County*, 77 Minn. 92; *Bethany v. Howard*, 149 Mo. 504. See also *Henricus v. Englert*, 137 N. Y. 488.

² *American Surety Co. v. Waseca County*, 77 Minn. 92 (holding that the surety cannot recover of the municipality money paid over to the contractor after his default in the payment of labor, &c., even when the payment was made contrary to the protest of the surety); *Philadelphia v. McLinden*, 205 Pa. 172.

³ *Freeman v. Chanute*, 63 Kan. 573; *Ihk v. Duluth*, 58 Minn. 182. This view may perhaps deserve further consideration before its final acceptance—the line of distinction between *State* and *corporate* duties and benefits is often so fine as to be indistinguishable except by the judicial vision.

In *Owen v. Hill*, 67 Mich. 43, 51, a bond was taken for the faithful performance of the contract, but none for

the protection of materialmen and laborers though required by statute. A materialman was surety on the bond taken, and it was held that his relations to the contract were such as to charge him with notice that the statutory bond was not taken, and that he furnished material upon the credit of the contractor, and could not recover against the officers of the municipality for negligence in not requiring the bond. Although a surety becomes liable on the bond to a materialman or subcontractor upon the failure of the contractor to pay, the liability of a city under a statute making it liable for the failure of its officers to exact a bond is only one of indemnity and depends upon the insolvency of the contractor and his inability to pay in the absence of a provision expressly declaring that the city shall thereby incur all the liability of a surety. *Wilcox Lumber Co. v. School Dist.*, 103 Minn. 43; 114 N. W. Rep. 262.

⁴ The fact that plaintiff received from the contractor money paid him on account of the work and applied it to another and antecedent debt, does

quirement, the right of *the subcontractor, laborer, or materialman* to relief under the bond is controlled by the terms of the original contract with the city. All such persons are presumed to have notice of the existence of the contract, of its terms, and of the rights and obligations of the parties thereto; and to have taken subcontracts, contributed labor, and furnished materials in strict subordination to such terms, relative rights, and obligations.¹ *The terms of the contract thus become material* in determining whether the subcontractor, materialman, or laborer is entitled to the benefit of the bond. For example, when the bond is taken for the benefit of those who perform work or furnish material at the request of the contractor or any subcontractor, it may become important to determine whether the person with whom the contractor has dealings is a materialman or a subcontractor, because if the former, his laborers are not within the condition of the bond, whilst they are entitled to its benefit if he is a subcontractor.² *A subcontractor is an undercontractor*, — one who takes under the original contract, and is to perform in accordance therewith, presumably with knowledge of the terms and conditions of the original contract.³ A statutory bond conditioned for the payment by the contractor or any subcontractor of indebtedness to any person on account of any labor performed or materials furnished is *to protect materialmen and laborers* at the hands of the contractor and subcontractor, and is not intended for the benefit of the *subcontractor*.⁴ A statutory requirement that persons seeking to enforce

not prevent a recovery against the surety. People v. Powers, 108 Mich. 339. The failure of a laborer to file a claim with the city and to preserve and enforce his statutory preference against the funds in the city's hands *does not discharge the surety* from liability to him. Whitehouse v. American Surety Co., 117 Iowa, 328; Read v. American Surety Co., 117 Iowa, 10. A judgment against the contractor for materials furnished is final and binding on the surety. Philadelphia v. Pierson, 217 Pa. 193.

¹ Avery v. Ionia Supervisors, 71 Mich. 538. See also Shaver v. Murdock, 36 Cal. 293. The act of a subcontractor in taking the notes of the contractor for the debt owing him will not necessarily relieve the surety. U. S. Fidelity & Guar. Co. v. Golden Pressed Brick Co., 191 U. S. 416.

² See Combs v. Jackson, 69 Minn. 336. If the bond is conditioned for the payment to "any and all persons" of "all sums of money which may be

due for labor and material supplied or performed in and about said work," it may be enforced according to its terms, and a person interested in the completion of the contract who has completed on the failure and abandonment of the contractor and subcontractor is entitled to judgment against the surety. Philadelphia v. Nichols Co., 214 Pa. 265. In Combs v. Jackson, 69 Minn. 336, quarrymasters who got out and delivered to the contractor crushed rock for use in a street improvement, were *held to be subcontractors*, and their laborers were held to be entitled to recover under such a bond.

³ Avery v. Ionia Supervisors, 71 Mich. 538.

⁴ Avery v. Ionia Supervisors, 71 Mich. 538; Kansas City v. McDonald, 80 Mo. App. 444. A person agreeing to deliver to the contractor on the ground all the stone for a public building cut and fitted and ready for the stone-setter as per plans and specifications for the contract is a

liability on a bond for material and labor must *give notice of their claims within a prescribed period* places a limitation of time upon the right to enforce the liability of the sureties.¹ The rendition of services to a *subcontractor of the assignee* instead of the original contractor does *not relieve the surety* from his liability.²

§ 831 (486). **Claims of Subcontractors, Laborers, and Materialmen; Statutory Liens.** — In the *absence of statutory provision* imposing a duty upon a municipality to protect the claims of subcontractors, materialmen, and laborers, a city usually owes them no duty. *Stipulations of the contract* requiring the contractor to pay for all labor and material are, as a general rule, deemed to have been made by the city for its own protection, and not for the benefit of third parties, and do not confer any cause of action against the city in favor of subcontractors, materialmen, or laborers.³ But under some cir-

subcontractor and not a materialman. Avery v. Supervisors, 71 Mich. 538. One who sells and delivers for a lump sum, curbstone, &c., for a street simply sells marketable material and is *not a subcontractor*. People v. Powers, 108 Mich. 339. Person furnishing brick for a public improvement as required for use is a *materialman and not a subcontractor*. Staffon v. Lyon, 104 Mich. 249. Coal consumed in generating steam power essential to the erection of a retaining wall is material furnished "in or about the execution of" a contract within the meaning of a bond for the benefit of the materialmen. Zipp v. Fidelity & Deposit Co., 73 N. Y. App. Div. 20. See also City Trust & Surety Co. v. United States, 147 Fed. Rep. 155. But see to the contrary Philadelphia v. Malone, 214 Pa. 90. But *tools and implements* used in erecting a wall and remaining after its erection are *not materials* "used in the execution of" the contract and do not entitle the party furnishing them to recover on the bond. Beals v. Fidelity & Deposit Co., 76 N. Y. App. Div. 526, aff'd 178 N. Y. 581. It is sufficient for the vendor of materials to show that they were ordered and delivered for the purpose of being used in the performance of the contract. He need not show that they actually entered into the construction. Red Wing Sewer Pipe Co. v. Donnelly, 102 Minn. 192.

¹ French v. Powell, 135 Cal. 636; Huggins v. Sutherland, 39 Wash. 552. See also Kansas City v. McDonald, 73 Mo. App. 439. A statute requiring

notice to be given "within thirty days from the time such work is completed" permits the filing of claims *before* completion. French v. Powell, 135 Cal. 636. See also Merchants & Traders' Nat. Bank v. Mayor, &c. of New York, 97 N. Y. 355.

² French v. Powell, 135 Cal. 636.

³ Columbia Brick Co. v. Dist. of Columbia, 1 App. D. C. 351; Parker v. Jeffery, 26 Oreg. 186; Mansfield v. New York, 165 N. Y. 208, aff'd 15 N. Y. App. Div. 316; McKay v. New York, 46 N. Y. App. Div. 579; Lancaster v. Freecoln, 192 Pa. 452; Terry v. Richmond, 94 Va. 537; Electric Appliance Co. v. U. S. Fidelity & Guar. Co., 110 Wis. 434. In the absence of a *statute conferring a lien* upon the property of the city or the funds in its hands, a mechanic cannot recover a general judgment against the city for money due him by the contractor, there being no privity of contract between him and the city. Albany v. Lynch, 119 Ga. 491; Hicks v. Roanoke Brick Co., 94 Va. 741; Attica Bridge & Mach. Works v. Johnson, 29 Ind. App. 257. As to right of city to retain part of moneys earned until claim for materials furnished has been paid, see State v. Webster, 20 Mont. 219. A contract by a city contained a provision that the contractor should indemnify it against any claim for injuries arising from the contractor's negligence and that it might retain the whole or any part of money due the contractor until any suits or claims for damages should be settled and satisfactory evidence to

cumstances it has been held that a city may by the terms of its contract convert the money owing to the contractor *into a trust fund in its hands*, which is subject to the equitable claims of subcontractors, materialmen, and laborers, *e. g.*, by a provision in the contract that payment shall not be made until evidence shall be produced that all persons who have done work or furnished materials and who have given notice to the city that their claims are unpaid, have been fully paid or secured; and that if any person so having done work or furnished materials and given notice shall furnish satisfactory evidence that the price of material is owing to him by the contractor, the city shall retain the contract price or such portion thereof as may be necessary until such liability shall be discharged or secured.¹ It has

that effect furnished. Notice of a claim for damages was filed, and the city retained a part of the amount due to the contractor to protect itself against the claim. In an action brought by the contractor to recover the balance of the contract in which the claimant was permitted to intervene, it was held that the claimant was not entitled to judgment that the city pay his claim out of the fund retained by it; that the claimant was not entitled to be subrogated to the rights of the city to the fund; and that he had no cause of action against the city. *Mansfield v. New York*, 165 N. Y. 208, aff'g 15 N. Y. App. Div. 316.

¹ By statute it was provided that all contracts to be made or let for work to be done or supplies to be furnished by the city of New York should be made by the appropriate heads of departments under such regulations as then existed or should thereafter be established by ordinances of the common council. At the time of the passage of the statute there was an ordinance that in all such contracts the head of the department having charge thereof should cause to be inserted a provision that payment of the last instalment due thereunder should be retained until satisfactory evidence was produced that all persons having done work or furnished materials, and who had given written notice of claim had been fully paid or secured, and that if any such person should furnish satisfactory evidence that money was due to him by the contractor under the contract, the last instalment, or such portion thereof as might be necessary, should be retained until such liability was discharged or secured. An action

was begun by the contractor's assignee to recover the balance payable under the contract, and all the persons who had filed notices of claims were made defendants with the city under allegations that they claimed some interest in the balance. It was held that the ordinance was authorized by law; that its purpose was to secure to persons furnishing labor and materials to contractors some of the advantages which the lien laws of the State gave to mechanics and materialmen; that the ordinance and the clause inserted in the contract were intended for the benefit of laborers and materialmen; and that while the city assumed no express responsibility to pay the laborers and materialmen and could not be sued on such liability, it was placed under an *implied obligation to hold the money as trustee* according to the terms and effect of the contract, which could be enforced in an action to which all persons interested in the money were made parties. *Merrill's & Traders' Nat. Bank v. Mayor, &c. of New York*, 97 N. Y. 355. See also *Mechanics & Traders' Nat. Bank v. Winant*, 123 N. Y. 265. In *Hamilton v. Gambell*, 31 Oreg. 328, it was held that an ordinance requiring the auditor to withhold warrants until the expiration of five days after acceptance of the work by the council; that laborers, materialmen, and subcontractors might file notice of claim within said period and begin action and cause a writ of attachment to be issued within twenty days after acceptance; and that in that event a sufficient amount to pay the claim should be retained until the determination of the rights of the parties was not *ultra vires*.

been held that it is within the *power of the legislature* to impose an *absolute responsibility upon the city* for claims of laborers working on its public improvements without violating any constitutional right.¹ But the *usual method* in which the legislature has exercised

when the charter directed the council to provide by ordinance the time and manner of doing the work, subject to certain restrictions, one being that a bond should be exacted for the protection of laborers, materialmen, and subcontractors. The statutory requirement of a bond did not preclude the council from making additional provision for the protection of persons doing work or furnishing materials.

In *State v. Liebes*, 19 Wash. 589, it was held that where the *statutory power of the city to contract* for improvements contains no restriction as to the regulations which it may adopt in connection therewith, a city may stipulate in a contract that no payment shall be made until the work shall have been completed and all labor paid thereon, and that upon failure of the contractor to pay for labor, after notice, the city may apply any money due to the payment of such labor. Such stipulations constitute the city a trustee for the benefit of unpaid laborers, and they may maintain an action against the city and the contractor to compel the application upon their claims of such part of the money due the contractor as may be necessary to satisfy same. But in *Lesley v. Kite*, 192 Pa. 268, the city of Philadelphia had adopted an ordinance that the director of public works should give one month's notice of the date of final payment and satisfactory evidence should be furnished that full compensation had been made for all labor and materials furnished, previous to drawing the warrant for the final payment. The Supreme Court of Pennsylvania, although its attention was called to the *New York cases cited above*, held that this ordinance did not create and was not intended to create any contractual or other relation between the city and its contractors for municipal improvements or subcontractors under the latter that would authorize the maintenance of a suit in equity to impress a trust upon the fund in the hands of the city for the benefit of subcontractors; that, if it did, the ordinance would be clearly *ultra vires*, and also void as in conflict

with the principles of public policy recognized and established in that State; that the city was powerless to provide any remedy to be used as a substitute for attachment or any other remedy which the legislature had hitherto withheld on grounds of public policy or for any other cause.

A contract for laying water mains authorized the city to retain a sufficient sum to meet claims for damages which might arise from the negligence of the contractor. An action having been begun against the city, a bond was given as a substitute for the money so retained. Judgment was recovered against the city and the contractor in the action; both appealed; thereafter the city against the contractor's protest settled by paying less than the judgment. The contractor and his surety were given no opportunity to say whether they would indemnify the city on condition that it either prosecute the appeal or permit the surety to do so. After the settlement the city brought an action on the bond. Held that it was a question of fact whether or not the settlement was made in good faith, and if so made whether it operated to the injury of the principal and surety. If made in bad faith with intention of injuring the principal and surety, the city could not recover, unless it showed that its action did not operate to the disadvantage of either. *New York v. Baird*, 176 N. Y. 269, rev'g 74 App. Div. 238.

¹ By a *Massachusetts statute*, it was enacted that a person to whom a debt is due for his own labor performed in constructing any building or other public work owned by a city or town under a contract with any person other than such city or town should have a right of action against such city or town to recover such debt with costs, provided that he give written notice within thirty days and commence the action within sixty days after ceasing to perform such labor. In *Callahan v. Boston*, 175 Mass. 201, the court held that *this statute was constitutional*, *Holmes, C. J.*, saying: "The effect of that act is that if a city or town sees fit voluntarily to order the

its prerogative for the protection of subcontractors, laborers, and materialmen *has been to give to them a lien* upon the moneys due from the city to the principal contractor analogous in all respects to mechanics' liens upon real property owned by private individuals.¹ The statutory lien so conferred is usually given to all persons employed upon or furnishing materials towards the performing of any work or any public improvement.² The *lien is effectuated* by a notice which must comply with the statutory requirements,³ must *state the*

construction of public works owned by it, then *volens volens* it must assume a part of the responsibility of an employer to the workmen employed by the contractor with whom it deals. It is intended to be a milder application of the principle of the mechanics' lien laws. We see no constitutional obligation to the law. It is a familiar type of statute and has been upheld heretofore. *Hart v. Boston*, R. B. & L. R. Co., 121 Mass. 510. A compulsory relation of master and servant is not unknown even to the common law. *Benjamin v. Dockham*, 134 Mass. 418."

¹ Constitutionality of statute sustained. *West Chicago Park Com'rs v. Western Granite Co.*, 200 Ill. 527. A county is a municipal corporation within the meaning of a statute giving a lien for labor or materials used in the construction of a public improvement. *Herman v. Essex County*, 71 N. J. Eq. 541; 64 Atl. Rep. 742. A *statute giving a lien to subcontractors, materialmen, and laborers* for work and labor on public improvements affects only the remedies which they may pursue for the recovery of their debts, and it may be made applicable to contracts entered into prior to its enactment. *Smith v. Bell*, 70 Ill. App. 490.

² In *Iowa*, the statutory right conferred on subcontractors, mechanics, and materialmen has been held to be a mere preferred claim and not a lien. *Whitehouse v. American Surety Co.*, 117 Iowa, 328. Although the statute can have *no extraterritorial effect*, yet as it relates merely to the remedy, one who sells and delivers to the contractor in another State material to be used in the improvement may claim and assert the statutory lien. *Mack v. Degraff & Roberts Quarries Co.*, 57 Ohio St. 463. A corporation is a "person" within the meaning of a statute conferring the right to a lien. *Gaskell v. Beard*, 58 Hun (N. Y.), 101. A schoolhouse is a "public improve-

ment" within the meaning of such a statute. *Spalding Lumber Co. v. Brown*, 171 Ill. 487. A statute conferring a lien upon persons employed upon or furnishing materials for a public improvement does not limit the lien to persons in immediate privity with the original contractor, but *operates in favor of one who contracts with a subcontractor* to furnish labor or material. *Garrison v. Borio*, 61 N. J. Eq. 236; *Herman v. Essex County*, 71 N. J. Eq. 541; 64 Atl. Rep. 742. But see *James P. Hall Incorp. Co. v. Jersey City*, 64 N. J. Eq. 766. A *manufacturer of iron pipes* furnished to a contractor for the construction of city water works is within a statute giving a lien to a "mechanic, merchant, or trader" who is employed on or furnishes material for a city improvement. *Camden Iron Works v. Camden*, 60 N. J. Eq. 211; s. c. 64 N. J. Eq. 723. Express waiver by subcontractor of right to statutory lien, see *McCabe v. Rapid Transit Subway Const. Co.*, 127 Fed. Rep. 465. When a statute makes it obligatory on the city to retain a portion of the contract price for the security of laborers and materialmen, this duty cannot be evaded. So held in case where owner of all the abutting property, except one block owned by the city, was granted authority to grade a street at his own cost, the contract to be let by the city for his benefit. *Seattle v. Turner*, 29 Wash. 515.

³ Tenth Nat. Bank v. *Smith Const. Co.*, 218 Pa. 581. General sufficiency of notice, see *Seattle v. Turner*, 29 Wash. 515; *James P. Hall Incorp. Co. v. Jersey City*, 64 N. J. Eq. 766. The notice of lien may be made and verified by an agent although there is no express statutory provision to that effect. *McDonald v. Mayor, &c. of New York*, 170 N. Y. 409; rev'g 58 App. Div. 73. Verification held to be unnecessary. *Clapper v. Strong*, 90 N. Y. App. Div. 537.

amount owing to the claimant in good faith,¹ and must be filed with or served on the proper officers of the municipality.² Upon *service of this notice the lien attaches* to the amount due. There can be no lien if there is nothing due to the principal contractor, although the defence of the city that nothing be due is founded upon payment,³

¹ An error in stating the amount which is not inconsistent with good faith will not invalidate the notice of lien, but if the amount be stated in such terms as to disclose a fraudulent purpose to impound a sum larger than that which was definitely known to be due to the claimant, the court will refuse to enforce any lien founded upon such notice. *Camden Iron Works v. Camden*, 60 N. J. Eq. 211; s. c. 64 N. J. Eq. 723; *Garrison v. Borio*, 61 N. J. Eq. 236; *James P. Hall Incorp. Co. v. Jersey City*, 64 N. J. Eq. 766. If the amount be overstated, and in consequence moneys belonging to the contractor are tied up, interest on the excess may be allowed to the contractor. *Camden Iron Works v. Camden*, 60 N. J. Eq. 211.

² The lien becomes perfect upon the service of notice on the proper officers. *Spalding Lumber Co. v. Brown*, 171 Ill. 487. But when the statute requires an action to be commenced within ninety days from the filing of the claim, the money cannot be retained by the municipality after that time unless an action is begun by the claimant. *Third Nat. Bank v. Atlantic City*, 126 Fed. Rep. 413. If payment be made to the contractor after service of the notice by a subcontractor or materialman, such payment does not defeat the lien and the city is liable. *West Chicago Park Com'rs v. Western Granite Co.*, 200 Ill. 527. When the statute requires the notice to be filed with the "financial officer of the city," the comptroller and not the treasurer of the city is the officer with whom the claim should be filed. *James P. Hall Incorp. Co. v. Jersey City*, 64 N. J. Eq. 766. *County auditor, and not the county treasurer*, held to be the proper officer when claims were required to be filed "with the public officer through whose order the payment is to be made." *Green Bay Lumber Co. v. Thomas*, 106 Iowa, 420. A notice is sufficiently served when it is served upon the secretary of a board of commissioners and is actually brought to the notice of the commissioners at a

meeting and is spread upon the record of the meeting. *West Chicago Park Com'rs v. Western Granite Co.*, 200 Ill. 527.

³ If the creditors of a subcontractor file a lien for work performed by them for the subcontractor, it is necessary not only that there should be money owing by the city to the principal contractor, but that the principal contractor should owe money to the subcontractor. If it appears that there is no indebtedness of the contractor to the subcontractor, the creditors of the latter have no lien. *Brainard v. Kings County*, 84 Hun (N. Y.), 290; *Garrison v. Borio*, 61 N. J. Eq. 236. When the defence of a city is that the moneys owing to the contractor have, after the filing of the plaintiffs' claim, been disbursed to others in settlement of his claims, the burden is on the city to show that the claims so paid were prior in right to that of plaintiff. *Iowa Brick Co. v. Des Moines*, 111 Iowa, 272. The fact that the statute makes it the duty of the proper officer to withhold a sufficient amount to pay the claim and provides that any officer violating the duty imposed upon him shall be liable on his official bond to the claimant for the damages resulting from such violation, does not prevent the claimant from prosecuting an action to enforce the lien. The remedy against the officer is not exclusive but cumulative. *National Bank of La Crosse v. Petterson*, 200 Ill. 215, aff'd 102 Ill. App. 501; *West Chicago Park Com'rs v. Western Granite Co.*, 200 Ill. 527. Where the contract provides that moneys owing to the contractor may be retained until all claims for damages resulting from negligence or carelessness in the performance of the work shall have been settled and evidence thereof furnished, and a claim for such damages is filed and an action brought against the city thereon, a subcontractor cannot establish his lien upon the moneys so retained without showing that the claim for damages has been settled. *Brown v. New York*, 72 N. Y. App. Div. 420. See also

or upon the failure of the contractor to complete the work and damages resulting to the city therefrom,¹ or upon a previous assignment by the contractor of moneys payable to him under the contract.² The *remedies* are similar in nature to a suit for the foreclosure of mechanics' lien, although it might be more proper to describe the proceeding as in the nature of a bill of interpleader brought in a court of chancery.³

§ 832. **Assignment of Contracts.** — A contract with a municipality to furnish material and perform labor in and about an improvement is, on the question of its assignability, *subject to the same general principles as contracts between individuals*. A contract to pay money may be assigned by the person to whom the money is payable, if there is nothing in the terms of the contract which manifests the intention of the parties to it that it shall not be assignable. But when rights arising out of the contract are coupled with obligations to be performed by the contractor, and *involve such a relation of personal confidence* that it must have been intended that the right should be exercised and the obligation performed by him alone, the contract, including both rights and obligations, cannot be assigned without the consent of the other party to it.⁴ The fact that a party

Cranford v. Brooklyn, 13 N. Y. App. Div. 151.

¹ As to the right of the contractor to claim the benefit of set-offs and recoupments of damages in an action brought by the subcontractor under the New Jersey statute, see Norton v. Sinkhorn, 61 N. J. Eq. 508; s. c. 63 N. J. Eq. 313.

² McKay v. New York, 46 N. Y. App. Div. 579; McDonald v. Ballston Spa, 34 Misc. (N. Y.) 496; Hackett v. Campbell, 10 N. Y. App. Div. 523. In *Illinois*, the rule is adopted that the assignee takes subject to all the equities against the assignor, and that the assignment does not defeat the right to file liens. Spalding Lumber Co. v. Brown, 171 Ill. 487. To perfect the assignment it is essential that notice thereof be given to the city. Third Nat. Bank v. Philadelphia, 126 Fed. Rep. 413. An assignment of a contract for a public improvement held to be within a statute requiring assignments of contracts for performance of labor or the furnishing of material to be filed in the office of the clerk of the county where the property improved is situated. Brace v. Gloversville, 167 N. Y. 452.

³ If the law has not prescribed the mode of enforcing the lien, it may be enforced by a suit in equity. West Chicago Park Com'rs v. Western Granite Co., 200 Ill. 527; National Bank of LaCrosse v. Petterson, 200 Ill. 215. In *New Jersey* the court of chancery is the proper forum to enforce the statutory remedy. There can be no personal judgment in suits on those liens. Delafield Construction Co. v. Sayre, 60 N. J. L. 449; Garrison v. Borio, 61 N. J. Eq. 236. The contractor cannot in such a suit recover a judgment against the city for the balance owing him. United States Fid. & Guar. Co. v. Newark, 72 N. J. Eq. 841; 66 Atl. Rep. 904. Costs against unsuccessful claimant in action to enforce claim. James P. Hall Incorp. Co. v. Jersey City, 64 N. J. Eq. 766. If the contractor fails to begin suit within the time prescribed by the statute, the lien is lost and cannot be revived by any act of the municipality. Roselle Park v. Montgomery (N. J. Eq.), 60 Atl. Rep. 954.

⁴ Arkansas Valley Smelting Co. v. Belden Mining Co., 127 U. S. 379; Delaware County v. Diebold Safe Co., 133 U. S. 473; Burck v. Taylor, 152

to the contract is or *represents a municipal corporation*, may have a bearing upon the question *whether the contract is assignable* in whole or in part without its assent for the reason that the statutes regulating the making of the contract, and the relationship of the contracting parties, may be inconsistent with an intent to permit an assignment of the contract.¹ If the entire contract cannot be assigned, it follows, *a fortiori*, that a portion of the contract, including both the rights and the obligations of the contracting party, cannot be assigned.² But in some cases it has been held that contracts with a municipality to furnish material or perform labor, from their nature, do *not imply any relation of personal confidence* in the contracting party, and that they may be assigned in their entirety.³ An assign-

U. S. 634. If contract for the construction of a bridge is entered into by a city, the contractor giving bond with sureties for its performance, and if, during the progress of the work, the contractor assigns the contract without the assent of the city, and afterwards renounces all interest in it, and refuses to go on with the work, the city has the right to decline to permit the assignee to continue the work. *Pike v. Waltham*, 168 Mass. 581. Where a contract to do work for a city is assigned as a whole after a part performance, the assignment includes all sums due for work previously done under the contract which have been retained by the city to insure performance, and the assignee is entitled to payment thereof. *Chapin v. Pike*, 184 Mass. 184. *Loring J.*, said: "Where the contract as a whole is assigned, there is no separation between the benefits and burdens. A contract is a single entity; and if it is assigned as an entity, and the contract is fully executed except the payment of certain money earned under the contract, the assignee is entitled to it."

¹ In *Delaware County v. Diebold Safe Co.*, 133 U. S. 473, 488, county commissioners in *Indiana* were authorized to build jails, &c., but were required to let contracts after public advertisement for bids and to the lowest responsible bidder, taking from him a bond with sureties to faithfully perform the work and to promptly pay all debts incurred in the prosecution of the work, including labor and materials furnished, and any laborer or materialman having a claim against the contractor was authorized to sue upon that bond. The contractor for

a jail made an assignment of a part of the contract, including both rights and obligations, and the assignee agreed to do the iron work the same as though the contract therefor had been awarded to the assignee direct. In considering the *validity of this partial assignment* the Supreme Court of the United States expressed the opinion that the statutory provisions before referred to, as construed and applied by the courts of *Indiana*, were inconsistent with the theory that the original contractors could, at their pleasure, and without the assent of the county commissioners, split up the contract and assign it in parts, so as to transfer to different persons the duty of furnishing different kinds of material and labor and the right of recovering compensation for such material and labor from the county commissioners. It held that the assignee could not recover under the contract from the county commissioners. In *French v. Powell*, 135 Cal. 636, it was held that an assignment of a contract, even with the consent of the surety and the city, could not shift the burden of the obligation in favor of materialmen and laborers; and that persons furnishing labor after the assignment might recover against the original contractor and his surety under the bond.

² *Delaware County v. Diebold Safe Co.*, 133 U. S. 473; *Burek v. Taylor*, 152 U. S. 634.

³ See *Ernst v. Kunkle*, 5 Ohio St. 520. In *Horne v. Wood*, 23 N. Y. 350, it was held that a contract for the use of convict labor in the State prison may be assigned. In *Devlin v. Mayor, &c. of New York*, 63 N. Y.

ment of *money due or to become due under the contract*, as distinguished from an assignment of the contract itself, is generally sustained as valid.¹ If, however, the assignment is *only of a part of the money* to become due upon the contract, in some jurisdictions at least, and when the amount ultimately to be paid under the assignment is not determinate in its nature, though capable of being ascertained upon the performance of the contract, it has been held that *the assignment of a part of the claim* is not binding on the municipality unless it assents to such severance of its liability.² If, however, the assign-

8, it was held that there was nothing in the spirit or the letter of the statutes authorizing the contract, or in the public policy, to prohibit the *assignment of a street cleaning contract with the assent of the city authorities*, so long as the city retained the personal obligation of the original contractor and his sureties for its faithful performance, and that, in any event, the city, by acting under the contract after it had been assigned, and recognizing the assignee, waived the objection that the contract was not assignable. The court in so deciding expressed the opinion that the work involved in the contract was not of such a nature as to call for the exercise of any peculiar skill, science, or experience, and that it fell within the class of contracts which were assignable in their nature. In *Vandegrift v. Cowles Engineering Co.*, 161 N. Y. 435, the same court held that a contract between individuals for the *construction of a steamboat* was assignable. See also *New England Iron Co. v. Gilbert El. R. Co.*, 91 N. Y. 153. In *Taylor v. Palmer*, 31 Cal. 240, 241, a contract for *street work* was held to be assignable. In *St. Louis v. Clemens*, 43 Mo. 395, a contract for *grading and curbing a street* was held to be assignable because it did not involve any element of personal skill or the rendition of personal services. In this case, however, the city had recognized the assignment. In *Philadelphia v. Lockhardt*, 73 Pa. 211, it was held that a contract with a city was assignable by the contractor before he had entered upon its performance. This case is distinguished in later cases on the ground that the assignment in question was an assignment of the entire contract. See *Philadelphia's Appeal*, 86 Pa. 179, 182; *Geist's Appeal*, 104 Pa. 351; holding that there

cannot be an assignment of a part of a claim under the contract.

¹ *Foley v. Bullard*, 99 Cal. 516; *Diggins v. Hartshorne*, 108 Cal. 154; *Bernstein v. Downs*, 112 Cal. 197; *Brckett v. Blake*, 7 Met. (Mass.) 335; *Dickey v. Porter*, 203 Mo. 1; *Hall v. Buffalo*, 1 Keyes (N. Y.), 193; *Field v. Mayor, &c. of New York*, 6 N. Y. 179; *Parker v. Syracuse*, 31 N. Y. 376; *People v. Comptroller*, 77 N. Y. 45; *Southern Pav. Co. v. Chattanooga* (Tenn. Ch. App.), 48 S. W. Rep. 92; *Hermann v. Oconto*, 100 Wis. 391.

² In *Cook v. Menasha*, 103 Wis. 6, a contractor agreed to do certain paving for a city at a fixed price per square yard. He gave *materialmen* an order requesting the city to pay them 50 cents per square yard for all material furnished by them and used in the paving. It was held that as the order had never been assented to by the city, although it had been filed with the city clerk, the order could not operate as an assignment as it only affected a part of the contract price, and was not binding on the city unless it assented to a severance of its liability, and that there could be no recovery against the city or against a bank to whom the contractor had assigned a city warrant after making the order in favor of the plaintiff. Following *Skobis v. Ferge*, 102 Wis. 122, where it was held that the debtor has a right to pay his debt in *solido* and to refuse to be subjected to suits by several claimants. In *Appeal of Philadelphia*, 86 Pa. 179, it was held that while a *partial assignment* of a contract between individuals may be enforced in equity, yet where a municipality is party to a contract, it is not bound to recognize partial assignments of it. In this case the city had drawn a warrant to the original contractor after notice to the city of the assign-

ment of the contract *be recognized by the municipality*, although such recognition be only by dealing with the assignee and treating him as if he were the principal contractor, the municipality is estopped to contest the validity of the assignment and the assignment is effectual.¹

ment, and it was held that there could be no recovery against the city. *Mercer, J.*, said; "The question now presented is whether such a corporation is bound to recognize an assignment of a *part only* of its obligation. If it must one part, we see no reason why it must not as many parts as the convenience or whim of the obligee shall induce him to assign. The probable and natural effect of holding a municipality liable to each assignee would subject its officers to annoyances and the city to litigation and costs. It is conceded that at law the enforcement of such assignments would be questionable; yet it is claimed that they are good in equity, and therefore this assignment may be enforced here. There is no doubt that as between individuals this rule prevails in equity. *Whether it would so be held against a municipal corporation is now the question.* . . . The policy of the law is against permitting individuals by their private contracts to embarrass the financial officers of a municipality. . . . A municipal corporation should not be subjected to the embarrassments, responsibilities, and costs of adjudicating contracts to which it was not a party." In *Geist's Appeal*, 104 Pa. 351, *assignments were made of parts of a claim against the city*. Subsequently the contractor made an assignment for the benefit of his creditors, and the assignee for creditors collected and received the entire amount payable under the contract. It was held that a partial assignment of a claim upon a municipal corporation is not binding upon the corporation; that such an assignment amounts merely to an agreement to pay out of a particular fund, and that, therefore, as in a question with the general assignee for creditors, the assignees of parts of the claim were not entitled to recover the amounts assigned to them.

¹ *Taber v. Ferguson*, 109 Ind. 227; *Sims v. Hines*, 121 Ind. 534; *McCubbin v. Atchison*, 12 Kan. 166. Where a city acquiesces in an assignment of the contract by allowing, with its full

knowledge, work to be done by the assignee under it, it is immaterial whether the contract is or is not by its terms assignable, or can be sublet, and the city is liable to the assignee for the reasonable value of work done; as, for instance, where after an assignee has been engaged upon the work on a street improvement, he is required by the city to abandon the work, and the city, without his consent, subsequently lets the contract for the same improvement to another person. *Dunkirk v. Wallace*, 19 Ind. App. 298. See also *Ocorr & Rugg Co. v. Little Falls*, 77 N. Y. App. Div. 592, *aff'd* 178 N. Y. 622. A contract to do city printing made with the proprietors of a newspaper with particular reference to the newspaper as the basis of the contract, was assigned by them to parties to whom they had leased the newspaper. In an action to restrain the city from letting the contract to another party, it appeared that the same paper was being published in such a way as to enable the work to be performed as fully as it could have been under its original proprietors; and the court held that, if immediately upon the transfer of the paper and the assignment of the contract, action had been taken by the city to cancel it because of the assignment, there might have been ground for claiming that it was no longer in force, but as it appeared that the contract was allowed to remain in force and apparently binding upon the city and the assignee, and work had been done by the assignee to the knowledge of the city, the right of the city to forfeit the contract because of the assignment was waived. *Norton v. Roslyn*, 10 Wash. 44. The assignee of a contract under an assignment, which was ratified by the city council, cannot show that the city delayed, hindered, and obstructed the work before the assignment, while the contract belonged to the assignor. He alone could complain of the wrongful acts of the city or its officer in hindering him or his employees in its perform-

As a general rule, a contract made in *contravention of a statute* is void and cannot be enforced. The only exception arises when, from an examination of the statute, the courts are able to discern a different or limited purpose on the part of the lawmakers.¹ Statutes *prohibiting the assignment of public contracts* have usually been interpreted by these principles, and if the court has come to the conclusion that it was not the intention of the legislature to affect rights other than those strictly between the contracting parties, the operation of the statute will be limited in its effect to the relation between the contracting parties.² Under a *statute which prohibits a contractor from*

ance. *Marshall v. San Antonio* (Tex. Civ. App.), 63 S. W. Rep. 138.

¹ *Burek v. Taylor*, 152 U. S. 634, 649.

² In *Hobbs v. McLean*, 117 U. S. 567, one Peck having in response to an advertisement put in a *bid for furnishing wood and hay to the government* and expecting the contract to be awarded to him, entered into partnership with McLean and Harmon, by which Peck was to furnish one-half of the capital required and McLean and Harmon each one-fourth, the profits and losses of the partnership to be divided in like proportion. The partnership was formed for the purpose of carrying out the expected contract. The contract was obtained; and, after performance, money therefor was paid to the assignee in bankruptcy of Peck. The other partners, McLean and Harmon, filed a bill to recover their proportionate share of the profits under the terms of the partnership. It was urged that the partnership was *invalid under U. S. Rev. St. § 3737*, which prohibits the transfer of any "contract or order or any interest therein," and declares that "any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned." It was held that this statute did not constitute any defence. Mr. Justice Woods said: "Interpreting the articles (of co-partnership) in the light of the statute as it is the duty of the court to do, they were not intended to transfer, and do not transfer, to the plaintiffs any claim or demand, legal or equitable, against the United States, or any right to exact payment from the government, by suit or otherwise. They may be fairly construed to be the personal contract of Peck, by which, in consideration of money to be advanced and services to be performed by the

plaintiffs, he agreed to divide with them a fund which he expected to receive from the United States, on a contract which he had not yet entered into. This is the plainly expressed meaning of the partnership contract, and it is only by a strained and forced construction that it can be held to effect a transfer of Peck's contract with the United States, and to be a violation of the statute. *We are of the opinion that the partnership contract was not opposed to the policy of the statute.* The sections under consideration were passed for the protection of the government. *Goodman v. Niblack*, 102 U. S. 556. They were passed in order that the government might not be harassed by multiplying the number of persons with whom it had to deal and might always know with whom it was dealing, until the contract was completed and a settlement made. Their purpose was not to dictate to the contractor what he should do with the money received on his contract after the contract had been performed." Speaking of this statute Mr. Justice Brewer, in *Burek v. Taylor*, 152 U. S. 634, 648, said: "By the section quoted, not only was a transfer of the contract prohibited, but also the result of such a forbidden transfer declared. In terms it was said that any 'such transfer shall cause the annulment of the contract or order transferred so far as the United States is concerned.' *Expressio unius est exclusio alterius.* The express declaration that so far as the United States are concerned a transfer shall work an annulment of the contract carries by clear implication the declaration that it shall have no such effect as between the contractor and his transferee. In other words, as to them, the transfer is like any other transfer of property and controlled by

*assigning, subletting, or otherwise disposing of a contract with a city, or of his right, title, or interest therein, or his power to execute such contract without the previous consent in writing of the department or official awarding the same, and which declares that the municipal corporation shall be relieved and discharged from any and all liability and obligations growing out of the contract to the contractor or to his assignee, transferee, or sublessee, and that he and they shall forfeit all moneys earned thereunder except so much as may be required to pay his employees, an assignment of the contract by an individual to a corporation renders the contract invalid and operates to relieve the municipality from all liability and obligations growing out of the contract.*¹ But in New York it has been held that under such a statute the contractor is not prohibited from *assigning money* payable to him under the contract, and that his assignee may recover these moneys from the municipality.² Similar considerations govern

the same rules. Its invalidity is only so far as the government is concerned, and it alone can raise any question of the violation of the statute. The government in effect by this section said to every contractor, You may deal with your contract as you please and as you may deal with any other property belonging to you, but so far as we are concerned, you and you only, will be recognized either in the execution of the contract, or in the payment of the consideration." See also as to the effect of this statute, *Dulaney v. Scudder*, 94 Fed. Rep. 6.

¹ *Suburban El. L. Co. v. Hempstead*, 38 N. Y. App. Div. 355. The fact that the assignor is the president and manager of the company, or that he is, as he testifies, "practically the company" itself, does not prevent the statute from operating, nor does the receipt of benefits by the city under the contract. *Suburban El. L. Co. v. Hempstead*, 38 N. Y. App. Div. 355.

² *McKay v. New York*, 46 N. Y. App. Div. 579; *Snyder v. New York*, 74 N. Y. App. Div. 421; *Brace v. Gloversville*, 167 N. Y. 452, aff'g 39 N. Y. App. Div. 25. To the same effect, *Dickson v. St. Paul*, 97 Minn. 258. The statute of New York prohibiting the assignment, subletting or disposal of a contract without the previous consent in writing of the department or official awarding the same, has been held not to prohibit the subletting of a portion of the contract work by one who has undertaken a

contract involving a variety of work. The prohibition is simply against assigning, subletting, &c., the whole, or a substantial part of a contract, entered into with a municipality so as to put it out of the power of the original contractor to perform it. Hence, if a contract be awarded by a city to a mason for the erection of a brick building, he may himself perform the mason work, build the foundation, and erect the walls, and sublet the carpenter work to a practical carpenter, and plumbing to a plumber, and so on, always, however, retaining a substantial part of the contract to be performed by himself and all the work to be done, under his direction and supervision, for the performance of every detail of which he is accountable to the municipality. *Ocorr & Rugg Co. v. Little Falls*, 77 N. Y. App. Div. 592, aff'd 178 N. Y. 622. An assignment of claims for damages arising from a breach of the contract on the part of the city is not an assignment of the contract prohibited by the New York statutes. *Snyder v. New York*, 74 N. Y. App. Div. 421. The provision of the charter of Duluth that no contract on which a bond or deposit is required shall be assigned or transferred, and that the city may on an attempted assignment relet the contract or complete it at the expense of the contractor or his surety, deals merely with assignments which are made before the work or thing to be done, forming the subject matter of the contract, is completely executed,

the effect of a clause in a contract prohibiting the assignment thereof and providing for a forfeiture thereof in the event of its being assigned. Such a clause, forming a part of the contract, has the force of law over those who are parties to the contract.¹ But this provision is inserted in the contract *solely for the benefit of the city*, and prevents any claim being asserted against it in the absence of its consent. It is a shield to protect the city, and is not intended for the benefit of persons with whom the contractor may deal.² Notwithstanding such a provision the contractor may assign moneys due or to become due under the contract, and the assignment is valid and enforceable and takes priority over statutory liens subsequently filed.³

and not to an assignment of the amount due to the contractor for such performance of the work. *Lowry v. Duluth*, 94 Minn. 95.

¹ *Fortunato v. Patten*, 147 N. Y. 277; *Burck v. Taylor*, 152 U. S. 634, 649; *Murphy v. Plattsmouth*, 78 Neb. 163; 110 N. W. Rep. 749.

² *Fortunato v. Patten*, 147 N. Y. 277. Where a contract for a *street improvement in a city contained a provision that the contract should not be assigned without the consent of the common council*, no one except the contractor can sue on a precept issued to the contractor upon an allegation that he has done the work by agreement with the contractor without an averment also of the assignment of the contract with the consent of the common council. *Deffenbaugh v. Foster*, 40 Ind. 382.

³ *Fortunato v. Patten*, 147 N. Y. 277; *Episcopo v. New York*, 35 N. Y. Misc. 623; *Hipwell v. National Surety Co.*, 130 Iowa, 656. See also *Bank of Harlem v. Bayonne*, 48 N. J. Eq. 246.

But see *contra*, *Omaha v. Standard Oil Co.*, 55 Neb. 337; *Murphy v. Plattsmouth*, 78 Neb. 163; 110 N. W. Rep. 749. A clause in a contract forbidding assignment is not available to the city as a defence unless expressly pleaded. *Episcopo v. New York*, 35 N. Y. Misc. 623. If a contract for the erection of a jail for a city is, without the consent of the city, assigned prior to the commencement of insolvency proceedings by the contractor, *the assignee*, who after notice to the city of the assignment and record thereof in the office of the city clerk, completes the contract at his own expense and from time to time receives payments from the city on account of the work, is upon completion of the building and acceptance by the city *equitably entitled* as against the assignee in insolvency of the assignor to the balance due under the contract, although by its terms it was not assignable without the written consent of the city. *Staples v. Somerville*, 176 Mass. 237.

CHAPTER XIX

WARRANTS ON MUNICIPAL TREASURY

	Section		Section
Power to call in Warrants for	850	Examination, Cancellation, and	
to issue	851	Reissue	861
Legal Requirements as to		Subrogation of Holder of Void	
Warrants	852	Warrants to Debt	862
Issuance and Cancellation of		Statutory Provisions making	
Warrants	853	Warrants Receivable for Mu-	
Legal Action on Warrants	854	nicipal Taxes and Debts.	863
Question of Validity and		Liability of Municipal Officers for	
Validity	855	Misfeasance	864
Validity; Rights of <i>Bona</i>		Limitation of Actions on War-	
Holder's	856	rants	865
Waiver; Estoppel	857	Mandamus to issue Warrants	866
Transfer and Assignment; Equi-		Interest on Corporate Indebted-	
ty between Successive Holders	858	ness	867
of Payment	859		
Amounts Payable out of a Partic-			
ular Fund	860		

§ 485). *Defined.* — *Orders or drafts drawn by one city officer* another and vouchers for moneys due, certificates of indebtedness for services rendered, or for property furnished for the use of the city by any device of the kind, issued for liquidating the amounts lawfully due to the public creditors, are necessary instruments operating on the machinery of municipal administration and for facilitating the collection of taxes.¹ A *warrant* is the command of the council, board, or official, whose duty it is to pass upon the validity of a claim, to determine the amount of a claim against the municipality, and to require the treasurer to pay money out of any funds in the city treasury, which are or may become available for the purpose specified, to the designated person whose claim therefor has been duly adjusted and allowed.²

¹ Mr. Justice Bradley, in *Nash v. Board of Commissioners*, 19 Wall. (U. S.) 468, 477. "Warrants are orders issued by the city clerk upon the city treasurer to pay money out of any funds in the city treasury which are or may become available for the purpose specified." *Little Rock v. United States*, 100 U. S. 418, 421.

² *City warrants* "are orders directing the payment of a claim after it has been subjected to the scrutiny of the auditing officer." *Hamilton County v. Sher-*

wood, 64 Fed. Rep. 103, 107. "A [county] warrant is the command of one duly authorized officer to another, whose duty it is to obey, to pay from the county funds a specified sum to a designated person whose claim therefor has been allowed by the court of county commissioners." *Savage v. Matthews*, 98 Ala. 535, 537. "A county warrant or order may be defined to be an instrument, generally in the form of a bill of exchange, drawn by the proper officer of the

§ 851. **Power to issue.** — Being merely devices for liquidating the amount legitimately due to the creditors of the municipality, and instruments necessary to carry on the machinery of municipal administration, *the power to issue warrants or orders* on the municipal treasury, although not expressly conferred, *may be implied* as incidental to municipal or *quasi*-municipal corporations, whenever it is not prohibited or restricted by constitution, charter, or statute.¹ Being simply a means of paying a debt, it is necessarily implied that a valid debt or obligation of the corporation exists for which a warrant may be drawn. The warrant does not constitute a new debt, or evidence of a new debt, but is only the prescribed means for drawing money from the municipal treasury to pay an existing debt.² It may also be laid down that, as a general rule, the power

county upon the county treasurer, directing him to pay an amount of money specified therein, from a particular fund, to the person named therein, or his order, or bearer." *Crawford v. Noble County*, 8 Okla. 450, 456, *per Hainer*, J.

¹ *Little Rock v. United States*, 103 Fed. Rep. 418, 421; *Buffalo School Furn. Co. v. School Dists.*, 7 Kan. App. 796; *Burrtton v. Harvey County Sav. Bank*, 28 Kan. 390. A city, in the absence of legislative or constitutional restriction, may make warrants on a specific fund *payable in gold coin*, although the sums coming into the fund may be payable in any kind of money. *Kenyon v. Spokane*, 17 Wash. 57. Municipal certificates of indebtedness are not "*bills of credit*" within the meaning of the prohibition (art. i. § 10) of the National Constitution (*Baltimore v. Board of Police*, 15 Md. 375), and possess no elements of commercial paper. *Chandler v. Bay St. Louis*, 57 Miss. 327.

Liability as respects scrip issued to circulate as money, see *Thomas v. Richmond*, 12 Wall. 349, in which the city was held not to be liable. See on this subject, *supra*, § 771, note, § 782, and also *Houston & T. C. R. Co. v. Texas*, 177 U. S. 66; *Allegheny City v. McClurkan*, 14 Pa. St. 81; *Jones v. Little Rock*, 25 Ark. 301; *Miller v. Lynchburg*, 20 Gratt. (Va.) 330; *Smith v. New Orleans*, 23 La. An. 5; *Clark v. Des Moines*, 19 Iowa, 199; *Dively v. Cedar Falls*, 21 Iowa, 565; s. c. 27 Iowa, 227; *Black v. Cohen*, 52 Ga. 621; *Cheeney v. Brookfield*, 60 Mo. 53; *Swackhamer v. Hackettstown*, 37

N. J. L. 191; *Lucas v. Pitney*, 27 N. J. L. 221.

Bonds issued by the city of Little Rock on bank-note paper, engraved with vignettes, in the similitude of bank-bills, intended to circulate as money, were held to be illegal and void under the legislation of *Arkansas*, both by the State and Federal courts. *Lindsey v. Rottaken*, 32 Ark. 619; *Jones v. Little Rock*, 25 Ark. 301; *Merchants' Nat. Bank v. Little Rock*, 5 Dillon C. C. 299; s. c. 98 U. S. 308. In the last-named case it was decided that this illegal money having been paid out by the city to *bona fide* creditors for valid claims, and the city having afterwards called it in, and by the action of the municipal council acknowledged an indebtedness for the amount to the holders and promised to pay the same, it was liable on such acknowledgment and new promise. In *Jones v. Little Rock*, *supra*, the court refused to interfere by injunction at the instance of a taxpayer to prevent that city from issuing paper of this character.

An intention that *state warrants* issued by legislative authority should circulate as money must be clearly proved and cannot rest on inference. *Houston & T. C. R. Co.*, 177 U. S. 66.

² *State v. Cook*, 43 Neb. 318.

County warrants are *valid instruments only* when the board of supervisors had legal authority to issue them, or to contract the obligation on which they were founded, and are not binding when issued in violation of law or in fulfillment of a contract that the board was prohibited from making. *Sault Ste. Marie v. Van Dusan*, 40

to issue a warrant does not exist *until the audit and allowance of the claim* in the manner prescribed by statute.¹ But in many instances it may be found under the legislation applicable to the municipality that the *auditing and allowing* the claim and the

Mich. 429; *Jefferson County v. Arrighi*, 54 Miss. 668; *Nash v. St. Paul*, 11 Minn. 174; *People v. Flagg*, 17 N. Y. 584; *Brady v. New York*, 20 N. Y. 312; *Hague v. Philadelphia*, 48 Pa. 527. A law creating or authorizing the liability of a county is a condition precedent to the exaction of payment from the county. *Hess v. Pegg*, 7 Nev. 23. A contract made by a county with another party, in which the county agrees to pay for services rendered, in county warrants, is in effect a contract payable in money, and is not void. *Babcock v. Goodrich*, 47 Cal. 488.

Where a municipality was without funds to meet its current expenses, it made a verbal agreement with the relator that the relator should advance such sums as might be required to meet the current expenses until the collection of the next taxes from which he was to be repaid. It was held that the agreement was not so much a loan of money as a contract to pay certain debts of the municipality, and on the refusal of the municipality to make payment of the warrants issued to the relator, although money had been paid into the treasury and applied on warrants issued subsequently to those held by the relator, it was held that *mandamus would lie to compel the municipality to pay the warrants*. *Cloud v. Lawrence*, 12 Wash. 163. If a city has no power to make itself generally liable for an improvement, warrants payable out of the general funds of the city issued in exchange for warrants drawn upon and payable only from an authorized special assessment fund are without consideration in so far as the general fund is concerned, and are void. *State v. Moss*, 44 Wash. 91.

The repeal of an ordinance authorizing the issue of warrants does not affect the validity of warrants issued before the repeal. *Kenyon v. Spokane*, 17 Wash. 57, 62. In *Nebraska*, school district officials can only contract for the payment of debts incurred for furnishing schoolhouses with reference to money on hand and at the time available for the purpose. They cannot contract on time or credit. Warrants

issued by the school district officers are affected by the limitation upon the power to contract; otherwise the limitation might be evaded. Hence, these officers cannot make a contract and give a district warrant for the amount due thereunder *payable at a future time*. *School Dist. v. Stough*, 4 Neb. 357; *State v. Sabin*, 39 Neb. 570; *Andrews v. McCook School Dist.*, 49 Neb. 420; *Pomerene v. School Dist. No. 56*, 56 Neb. 126; *Markey v. Sheridan School Dist.*, 58 Neb. 479. Warrants issued without authority of law being void and the municipality having a complete defence thereto in the hands of any holder, it cannot bring an action to recover the amount of such warrants before payment thereof. *Klamath County v. Leavitt*, 32 Oreg. 437.

¹ *Wilson v. State*, 53 Neb. 113.

Without the sanction of the county board the clerk has no authority to issue, or the treasurer to pay or countersign, any warrant. *People v. Klopke*, 92 Ill. 134. When the statute only authorizes the county auditor to issue warrants on the recorded vote or resolution of the board of supervisors, warrants issued without such recorded vote or resolution are void. *Polk County v. Sherman*, 99 Iowa, 60. A warrant being in legal effect merely an acknowledgment of and promise to pay a debt, it may be doubted whether the legislature has the power to validate illegal warrants without regard to the validity of the debt or obligation for which they are issued. Thus, in *Felix v. Wallace County*, 62 Kan. 832, warrants had been issued for a debt incurred under an unconstitutional statute; and it was held that a statute which purported to validate these warrants without attempting to validate the powers attempted to be conferred by, and exercised under the unconstitutional law, was in effect a legislative judgment against the county, divesting the county of legal defences, and was therefore a usurpation of the judicial powers vested by the constitution in the courts, and was void. But *quære?*

issuing of the warrant are vested in the same person, and that the making of the warrant is in itself an auditing and allowing of the claim. This question must necessarily be determined by an examination and consideration of the charter and statutory enactments applicable to the municipality. The fact that there is no money in the treasury available for the payment of the warrant at the time when it is drawn or issued does not, in the absence of any statute to the contrary, affect the power and duty to issue the warrant, if there is a debt immediately payable.¹ It has also been held, at least in the case of warrants payable out of a special fund, to which moneys will accrue during an indefinite period in the future,—*e. g.*, as water rents,—that the city has the power to so arrange its finances as to make the warrants payable at stated future periods of reasonably short intervals,—*e. g.*, in the case supposed, at yearly intervals.² But when the statute expressly provides that

¹ *Little Rock v. United States*, 103 Fed. Rep. 418; *Burton v. Harvey County Savings Bank*, 28 Kan. 390; *Anderson v. Issaquena County*, 75 Miss. 873; *State v. Hoffman*, 35 Ohio St. 435, 443. In *Little Rock v. United States*, 103 Fed. Rep. 418, the constitution and statute of Arkansas made municipal warrants receivable in payment of city taxes. There was no express limitation in either constitution or statutes of the power to draw warrants. It was held that a city had power to issue warrants to pay just debts, although there was no money in the treasury to pay them, and no prospect that there would be any within a year of their issue. This decision was largely influenced by the fact that the creditor had, by statute and constitution, the right to use the warrants in payment of taxes.

² In *Kenyon v. Spokane*, 17 Wash. 57, 61, a city had, under legislative authority, contracted for the construction of water works and for the purpose of paying for the cost of construction had created a special fund to be derived from a percentage of the water rents to be received by it in the future. It issued warrants payable at yearly intervals extending over a number of years. The court held that, as the income from the water works, a percentage of which was set apart to create the special fund, necessarily accrued from year to year, it was only a reasonable arrangement of the city finances to make different instalments of the warrants payable at yearly

intervals extending over a period of years. But in *Coler v. Sterling*, 15 S. Dak. 415, it was held that when by statute warrants were receivable for taxes and the provision of the statute prescribing the form of the warrants provided merely for payment out of any moneys in the fund not otherwise appropriated, without making any reference to the payment of warrants at a future date, an instrument directing payment three years after issue was not in compliance with the statute and was not entitled to be received in payment of taxes. *Infra*, § 852.

In *Alabama* the issuance, by authority of the commissioners' court, of interest-bearing warrants on the county treasurer, payable at a specified time in the future,—*e. g.* ten years after issue,—or payable severally at different future dates, for the amount of a debt contracted for the building of a court-house is not an issue of bonds within a constitutional prohibition of any issue of bonds without the previous vote of a majority of the citizens of the county. *Tally v. Jackson County (Ala.)*, 39 So. Rep. 167; following *Matkin v. Marengo County*, 137 Ala. 155. Statutory power "to issue county orders" gives no authority to issue negotiable bonds payable at a future day, with interest coupons attached. The difference is substantial. *Goodnow v. Ramsey County*, 11 Minn. 31; *Shawnee County v. Carter*, 2 Kan. 115; *Hull v. Marshall County*, 12 Iowa. 142.

warrants shall only be drawn when there is in the treasury an unexpended balance of the fund on which it is drawn, a warrant drawn in excess of the amount in the fund is void.¹

Without express authority from the legislature *a municipality cannot discount its warrants* to its creditors so as to make them equivalent to cash, or issue warrants for more than the sum actually due the claimant; and as to the excess they are void, and the holder will be treated only as the equitable assignee of the valid legal claim of the payee.² To give a warrant validity, it is essential that it should be delivered to the person entitled thereto.³

§ 852. **Statutory Requirements as to Form.** — When, by statute or charter, provision is made *as to the form in which warrants shall be drawn*, such provisions come within the general rule that where the statute specifies the manner in which a municipal officer shall perform an act, the provisions of the statute operate as a qualification or restriction upon the powers of the officer. Hence, when the statute

¹ O'Dell v. Scranton, 126 Mo. App. 136 Cal. 403. A warrant is not "issued" until it is delivered to the person entitled thereto. A forgery of the indorsement of the warrant by the auditor and a wrongful delivery by the auditor to another person, do not deprive the creditor of his right to a valid warrant for his debt. The fact that the creditor has a remedy by action on the auditor's bond will not preclude him from enforcing this right by *mandamus*. The remedy on the bond is not adequate to compel the performance of the official duty of the auditor. American Bridge Co. v. Wheeler, 35 Wash. 40. A county treasurer made payments on the bills of creditors when presented, placed the bills in his cash drawer, and afterwards from time to time fastened packages of the bills together and delivered them to the county commissioners, who made out warrants for the aggregate amount of each package, naming one or more of the claimants, adding the words "*et al.*" The warrants were not delivered to the several persons entitled to them and by them presented to the county treasurer. It was held that they were not legal warrants for payments out of the public moneys of the county in the treasurer's hands, and could not be received as evidence of payments made by the county treasurer by warrant of law. York County v. Robertson v. Alameda Library Trustees, 215 Pa. 578.

² Shirk v. Pulaski County, 4 Dillon C. C. 209; Goynes v. Ashley County, 31 Ark. 552; Foster v. Coleman, 10 Cal. 278; Clark v. Des Moines, 19 Iowa, 199; Bauer v. Franklin County, 51 Mo. 205; Erskine v. Steele County, 4 N. Dak. 339, 346, quoting text; Kellogg v. School Dist. No. 10, 13 Okla. 285; Municipal Security Co. v. Baker County, 33 Oreg. 338; Arnett v. Spokane, 6 Wash. 442; Million v. Soule, 15 Wash. 261. A municipality cannot contract for services and agree that if warrants issued in payment thereof are at a discount, an additional amount shall be issued sufficient to cover the discount. Erskine v. Steele County, 4 N. Dak. 339, 347. If the creditor receiving a county warrant is obliged to sell it at a discount in order to convert it into cash, the county is not liable for the difference between the amount realized and the amount of the claim. Cleveland County v. Seawell, 3 Okla. 281.

³ Commonwealth v. Crawford County, 20 Pa. Co. Ct. Rep. 593. If warrants are drawn and executed and handed to a person to be delivered to the payee, and are by that person wrongfully cashed and the moneys appropriated, there is no delivery of the warrants to the person entitled thereto.

prescribes the form in which a warrant shall be drawn, the statutory requirement must be substantially complied with; otherwise the warrant is void.¹ When so required by statute, a warrant *must be sealed*, and if not sealed, it is void.² It *must be signed* by the officer designated in the statute.³ Other requirements as to the form of warrants which are regarded as mandatory and which result in invalidity for non-compliance are provisions that warrants shall show on their face that they are made payable from taxes already levied when such taxes are collected;⁴ that they shall express on their face the amount levied, and appropriated to the fund on which they are drawn and the amount already expended;⁵ and that they shall specify the purpose for which they are issued.⁶ But where an at-

¹ *Lucas v. San Francisco*, 7 Cal. 463; *Martin v. San Francisco*, 16 Cal. 285. When the statute prescribes the form and merely provides for payment out of any moneys in the fund not otherwise appropriated without any provision contemplating payment of the warrants at a fixed future date, an instrument directing payment at a fixed future date three years after issue is not a compliance with the statute, and is not entitled to the benefit of another statutory provision making warrants receivable for taxes. *Coler v. Sterling*, 15 S. Dak. 415, *supra*, § 851. Requirement of registration within one year of issuance construed to be a condition of legal validity without which warrants were of no effect and not to operate as a statute of limitations. *Taylor v. Chickasaw County*, 74 Miss. 23.

² *Smeltzer v. White*, 92 U. S. 390; *Prescott v. Gonser*, 34 Iowa, 175; *Springer v. Clay County*, 35 Iowa, 243.

³ *Valley Bank v. Brodie*, 9 Ariz. 17; *Coles County v. Goehring*, 209 Ill. 142; *Decatur v. McKean*, 167 Ind. 249. A statute required the signature of warrants by the head of the "appropriate department." It was held that the clerk of council and all officials charged with details pertaining to the city government were within the meaning of the statute, although they might not properly be said to be heads of departments. *Bailey v. Philadelphia*, 167 Pa. St. 569. A municipal warrant given in payment of a lawful debt incurred in the ordinary business affairs of the municipality is not within a statute requiring the chief burgess or mayor to sign all "by-laws, rules, regu-

lations, and ordinances." The chief burgess has no power over warrants and cannot in effect veto them by directing the treasurer to refuse to pay them. *Commonwealth v. Diamond Nat. Bank*, 9 Pa. Super. Ct. 118; *Commonwealth v. Sholtis*, 24 Pa. Super. Ct. 487. Signature of majority of board of trustees of school district held to be sufficient. *State v. Morton*, 51 S. Car. 323. Where a warrant is regular on its face and is signed by the assistant auditor instead of the auditor, it will be presumed that the assistant auditor had authority to act in the absence of any evidence as to his power. *Houston v. Stewart*, 40 Tex. Civ. App. 499; 90 S. W. Rep. 49.

⁴ *Coles County v. Goehring*, 209 Ill. 142.

⁵ *Nat. Life Ins. Co. v. Dawes County*, 67 Neb. 40.

⁶ *Bingham County v. First Nat. Bank*, 122 Fed. Rep. 16; *Bayerque v. San Francisco*, 1 McAllister, 175, 176; *Travelers Ins. Co. v. Denver*, 11 Colo. 434, 439; *Raymond v. People*, 2 Colo. App. 329; *McNutt v. Lemhi County*, 12 Idaho, 63; *Glidden v. Hopkins*, 47 Ill. 525; *Tunica County v. Rhodes*, 85 Miss. 500; *Reeve v. Oshkosh*, 33 Wis. 477. Warrants which are void on their face for failure to comply with a statutory requirement that they specify the liability for which they are drawn, cannot be validated by ratification. *Bingham County v. First Nat. Bank*, 122 Fed. Rep. 16; *Glidden v. Hopkins*, 47 Ill. 525. A statutory requirement that any warrant shall show on its face "that the city council has directed its issuance and for what purpose" does not require that the order shall specify the special fund out of which the pay-

tempt has been made to comply with the statute a distinction has been drawn between the irregular and defective exercise of the power vested in the officers issuing the warrants, and the doing of an act in excess of the legal powers of the corporation; and it has been held that where the warrant shows that the officers attempted to comply with the requirements of the statute, the fact that their action is not in strict compliance therewith does not necessarily invalidate the warrant.¹

§ 853 (500). **Payment and Cancellation of Warrants.**—Payment by the treasurer or proper officer of a municipal corporation of its orders or warrants *ipso facto extinguishes* them. If lent, re-issued, or put into circulation again by the officer, after he has once obtained credit therefor, they are not valid securities, not even, it seems, in the hands of an innocent holder.²

ment is to be made. *Minor v. Loggins*, 14 Tex. Civ. App. 15, 17.

¹ In *Gray v. Peoria Board of School Inspectors*, 231 Ill. 63, warrants could only be drawn and issued against and in anticipation of the collection of taxes already levied to the extent of seventy-five per cent thereof, and were required to show on their face that they were so drawn. Warrants were issued stating that they were in "anticipation of taxes of 1905." It was held that this statement fairly implied that the treasurer should pay the warrants from the tax of 1905, and while the warrants were defectively executed, they were not wholly void, and therefore payment of the warrants out of the tax would not be enjoined at the suit of a taxpayer in the absence of evidence that the tax had not been levied, or that the warrants exceeded the amount authorized to be issued. In *Neal Banking Co. v. Chastain*, 121 Ga. 500, it was held that a failure to register warrants as required by law might subordinate the payment of the warrant to other warrants duly registered, but would not render the warrants void. Statutory form of county warrants held to be directory, and a mere departure from such form to be no defence to an action on the warrant. *Young v. Camden County*, 19 Mo. 309.

² *Nashville v. Ray*, 19 Wall. (U. S.) 468, 480; *Dist. of Columbia v. Cornell*, 130 U. S. 655; *McConnell v. Simpson*, 36 Fed. Rep. 750; *Allen v. McCreary*, 101 Ala. 514; *Chemung Canal Bank v.*

Chemung County, 5 Denio (N. Y.), 517.

In *Chemung Canal Bank v. Chemung*, 5 Denio (N. Y.), 517, it was held that where, without any fraudulent intent, the holder of valid county orders exchanged them with the treasurer for others which were in fact paid but which had never been allowed him in his accounts, the debt represented by the valid orders was not extinguished and was sufficient cause to support a settlement with the county allowing it. If, after payment of warrants, a clerk who has no duty or authority connected with the redemption of them steals them, fraudulently effaces the marks of cancellation, and puts them in circulation, *the municipality is not liable* to a purchaser in good faith without notice. *Dist. of Columbia v. Cornell*, 130 U. S. 655. See also *McConnell v. Simpson*, 36 Fed. Rep. 750. A municipal corporation is not liable for the increased face value of warrants which the clerk has fraudulently raised after issuance. *Chandler v. Bay St. Louis*, 57 Miss. 327. A purchase by the county treasurer's deputy, who performs all the duties of the office, of county warrants at a time when he had county funds in his hands, which he did not account for at the expiration of his term, was held to be a payment of warrants with the unaccounted funds rendering the warrants void in the hands of the deputy's transferee. *Allen v. McCreary*, 101 Ala. 514. County warrants which were paid by the treasurer were mis-

§ 854 (501). **Right of Action on Warrants.** — A creditor of a town is not bound to receive an order on the treasurer, but may sue upon

laid and he settled his accounts with the county without getting credit for the amount so paid. It was held that the warrants were extinguished, and that the treasurer could not, upon their subsequent discovery, maintain an action thereon against the county. The remedies of the treasurer in such case discussed, but not decided. *Lane v. Hunt County*, 13 Tex. Civ. App. 315. *Payment to bearer* in good faith held to exonerate the county. *Sweet v. Carver County*, 16 Minn. 106. Indictment for violation of statute making it unlawful for a city officer to buy city warrants, see *Trine v. People*, 36 Colo. 473.

The question whether a warrant has been paid is often one of intention. *Bardsley v. Sternberg*, 18 Wash. 612, rev'g on rehearing, 17 Wash. 243, cited *infra* more fully. A check was drawn by the county treasurer in payment of warrants, but before presentation, with due diligence, the bank upon which the check was drawn failed. It was held that the check was not payment of the warrants until paid, and that the holder of the warrants was entitled to recover thereon, although they had been marked paid. *Chambers v. Custer County*, 8 Idaho, 724; *Green v. Custer County*, 8 Idaho, 721. A clerk of a county treasurer, during the latter's absence, paid a county warrant which was not yet due, because other prior warrants on the same fund had not been paid. The clerk was ignorant of the fact that the warrant was not payable. It was held that the county treasurer might recover the amount paid from the person receiving it upon the ground of mistake in fact, the payment being treated as invalid because made contrary to law. *Morrow v. Surber*, 97 Mo. 155.

A course of dealing may be entered upon by the treasurer as the result of which warrants are turned over to persons or banks advancing money thereon at the request of the municipality or its treasurer, and when such is the case and under the peculiar circumstances of some of the cases, it has been held that the transaction did not amount to payment of the warrants, although the course of dealing was not to be commended.

In *Washington*, the warrants in

question were payable in the order of their issuance or of their presentation, and not in the discretion of the particular officer whose duty it was to pay them. The general custom of the treasurer of a city was, when current warrants on the general fund payable to a person named or order were presented to him, to give the holder the amount thereof and require an indorsement on the back. This was done without regard to the order of the issuance or presentation, and without regard to the question whether the warrant was payable. The treasurer then placed the warrants in his cash box and treated them as cash until disposed of to third persons. When several warrants had accumulated, they were taken from the cash box and listed on a separate sheet. The original list, after being copied in a letter-press book, was attached to the warrants. The warrants, with the list attached, were then disposed of to third persons, and at the time of delivery were marked "not paid for want of funds." They were paid for at par, and the cash received placed in the treasurer's cash box from which the warrants were taken. Sometimes the warrants were deposited in the bank where the treasurer kept the city funds, and in such case they were treated and credited as a deposit of cash and the bank sold the warrants to its customers. It was held that *these transactions did not show an intent to pay the warrants*, and that the warrants were not invalid in the hands of persons to whom they were delivered by the city treasurer or their assignees. The reasons inducing the court in reaching this decision were that the warrants were paid out of order and before due and without legal authority to pay; that they were carried as cash; that the city received the face of the warrants on the disposal of them; that no defalcation by the treasurer was shown, and that the custom was known to the finance committee of the city and the city comptroller. In holding that the warrants were not paid, the court condemned the practice. *Bardsley v. Sternberg*, 18 Wash. 612, rev'g on re-hearing, 17 Wash. 243. See further on the subject, *Tacoma v. German American Sav. Bank*, 15 Wash. 294; *New York*

his original cause of action.¹ If the creditor accepts a warrant, he is charged with the duty of presenting it to the treasurer upon whom it is drawn, or of alleging facts which excuse presentment, before he can maintain an action upon it. As such an instrument is in effect an order by the debtor on himself, if presented and payment be refused, the town is liable instantly and without notice of non-payment.² A municipal corporation is not bound like a private person to seek its creditor to make payment of its debt. Hence no action can be maintained on a warrant or other obligation of the city *without a previous demand*.³ If payment of the warrant is not restricted

Security & Trust Co. v. Tacoma, 21 Wash. 303.

The decision of the Washington Supreme Court was followed by the Supreme Court of *Colorado* in *Manitou v. First Nat. Bank*, 37 Colo. 344; 86 Pac. Rep. 75. In that case the credit of a town being below par, its warrants were at a discount. Thereupon the town treasurer and certain of the citizens presented the condition of affairs to a bank and asked its assistance. An arrangement was made that the town should keep its account with the bank exclusively, and that when the treasurer brought deposits to the bank, the warrants of the town properly indorsed, stamped, and deposited by him should be received and carried as cash or credited to the treasurer's account as cash to an amount not exceeding ten thousand dollars. On the presentation of certain legal warrants the treasurer stamped them as "presented; no funds," had the holder indorse the warrants, and gave him a check on the bank. Thereupon the warrants were deposited by the treasurer in the bank. It was held that the transaction did not disclose a payment and satisfaction of the warrants; that they had not been cancelled and reissued at the time they were deposited with the bank, and that they were valid in its hands. Distinguishing *McConnell v. Simpson*, 36 Fed. Rep. 750.

A statute which authorizes the State treasurer to "invest" moneys belonging to a special fund in the purchase of warrants on the general fund, "at the face or par value thereof, without regard to interest due thereon," does not authorize him to tender the holders of general fund warrants the amount thereof out of the special fund and insist upon the holder of the general

fund warrants assigning the warrants to him for the benefit of the special fund. He can only go into the market and buy in competition with others, and the holder is entitled to have his general fund warrant marked "not paid for want of funds" when there are no moneys in the general fund, although the treasurer tenders him the amount out of the special fund. *State v. Young*, 18 Wash. 21. To the same effect, *State v. Bartley*, 41 Neb. 277.

¹ *Ex parte Willis*, 74 Ark. 498, citing text; *Benson v. Carmel*, 8 Me. 112; *Wiley v. Greenfield*, 30 Me. 452. But the acceptance of a warrant issued in full satisfaction of the claim has been held to estop the claimant from recovering the difference between the amount of the claim and the amount allowed, particularly where a memorandum is indorsed upon it that the amount allowed is in full satisfaction of the claim. *La Plata County v. Morgan*, 28 Colo. 322.

² *Speer v. Kearney County*, 88 Fed. Rep. 749, citing text; *Central v. Wilcoxsen*, 3 Colo. 566; *Benson v. Carmel*, 8 Me. 112; *Pease v. Cornish*, 19 Me. 191; *East Union v. Ryan*, 86 Pa. 459. In *Varnier v. Nobleborough*, 2 Me. 121, *Mellen, C. J.*, says: "No suitable reason can be given why a town should be subjected to the perplexity of costs of an action before the payee of an order will do his duty and request payment. . . . There is an implied engagement to conform to established usage and present the order for payment." As to mode of presentment see *Steel v. Davis County*, 2 G. Greene (Iowa), 469; *Campbell v. Polk County*, 3 Iowa, 467.

³ *Pekin v. Reynolds*, 31 Ill. 529; *Sibley v. Pine County*, 31 Minn. 201; *Taylor v. New York City*, 67 N. Y. 87,

to any particular fund, it is not necessary in an action against the city either to allege or prove *that the municipality has funds in the treasury* to pay it.¹ But it is otherwise when the warrant is payable only from a particular fund. To entitle the creditor in such a case to remedy by action or *mandamus*, it is necessary for the plaintiff to allege and prove affirmatively that there is money in the fund;² and this is also the rule when the warrants are only payable in the order of presentation and registration.³

The general rule is that the indorsee or transferee of a warrant may sue thereon in his own name as the holder of a chose in action against the municipality;⁴ but in some jurisdictions, under the prac-

rev'g 5 Daly (N. Y.), 485; O'Keeffe v. New York City, 176 N. Y. 297, aff'g 86 N. Y. App. Div. 626; Holihan v. New York City, 33 N. Y. Misc. 249; Monteith v. Parker, 36 Oreg. 170; Dalrymple v. Whittingham, 26 Vt. 345.

Mandamus will lie to compel the payment of a warrant duly issued. Wyker v. Francis, 120 Ala. 509; Somerville v. Wood, 115 Ala. 534, 537; Ward v. Forkner (Cal.), 50 Pac. Rep. 713; Forbes v. Grand County, 23 Colo. 344; Beeney v. Irwin, 6 Colo. App. 66; Neal Banking Co. v. Chastain, 121 Ga. 500; State v. Adams, 161 Mo. 349; Martin v. Clark, 135 N. Car. 178; Commonwealth v. Diamond Nat. Bank, 9 Pa. Super. Ct. 118. But in the *Federal Courts*, *mandamus* is an auxiliary remedy and will not issue until the rendition of a judgment in an action on the warrant. Chickaming v. Carpenter, 106 U. S. 663; Jerome v. Rio Grande County, 18 Fed. Rep. 873. See Index, *Mandamus*. In *Washington*, no action lies on a warrant and the remedy is exclusively by *mandamus* to compel payment. Questions of fact affecting the legality of the warrant may be tried in a proceeding or action for *mandamus*. Cloud v. Sumas, 9 Wash. 399. See also Abernethy v. Medical Lake, 9 Wash. 112. But in *Oregon* it is held that the remedy by *mandamus* under an ordinary city warrant is not exclusive, and the holder may sue the city thereon. Goldsmith v. Baker City, 31 Oreg. 249, criticising Cloud v. Sumas, 9 Wash. 399, and saying that that case stands alone in holding that remedy on an ordinary city warrant is exclusively by *mandamus*. To the effect that an action will lie on a city warrant, see Connersville v. Connersville Hydraulic Co., 86 Ind. 184.

As to the power of the city treasurer

to decline to pay a warrant on the ground of its illegality, see Neal Banking Co. v. Chastain, 121 Ga. 500; Evans v. Bradley, 4 S. Dak. 83; Bechtel v. Fry, 217 Pa. 591; Wolf v. Oller, 16 Pa. Co. Ct. Rep. 235; Shattuck v. Kincaid, 31 Oreg. 379, 399; Goldsmith v. Baker City, 31 Oreg. 249.

¹ Connersville v. Connersville Hydraulic Co., 86 Ind. 184; King v. Frankfort, 2 Kan. App. 530; International Bank v. Franklin County, 65 Mo. 105 (overruling Howell v. Reynolds County, 51 Mo. 154); Aull Sav. Bank v. Lexington, 74 Mo. 104; Heffleman v. Pennington County, 3 S. Dak. 162; Kane v. Hughes County, 12 S. Dak. 438.

² Board of Education v. Foley, 88 Ill. App. 470; s. c. 90 Ill. App. 494; Union County v. Mason, 9 Ind. 97; Travelers Ins. Co. v. Denver, 11 Colo. 434; Hockaday v. Chaffee County, 1 Colo. App. 362.

³ Brannon v. White Lake Township, 17 S. Dak. 83; Stewart v. Custer County, 14 S. Dak. 155; State v. Campbell, 7 S. Dak. 568. See also Western Town Lot Co. v. Lane, 7 S. Dak. 1; s. c. on rehearing, 7 S. Dak. 599.

⁴ Kearney County v. Irvine, 126 Fed. Rep. 689, 694; Crawford County v. Wilson, 7 Ark. 214; Mills Nat. Bank v. Herold, 74 Cal. 603, 607; People v. Hall, 8 Colo. 485; Germania Bank v. Trapnell, 118 Ga. 578, 580; Campbell v. Polk County, 3 Iowa, 467; Clark v. Des Moines, 19 Iowa, 199; Clark v. Polk County, 19 Iowa, 248; Emery v. Mariaville, 56 Me. 315; Int. Bank v. Franklin County, 65 Mo. 105; Dalrymple v. Whittingham, 26 Vt. 345. The question is much influenced by code or statutory provisions as to parties and forms of action modifying the common-law rules as to choses in

tice which there prevails, no right of action exists in the name of the assignee and he must sue in the name of the person to whom it is issued.¹ But when a judgment is recovered against the municipality on a warrant, the judgment as a general rule does not alter or destroy the priority of the holder of the warrant, or of the holders of other warrants on the fund. The remedies incident to the debt are carried into the judgment and are not lost or destroyed by merger;² and, on the other hand, the rendition of the judgment does not entitle the judgment creditor to any priority over warrants which are by law entitled to prior payment.³

action and the proper parties plaintiff to sue thereon. *Right of indorsee to sue or enforce by mandamus in his own name*, see *Justices v. Orr*, 12 Ga. 137; *Floyd County v. Day*, 19 Ind. 450; *Dively v. Cedar Falls*, 21 Iowa, 565; *Kelley v. Brooklyn*, 4 Hill (N. Y.), 263; *Moss v. Oakley*, 2 Hill (N. Y.), 265; *Clarke v. School District*, 3 R. I. 199.

¹ In *Smith v. Cheshire*, 13 Gray (Mass.), 318, it is held that the remedy of a holder of a warrant is by action in the name of the person to whom it is issued as in the ordinary case of a suit by the assignee of a chose in action; the assignee cannot sue in his own name. See also *Hyde v. Franklin County*, 27 Vt. 185; *Taft v. Pittsford*, 28 Vt. 286, 289. In *Pennsylvania*, it is held that an order to pay money out of the funds of a municipality is not a paper on which an action will lie, being neither a bill, nor check, nor contract, nor a satisfaction of the original indebtedness, nor a negotiable instrument upon which the holder may sue in his own name. *Dyer v. Covington Township*, 19 Pa. 200; *Allison v. Juniata County*, 50 Pa. 351; *East Union Township v. Ryan*, 86 Pa. 459; *Maneval v. Jackson Township*, 141 Pa. 426; *O'Donnell v. Philadelphia*, 7 Phila. (Pa.) 234; *Snyder v. Bovaird*, 122 Pa. 442; *Commonwealth v. Sholtis*, 24 Pa. Super. Ct. 487. But where a contractor for an improvement gives a materialman an order on the city and the city thereupon issues its warrants to the materialman, payable to him, the warrants so issued are evidences of indebtedness which will support an action by the payee who need not sue in the right of the contractor. *Coleman v. New Kensington*, 140 Fed. Rep. 684. In *Alabama*, warrants are not assignable so as to be made the foundation of an action by the transferee.

West v. Foreman, 21 Ala. 400; *Savage v. Matthews*, 98 Ala. 535, 537.

² *United States v. King*, 74 Fed. Rep. 493.

³ *Grand County v. People*, 16 Colo. App. 215; *First Nat. Bank v. Morton County*, 7 Kan. App. 739. When warrants are payable in the order of presentment, the fact that a warrant duly presented is sued on, and a judgment recovered thereon, does not destroy the priority of the holder and judgment creditor arising from the presentment. *United States v. King*, 74 Fed. Rep. 493. Similarly under such circumstances, the recovery of judgment does not enlarge the creditor's rights. He still remains only entitled to payment of his debt in the order of presentation, and does not acquire any right to payment in priority to warrants previously presented merely by the fact that he has recovered a judgment. *Grand County v. People*, 16 Colo. App. 215. When the statute requires the treasurer to disburse moneys only on warrants drawn by the local authorities, the order of the court directing payment is a sufficient warrant to the treasurer. *United States v. King*, 74 Fed. Rep. 493. When payment of a warrant is *guaranteed*, there can be no recovery against the guarantor until the warrant has been presented to the treasurer as required by statute and payment refused. *Germania Bank v. Trapnell*, 118 Ga. 578; *Rochford v. School Dist.*, 19 S. Dak. 435; *Greely v. McCoy*, 3 S. Dak. 218. A warrant was drawn in the ordinary form by the county board of education. It recited that the consideration for which it was issued was property "purchased for the use of the public schools of said county" and the money was ordered to be paid "out of the public funds for the

§ 855 (502). **Presumption of Validity and Liability.** — *County and city orders* signed by the proper officers are *prima facie* binding and legal. These officers will be presumed to have done their duty. Such orders make a *prima facie* cause of action. Impeachment must come from the defendant.¹

§ 856 (487, 503). **Negotiability; Rights of Bona Fide Holders.** — We have already discussed the implied power of a municipality to borrow money,² and in the next chapter, in treating of Municipal Bonds, we shall discuss the power of the municipality, without ex-

year 1899." Immediately before the signatures of the board were the words "issued by authority of and payment individually guaranteed by." It was held that the individual liability of the signers was as guarantors only and that they could not be sued as makers of the warrant; that the warrant was the instrument of the board and not of the makers as individuals; and that the guarantee was merely a collateral undertaking. *Germania Bank v. Trapnell*, 118 Ga. 578. On a sale of warrants the seller guaranteed that they were "genuine and legally issued." It was held that the guarantee covered any invalidity arising from lack of seals as required by statute. *Smeltzer v. White*, 92 U. S. 390.

¹ *Wall v. Monroe County*, 103 U. S. 74; *Thompson v. Searcy County*, 57 Fed. Rep. 1030; *Hamilton County v. Sherwood*, 64 Fed. Rep. 103, 107; *Speer v. Kearney County*, 88 Fed. Rep. 749, 756; *Rollins v. Rio Grande County*, 90 Fed. Rep. 575; *Lake County v. Keene Five-Cents Sav. Bank*, 108 Fed. Rep. 505, 515; *Coffin v. Kearney County*, 114 Fed. Rep. 518; *Kearney County v. Irvine*, 126 Fed. Rep. 689; *Coffee County Com'rs Court v. Moore*, 53 Ala. 25; *Grayson v. Latham*, 84 Ala. 546; *Mills National Bank v. Herold*, 74 Cal. 603; *Mulnix v. Mutual Ben. L. Ins. Co.*, 23 Colo. 81; *Lake County v. Standley*, 24 Colo. 1, 15; *San Juan County v. Oliver*, 7 Colo. App. 515; *Neal Banking Co. v. Chastain*, 121 Ga. 500; *People v. Johnson*, 100 Ill. 537; *Hamilton v. Newcastle & D. R. Co.*, 9 Ind. 359; *Floyd County v. Day*, 19 Ind. 450; *Connersville v. Connersville Hydraulic Co.*, 86 Ind. 184; *Clark v. Des Moines*, 19 Iowa, 199, 211; *Leavenworth County v. Keller*, 6 Kan. 510; *Walnut Township v. Jordan*, 38 Kan. 562; *Buffalo School-Furn. Co. v.*

School Dists., 7 Kan. App. 796; *Hubbell v. South Hutchinson*, 64 Kan. 645; *Taylor v. Chickasaw County*, 74 Miss. 23; *Cheaney v. Brookfield*, 60 Mo. 53; *Wright v. Kinney*, 123 N. Car. 618; *D County v. Sauer*, 8 Okla. 235; *Crawford v. Noble County*, 8 Okla. 450, 455; *Goldsmith v. Baker City*, 31 Ore. 249; *Frankl v. Bailey*, 31 Ore. 285; *Shattuck v. Kincaid*, 31 Ore. 379, 399; *Seton v. Hoyt*, 34 Ore. 266, 277; *Edinburgh Am. Mtge. Co. v. Mitchell*, 1 S. Dak. 593; *Merchants Nat. Bank v. McKinney*, 2 S. Dak. 106; *Heffleman v. Pennington County*, 3 S. Dak. 162; *Kane v. Hughes County*, 12 S. Dak. 438; *Stephens v. Spokane*, 11 Wash. 41, 47, quoting text; *State v. Mutty*, 39 Wash. 624; *Bigelow v. Washburn*, 98 Wis. 553; *School Dist. No. 3 v. Western Tube Co.*, 5 Wyo. 185; a. c. 13 Wyo. 304; *Appel v. State*, 9 Wyo. 187, 197.

Such debts "do not stand on the footing of those contracted under a special conditional grant of power." *Floyd County v. Day*, 19 Ind. 450, *supra*; *People v. Mead*, 24 N. Y. 114; *ante*, chap. xi. § 393; *supra*, § 856. When warrants are regular on their face, the city must assume the burden of proving that they were issued contrary to law without the adoption of an ordinance appropriating money to pay them. *Hubbell v. South Hutchinson*, 64 Kan. 645. But a paper purporting to be a municipal warrant does not prove itself. To establish a right to recovery thereon, it is necessary to prove the signature in the ordinary manner when the execution of the warrant is put in issue by the pleading. *Apache County v. Barth*, 177 U. S. 538, rev'g 6 Ariz. 13. See also *Robertson v. Alameda Library Trustees*, 136 Cal. 403.

² *Ante*, §§ 278-293.

press grant of authority to do so, to make and deliver *negotiable* instruments.¹ The question whether there is any implied power in the officers of a town, county, or city corporation to issue warrants or orders which shall be free from equities in the hands of holders has been disposed of by a long line of decisions which denies to these warrants or orders the principal attribute of negotiability, viz., freedom in the hands of *bona fide* transferees from equities in favor of the municipality. This result is arrived at as much by reason of the purpose or object intended to be attained by these instruments as by a consideration of the lack of power, inherent or implied, on the part of municipalities to make and issue negotiable instruments without clear statutory authority therefor. Such warrants or orders, drawn for ordinary municipal expenses, *are not intended to have the qualities of commercial paper*, but are instruments authorized for convenient use in conducting the current and ordinary business of the corporation and as a means of anticipating its ordinary revenue. It would overwhelm municipalities with ruin to hold that such warrants or orders have the qualities of negotiable paper, especially that quality which protects an innocent holder for value from defences of which he has no notice, actual or constructive. All holders of such warrants or orders, even when payable to order or bearer, stand in the shoes of the payee, and their rights and remedies are often essentially different from those of the holders of authorized negotiable municipal bonds. Such is the sound doctrine, and such is the doctrine of the authorities without exception.²

¹ *Post*, §§ 874-887.

² *The Floyd Acceptances*, 7 Wall. (U. S.) 666; *Carroll County v. United States*, 18 Wall. (U. S.) 71; *Nashville v. Ray*, 19 Wall. (U. S.) 468; *Wall v. Monroe County*, 103 U. S. 74; *Ouachita County v. Wolcott*, 103 U. S. 559; *Ottawa v. Nat. Bank*, 105 U. S. 342, 345; *Dist. of Columbia v. Cornell*, 130 U. S. 655, 661; *Shirk v. Pulaski County*, 4 Dillon C. C. 209, 213; *United States v. Miller County*, 4 Dillon C. C. 233; *Thompson v. Searcy County*, 57 Fed. Rep. 1030; *Watson v. Huron*, 97 Fed. Rep. 449; *Coleman v. New Kensington*, 140 Fed. Rep. 684; *Allen v. McCreary*, 101 Ala. 514; *Ex parte Willis*, 74 Ark. 498; *People v. County*, 11 Cal. 170; *People v. Gray*, 23 Cal. 125; *Ib.* 447; *Shakespear v. Smith*, 77 Cal. 638; *Bank of Santa Cruz County v. Bartlett*, 78 Cal. 301; *People v. Rio Grande County*, 11 Colo. App. 124; *People v. Hall*, 8 Colo. 485, citing text; *Goodwin v. East Hartford*, 70 Conn. 18, citing text; *People v. Johnson*, 100 Ill. 537; *Morrison v. Austin State Bank*, 213 Ill. 472; *Connersville v. Connersville Hydraulic Co.*, 86 Ind. 184; *Davis v. Steuben School Township*, 19 Ind. App. 694; *Hammond v. Evans*, 23 Ind. App. 501; *Clark v. Des Moines*, 19 Iowa, 199, 211, 214; *Clark v. Polk County*, 19 Iowa, 248; *First Nat. Bank v. Gates*, 66 Kan. 505; *Garfield Township v. Crocker*, 63 Kan. 272; *Sturtevant v. Liberty*, 46 Me. 457; *Emery v. Mariaville*, 56 Me. 315; *Perkins v. Milford*, 59 Me. 315, 316; *Hussey v. Sibley*, 66 Me. 192, 196; *Parsons v. Monmouth*, 70 Me. 262, 264; *Smith v. Cheshire*, 13 Gray (Mass.), 318; *Cheshire v. Howland*, 13 Gray (Mass.), 321, 323; *Miner v. Vedder*, 66 Mich. 101; *Field v. Highland Park*, 141 Mich. 69; *Matthis v. Cameron*, 62 Mo. 504; *School Dist. v. Stough*, 4 Neb. 357; *State v. Cook*, 43 Neb. 318; *Bartley v. State*, 53 Neb. 310, 335; *Halstead v.*

§ 857 (504). **Defences; Estoppel.**—A municipal corporation is *not estopped*, after a warrant upon its treasury has been issued, to set up the defence of *ultra vires*, or *fraud*, or *want or failure of consideration*.¹ A city may, where the remedy at law is inadequate,

Mayor, &c. of New York, 5 Barb. (N. Y.) 218, aff'd 3 N. Y. 430; Wright v. Kinney, 123 N. Car. 618; McPeeters v. Blankenship, 123 N. Car. 651; Capital Bank v. School Dist., 1 N. Dak. 479; Goose River Bank v. Willow Lake School Township, 1 N. Dak. 26, citing text; Erskine v. Steele County, 4 N. Dak. 339; Gilman v. Gilby, 8 N. Dak. 627; Crawford v. Noble County, 8 Okla. 450; Kellogg v. School Dist., 13 Okla. 285; Jack v. Wichita Nat. Bank, 17 Okla. 430; 89 Pac. Rep. 219; Goldsmith v. Baker City, 31 Oreg. 249, 252, citing text; Frankl v. Bailey, 31 Oreg. 285; Klamath County v. Leavitt, 32 Oreg. 437; Livingston's Appeal, 9 Pa. Super. Ct. 110; Livingston v. School Board, 15 Pa. Super. Ct. 358; Commonwealth v. Sholtis, 24 Pa. Super. Ct. 487, 489; Hubbell v. Custer City, 15 S. Dak. 55; Loomis v. Brown County, 15 S. Dak. 606; Hyde v. Franklin County, 27 Vt. 185; West Philadelphia Title Co. v. Olympia, 19 Wash. 150; Hubbard v. Lyndon, 28 Wis. 674; School Dist. v. Western Tube Co., 5 Wyo. 185. "To invest such documents with the character of commercial paper, so as to render them in the hands of *bona fide* holders absolute obligations to pay, however irregularly or fraudulently issued, is an abuse of their true character and purpose. It has the effect of converting a municipal organization into a trading company, and puts it in the power of corrupt officials to involve a political community in irretrievable bankruptcy. No such power ought to exist, and in our opinion no such power does legally exist, unless conferred by legislative enactment, either express or clearly implied." Per Mr. Justice Bradley in *Nashville v. Ray*, 19 Wall. (U. S.) 468, 477.

A city borrowed money on time and pledged as security checks or warrants on the city treasury. The pledgee sold the warrants before maturity of the loan. It was held that, inasmuch as the pledgee had no power to sell before default, the purchaser acquired no title to the warrants as against the city. *Nashville v. Ray*, 19 Wall. (U. S.) 468, 481. If a judgment against a

municipality is void, warrants issued to satisfy the judgment are also void. *State v. Tanner*, 45 Wash. 348.

By the Civil Code of *California*, the only equities to which a non-negotiable instrument is subject are "equities and defences existing in favor of the maker at the time of the indorsement" or transfer. Hence, it was held that a warrant delivered to a contractor as part payment of the contract price pursuant to architect's certificate duly made, and assigned by the contractor, is not affected by notices of claims of materialmen, &c. given after the assignment, nor is it affected by the subsequent default of the contractor in proceeding with the completion of the work. *Long Beach School Dist. v. Lutge*, 129 Cal. 409.

¹ *Thomas v. Richmond* (scrip to circulate as money), 12 Wall. (U. S.) 349; *Webster County v. Taylor*, 19 Iowa, 117; *Clark v. Des Moines*, 19 Iowa, 199; *Clark v. Polk County*, 19 Iowa, 248; *Hodges v. Buffalo*, 2 Denio (N. Y.), 110; *Halstead v. New York*, 3 N. Y. 430; *Brown v. Utica*, 2 Barb. (N. Y.) 104; *Anthony v. Adams*, 1 Met. (Mass.) 284, 286; *Commonwealth v. Sholtis*, 24 Pa. Super. Ct. 487 citing text; *Municipal Sec. Co. v. Baker County*, 33 Oreg. 338; *Hubbell v. Custer City*, 15 S. Dak. 55. See also cases cited above to § 856. The allowance of a claim by a county board is not final and conclusive. Such allowance is *prima facie* evidence of the correctness of the claim; "but," says *Kingman*, C. J., "the settlement of an account by the county board is not more sacred than a settlement made by individuals." The court therefore held, and properly so, that the allowance of a claim by the county was not an *adjudication* in the sense that it would conclude the county as to the amount allowed when sued upon the warrant drawn in pursuance of such allowance. *Leavenworth County v. Keller*, 6 Kan. 510; *Nashville v. Ray*, 19 Wall. (U. S.) 468; *Shirk v. Pulaski County*, 4 Dillon C. C. 209; *Cheeny v. Brookfield*, 60 Mo. 53; *post*, chap. xxxii. But see as to the rule in *New York*, where it is held that the allowance of a claim against a municipality

maintain a *bill in equity* to cancel warrants illegally issued.¹ Taxpayers may enjoin the issue of illegal warrants or scrip.² It has

is a *judicial determination* which cannot be reopened when once decided, if it is within the jurisdiction of the auditing board, *Osterhoudt v. Rigney*, 98 N. Y. 222; *Nelson v. Mayor, &c. of New York*, 131 N. Y. 4; *People v. Clarke*, 174 N. Y. 259. Warrants may, it seems, be *usurious*. *Clark v. Des Moines*, 19 Iowa, 199; *post*, § 867, note.

When warrants are issued for an illegal purpose to the knowledge of the payee, a recital therein that they are issued for a lawful purpose does not estop the city from disputing their validity in a suit by a *bona fide* indorsee for value who had no notice of the illegality; they are subject in his hands to all the equities of the city against the original payee. *Watson v. Huron*, 97 Fed. Rep. 449. When a county is prohibited from issuing warrants exceeding 85 per cent of the tax levy against which they are drawn, a warrant issued in excess thereof is void, and an indorsement on the warrant of a false statement of the amount of the levy which makes the warrant on its face appear to be within the statutory limit, does not estop the county from asserting its invalidity. *National Life Ins. Co. v. Dawes County*, 67 Neb. 40. See also *Bacon v. Dawes County*, 66 Neb. 191. A warrant was void because it was issued without consideration and was in excess of the corporate powers. It was held that neither the original issue of the warrant nor its renewal by an issue of new warrants after transfer to a *bona fide* holder estopped the village from denying liability when sued by a *bona fide* purchaser. *Field v. Highland Park*, 141 Mich. 69.

But it has been held that a municipality, by executing warrants apparently regular on their face and inducing lenders or investors to advance money or buy them, is estopped from denying their validity or effect on the ground that in their execution or in the preliminary proceedings which warranted their execution, its officers failed to comply with some law or rule of action relative to the mere time or manner of their procedure with which they might have complied, but which they carelessly or negligently disregarded, *e. g.*, issuing warrants at an adjourned or special session of a board. *Speer v. Kearney County*, 88 Fed. Rep.

749, 758. When, by promises to pay or other misrepresentations, a city induced the holders of warrants to refrain from acting until the debt for which void warrants were issued was barred by the statute of limitations, the city was held to be estopped to plead the invalidity of the warrants. *Hubbell v. South Hutchinson*, 64 Kan. 645.

¹ *Coffee County Com'rs Court v. Moore*, 53 Ala. 25, citing text; *Pulaski County v. Lincoln*, 9 Ark. 320; *Webster County v. Taylor*, 19 Iowa, 117; *Paris Tp. Trs. v. Cherry*, 8 Ohio St. 564; *Glastenbury v. McDonald*, 44 Vt. 450. In *Mississippi*, a board known as the board of police are authorized by law to audit and allow, upon due proof, all claims against the county; and counties in that State cannot be sued directly. The action of the board in allowing claims for matters of county charge, and in ordering warrants to issue therefor, is final and conclusive on the county, in the absence of fraud, until it is reversed or vacated. *Carroll v. Tishamingo Police Board*, 28 Miss. 38. But the weight of authority is otherwise. *Shirk v. Pulaski County*, 4 Dillon C. C. 209.

Effect of issuing new orders for old. See *Clark v. Des Moines*, 19 Iowa, 199; *Chemung Canal Bank v. Chemung County*, 5 Denio (N.Y.), 517; *Lake v. Williamsburgh Trustees*, 4 Denio (N.Y.), 520; *Shirk v. Pulaski County*, 4 Dillon, C. C. 209.

On warrants or orders the *statute of limitations* does not begin to run until payment is denied. *Justices of Bibb Co. Inferior Court v. Orr*, 12 Ga. 137. See *Carroll v. Tishamingo County Board of Police*, 28 Miss. 38; *De Cordova v. Galveston (bonds)*, 4 Tex. 470; *Kenosha v. Lamson (coupons)*, 9 Wall. (U. S.) 477; *supra*, § 856, note; *Baker v. Johnson County*, 33 Iowa, 151. In *Nebraska*, county warrants are not within the limitation statutes. *Brewer v. Otoe County*, 1 Neb. 373.

² *Colburn v. Chattanooga (Tenn.)*, 17 Am. Law Reg. n. s. 191; *post*, §§ 1579, 1586. A taxpayer cannot enjoin the payment of a county warrant where he has a complete and adequate remedy at law by appeal to the district court from the allowance of the claim. *Taylor v. Davey*, 55 Neb. 153, distinguishing *Ackerman v. Thummel*,

also been held that if money be paid under a void warrant issued for an unauthorized debt, such money may be recovered by the municipality as for money had and received to its use.¹

§ 858. **Transfer and Assignment; Equities between Successive Holders.**—Although ordinary municipal warrants are not negotiable instruments in the sense that a *bona fide* holder takes them free from any equities or defences available to the municipality, they are so far negotiable or assignable that they may be transferred by delivery when payable to bearer, or by indorsement and delivery when payable to a specified person or his order.² The capacity of being transferred by indorsement and delivery is the only negotiable characteristic which the courts concede to municipal warrants with any degree of unanimity. In other respects, whilst there are cases which have determined the rights and interests of the parties in municipal warrants upon the theory that they are negotiable in their character, except that they do not possess the attribute of freedom from defences or equity in favor of the maker in the hands of *bona fide* holders, yet these decisions seem to be contrary to the weight of authority. Even with

40 Neb. 95, where the issuance and payment of a county warrant was enjoined, but the statute did not authorize any appeal by a taxpayer whose only adequate remedy therefore was by injunction.

¹ National Surety Co. v. State Sav. Bank, 156 Fed. Rep. 21; Clark v. School Dist. No. 16, 84 Ark. 516; McDonald's Admx. v. Franklin County, 125 Ky. 205; 100 S. W. Rep. 861; Webster v. Douglas County, 102 Wis. 181. But no recovery back can be had from *bona fide* purchasers of illegal or fraudulent warrants who took them in good faith and collected the money in ignorance of the fraud or illegality. Webster v. Douglas County, 102 Wis. 181.

² Nashville v. Ray, 19 Wall. (U. S.) 468, 478; Wall v. Monroe County, 103 U. S. 74; Watson v. Huron, 97 Fed. Rep. 449; Mills Nat. Bank v. Herold, 74 Cal. 603; Germania Bank v. Trapnell, 118 Ga. 578, 580; Wright v. Kinney, 123 N. Car. 618; Crawford v. Noble County, 8 Okla. 450; Heffleman v. Pennington County, 3 S. Dak. 162. "Custom and usage may have so far assimilated them to regular commercial paper as to make them negotiable, that is, transferable by delivery or indorse-

ment. This quality renders them more convenient for the purposes of the holder, and has undoubtedly led to the idea so frequently, but as we think erroneously, entertained, that they are invested with that other characteristic of commercial paper,—freedom from all legal and equitable defences in the hands of a *bona fide* holder." Per Mr. Justice Bradley in Nashville v. Ray, 19 Wall. (U. S.) 468, 478. But in an action on a warrant, the plaintiff's possession of a warrant which is payable to another person "or order," is not sufficient to sustain a judgment for the plaintiff without indorsement or other proof of title. School Dist. v. Reeve, 56 Ark. 68.

In People v. Gray, 23 Cal. 125, it was held that a warrant drawn by the county auditor upon the treasurer payable to *A or bearer* does not possess the quality of negotiable paper so as to make it transferable by delivery. See also Martin v. San Francisco, 16 Cal. 285. But this decision seems to have been departed from in the later case of Mills Nat. Bank v. Herold, 74 Cal. 603, 606, and is in conflict with the general course of decision.

respect to the transfer of municipal warrants it has been held that the legislature may deprive them of all attributes of negotiability as by enacting that warrants shall only be paid to the payee named in them, his legal representative or his assignee, by a writing in a form prescribed by statute, and that no bank assignment shall confer any title.¹ Ordinary warrants drawn by one officer upon another officer of the same corporation *are not bills of exchange*, as such bills involve the idea of two parties, but are orders by the corporation on itself, — mere directions to the treasurer to pay the amount to the bearer.² When a warrant *is payable from a specific fund*, it is further deprived of any negotiable character by reason of the fact that its payment is dependent upon the sufficiency of the fund, and it does not constitute an absolute and certain promise to pay such as is required to bring an instrument within the rules of the law merchant applicable to bills of exchange and promissory notes.³ The fact that warrants are transferable by indorsement and delivery does not, according to the weight of authority, confer upon the person in whose possession they may be the right and power to transfer them free from equities affecting his title. In other words, not only are municipal warrants subject in the hands of a *bona fide* purchaser to any equities and defences in favor of the municipality, but the title of such *bona fide* purchaser is also subject to any equities in favor of persons, who may have a better right or title thereto than the person from whom

¹ *Isenhour v. Barton County*, 190 Mo. 163. In this case the court did not consider whether the statute applied to warrants issued before as well as after its enactment. Under this statute an assignment which is not made in the statutory form is ineffectual to transfer legal title. *State v. Harrison*, 99 Mo. App. 57; 72 S. W. Rep. 469. But although the assignment is in blank and not in the form required by the Missouri statute, and notwithstanding the provision of the statute that "no blank indorsement shall transfer any right to a warrant," the assignee acquires by delivery and possession of *indicia* of ownership an equitable title which will sustain an action against a wrong-doer for conversion of the warrant. *Craig v. Mason*, 64 Mo. App. 342.

² *Texas Police Jury v. Britton*, 15 Wall. (U. S.) 566; *Nashville v. Ray*, 19 Wall. (U. S.) 468; *Ex parte Willis*, 74 Ark. 498; 86 S. W. Rep. 301, quoting text; *Dana v. San Francisco*, 19 Cal. 486; *Justices v. Orr*, 12 Ga. 137; *People v. Johnson*, 100 Ill. 537; *Clark v.*

Polk County, 19 Iowa, 247; *Hasey v. White Pigeon Beet Sugar Co.*, 1 Doug. (Mich.) 190; *Miner v. Vedder*, 66 Mich. 101; *State v. Cook*, 43 Neb. 318; *Fairchild v. Ogdensburgh, C. & R. R. Co.*, 15 N. Y. 337; *Bull v. Sims*, 23 N. Y. 570, 572; *Miller v. Thomson*, 3 Man. & Gr. 576.

³ *Bayerque v. San Francisco*, 1 McAllister, 175; *Martin v. San Francisco*, 16 Cal. 285; *Morrison v. Austin State Bank*, 213 Ill. 472, rev'g 113 Ill. App. 651; *Delfosse v. Metropolitan Nat. Bank*, 98 Ill. App. 123. When the statute provides that instruments in writing whereby one person acknowledges any sum to be due to any other, shall be taken to be due and payable to the person to whom such writing is made and assignable by indorsement as bills of exchange are, and authorize the assignee to sue in his own name, a city warrant is, by virtue thereof, a negotiable instrument, and an allegation of consideration is not necessary in an action thereon. *Travelers Ins. Co. v. Denver*, 11 Colo. 434.

he receives them.¹ But although the title of a *bona fide* purchaser is subject to equities in favor of persons having a prior right thereto, if the holder or owner of a warrant permits a situation to arise which justifies the later purchaser in relying on the *indicia* of ownership in the person from whom he receives the warrant, the true owner will be estopped to assert his superior right.² In some cases it has

¹ After a warrant had been indorsed in blank, it was lost by the payee and passed into the hands of an innocent purchaser for value from the finder. It was held that the purchaser acquired no title to the warrant and could not recover. *People v. Johnson*, 100 Ill. 537. A warrant issued to a co-partnership was accepted in payment of an individual debt of one of the partners. The person so receiving it transferred it to an innocent purchaser. It was held that the title of the latter was subject to the equities existing in favor of the co-partnership. *Morrison v. Austin State Bank*, 213 Ill. 472, rev'g 113 Ill. App. 651. Municipal orders or warrants were pledged and were retained by the pledgor subject to the right of the pledgee. It was held that a person who purchased them from the payee without notice, took them subject to the equities of the pledgee. *Miner v. Vedder*, 66 Mich. 101. Where county warrants were unlawfully received and misappropriated by a person who had no right to receive them, it was held that a purchaser from that person acquired no title to them. *First Nat. Bank v. Gates*, 66 Kan. 505. Where a county treasurer was forbidden by law from dealing in warrants and instead of cancelling a warrant marked it "not paid" and sold it, it was held that a subsequent holder who purchased it without notice of the illegality did not stand in any better position than the person to whom the treasurer sold the warrant, and could not recover on the treasurer's bond. *McConnell v. Simpson*, 36 Fed. Rep. 750.

But in *Fidelity Trust Co. v. Palmer*, 22 Wash. 473, a contrary view was adopted by the Supreme Court of Washington; and it was held that, so far as any question involving title is concerned, a city warrant is governed by the rules applicable to negotiable paper. Hence, if a city warrant is indorsed in blank and is sold to a *bona fide* purchaser by one to whom it has been temporarily entrusted by its real owner,

the purchaser acquires title thereto. *Gordon, C. J.*, said; "The great weight of authority is that a county or city warrant possesses all of the qualities of negotiable paper but one, namely, that it is open to any defences that might have been made to the claim upon which it is founded, for all purposes involving its title it must be treated as negotiable. *Union Sav. Bank v. Gelbach*, 8 Wash. 497; *Dist. of Columbia v. Cornell*, 130 U. S. 655; *Ferguson v. Staples*, 82 Me. 159; *Garvin v. Wiswell*, 83 Ill. 215; *Crawford County v. Wilson*, 7 Ark. 214. Such being its character, the question is not affected by the fact that Stevens had no right to sell the warrant." Much may be said in favor of this view, but an examination of the cases cited shows that they fall short of supporting the broad principle upon which the court relied, and that they do not go further than to lay down the rule that a municipal warrant has such negotiable characteristics as to permit its transfer by indorsement and delivery, except in the case of *Ferguson v. Staples*, 82 Me. 159, *supra*, where the purchaser of a void municipal warrant was held to be entitled to recover from the vendor thereof.

It has been held that if a warrant is assigned to two different persons, both acting in good faith, the assignee who first gives notice of his claim has the prior and better right to it, though his assignment is the later in date. *Jack v. Wichita Nat. Bank*, 17 Okla. 430; 89 Pac. Rep. 219, citing *Spain v. Hamilton's Admrs.*, 1 Wall. (U. S.) 604; *Methven v. Staten Island L. H. & P. Co.*, 66 Fed. Rep. 113; *Dearle v. Hall*, 3 Russell, 1; *Loveridge v. Cooper*, 3 Russell, 30.

² *Delfosse v. Metropolitan Nat. Bank*, 98 Ill. App. 123. A contractor assigned a contract with a township to a bank to secure a debt. The bank allowed him to retain the original contract, and he agreed to collect the contract price and remit it to the bank. The contractor obtained a warrant

been held that warrants have so far the characteristics of negotiable paper as to render persons transferring them by indorsement *liable as indorsers*.¹ More recently the Supreme Court of Maine has held that if a warrant is passed by a debtor to his creditor to satisfy a debt, both parties acting in good faith, the transaction is not payment if at the time it was worthless because made in excess of the corporate powers,² and same court has also held that the indorsement and transfer of an overdue town order by the payee for value raises a contract on his part that the order is genuine and is the legal promise of the town that it purports to be; and that if it proves to

from the township in payment of the debt, and transferred it to a third person for value without notice. It was held that the bank by permitting the contractor to retain the original contract and other *indicia* of ownership was estopped to assert its superior right to the warrant, and that the equities of the second assignee should prevail. *Washington Township v. First Nat. Bank*, 147 Mich. 571.

¹ *Campbell v. Polk County*, 3 Iowa, 467; *Fairchild v. Ogdensburgh, C. & R. Co.*, 15 N. Y. 337; *Hodges v. Schuler*, 22 N. Y. 114; *Bull v. Sims*, 23 N. Y. 570. In the *New York* decisions it is to be observed that this liability was based upon the theory that the warrant, though not a bill of exchange, was the promissory note of the municipality. In *Miller v. Thomson*, 3 Man. & Gr. 576, the Court of Common Pleas in England had determined that an instrument in the form of a bill of exchange drawn on a joint stock bank by the manager of one of its branches by order of the directors might be declared upon as a promissory note. The court said that there were not two distinct parties as drawer and drawee, which was essential to constitute a bill of exchange, and that being so the only alternative was that the instrument was a promissory note, and properly declared upon as such. In *Fairchild v. Ogdensburgh, C. & R. Co.*, 15 N. Y. 337, the president of a corporation made a warrant on its treasurer in favor of the corporation. It was held, following the English decision, that as both the drawer of the warrant or order, and the party to whom it was addressed represented the corporation, neither incurred nor were expected to incur any personal obligation, the paper lacked the essential elements of a bill of exchange, and was simply the

promissory note of the corporation and properly declared upon as such. In *Bull v. Sims*, 23 N. Y. 570, an ordinary warrant drawn by the mayor of a city upon the city treasurer was held to be in the nature of a negotiable promissory note and to be properly treated as such for the purpose of sustaining the liability of the indorser.

In that case, the action was by an indorsee against the defendant as indorser of the following instrument:

MILWAUKEE, Aug. 1, 1859.

The treasurer will, on or before the 1st day of February next, pay to the order of E. Sims, fifty dollars, *out of any funds belonging to the city not before specially appropriated*, the same having been this day allowed for dredging, and chargeable to the general city fund.

H. L. PAGE, Mayor.

R. R. LYNCH, Clerk.

It was held that the defendant incurred the responsibility of an indorser of negotiable paper, and that the plaintiff was not bound to show the existence of funds in the city treasury sufficient to pay the warrants, and not specially appropriated at the time of its maturity. But in *Keller v. Hicks*, 22 Cal. 457, the court held that county warrants are merely a means prescribed by law for drawing money from the county treasury and are not negotiable paper, and that the assignor by indorsement of a county warrant is not liable to the assignee as an indorser of negotiable paper, nor as an assignor of an instrument in writing promising to pay money or acknowledging money to be due under a statute relating to bonds and bills.

² *Hussey v. Sibley*, 66 Me. 192.

be invalid, the transferee may either sue the indorser on his contract and recover the contents of the order according to its tenor, or may sue for the consideration paid and interest thereon.¹

§ 859. **Order of Payment.**—It is within the power of the legislature to prescribe *the order of payment of warrants*, — *e. g.*, that they be paid in the order of issuance, or the order of presentation and registration;² and a statutory provision which is in force at the time when warrants are issued that they shall be paid in a prescribed manner, — *e. g.*, the order of presentation and registration, — *creates a contract for precedence* with the warrant holders which cannot be impaired by subsequent legislation.³ The date of presentation and registration establishes the right of precedence of warrants when

¹ *Ferguson v. Staples*, 82 Me. 159. In this case, the court defined the contract of the indorser of due negotiable paper and sustained the liability of the indorser of the warrant or order on the principles applicable thereto. *Has-kell, J.*, said, "Town orders, although not commercial paper to the extent that transfer to an innocent holder shuts out equitable defences, may be negotiable in form under the same rules of law that would be applicable to negotiable paper," citing *Parsons v. Monmouth*, 70 Me. 262, which, however, only holds that town orders are so far negotiable as to pass by indorsement and delivery, and that they may be sued on by the transferee. It has been held that if the purchaser of a warrant has a cause of action against the vendor on the ground that the warrant is void, being issued for a claim not legally allowable, the cause of action accrues immediately upon the purchase, and the statute of limitations commences to run from that date, in the absence of any actual misrepresentation or fraudulent concealment, other than silence as to the consideration for the warrant. *Stewart v. Bank of Indian Territory*, 68 Kan. 755.

² *First Nat. Bank v. Arthur*, 10 Colo. App. 283; *Raton Water Works Co. v. Raton*, 9 N. Mex. 70. Prior to the enactment of the *Washington* statute requiring the presentation and registration of warrants, it was held that it was the duty of the treasurer to pay warrants drawn upon a particular fund in the order either of their date or the time of presentation for payment. *La France Fire Engine Co. v.*

Davis, 9 Wash. 600. See also *Bardsley v. Sternberg*, 18 Wash. 612. An ordinance which directs that warrants shall be paid in the order of presentation and registration was held not to impair the obligation of the contract in warrants issued prior to its adoption. *First National Bank v. Arthur*, 10 Colo. App. 283. When a city ordinance provided that when any warrant should be presented to the treasurer for payment, and if there were no funds in his hands he should register such warrant, indorse on its face the date and time of such registry, and the warrant should draw interest therefrom, it was held that it was the duty of the treasurer to pay such warrants in the order of their registration, although neither the charter nor the ordinances of the city expressly prescribed the order in which the treasurer should pay city warrants. *First National Bank v. Arthur*, 10 Colo. App. 283.

³ *Phillips v. Reed*, 109 Iowa, 188, 194, s. c. 107 Iowa, 331; *Eidemiller v. Tacoma*, 14 Wash. 376, 383 (disapproving *Esser v. Spaulding*, 17 Nev. 289).

When warrants are payable from a special fund in the order of their presentation, the fact that the city provides for an issue of refunding warrants at a reduced rate of interest payable from the same fund, and thereby places in the fund money sufficient to immediately pay the entire original issue, does not violate any right of the holder of the original warrants in the absence of a provision therein for a stated period of payment. *Kenyon v. Spokane*, 17 Wash. 57, 62.

the statute so prescribes,¹ and the municipality owes the holder of the warrant a duty to pay in that order, and for a breach of that duty the warrant holder is entitled to redress by action against the municipality.²

The question *whether each year's revenue is to be treated as a separate fund* for the payment of warrants during that year to the extent at least of providing for the year's necessary expenses, thereby postponing or precluding the payment therefrom of warrants drawn in previous years, is necessarily to be determined by the legislation of the particular State, or by the charter or statute applicable to the particular city.³

¹ *Shannon v. Huron*, 9 S. Dak. 356. Wash. 500. See also to the same effect *First Nat. Bank v. Arthur*, 10 Colo. App. 283.

² In *Iowa*, under the statutes and practice in that State, payment in the order of presentation applies only as between warrants issued in a given year. *Phillips v. Reed*, 109 Iowa, 188; s. c. 107 Iowa, 331. As to the rule in *California*, under the constitution and statutes of that State, see *Shaw v. Statler*, 74 Cal. 258; and § 210, *ante*, as to the constitutional limitation of indebtedness based upon income and revenue. In *Missouri*, a warrant does not become unenforceable merely because the available funds for its payment arising from the year's revenue are exhausted before it is reached for payment. It is payable out of any surplus revenue in the hands of the treasurer that may arise in subsequent years after payment of the current expenses for these years; the old warrants are payable from such surplus revenue in the order of presentation and not *pro rata*. *State v. Johnson*, 162 Mo. 621. See also *Wilson v. Knox County*, 132 Mo. 387. In *South Dakota*, it is held that when the statute requires the payment of warrants in the order of their presentation and registration, the moneys accruing yearly to the particular fund must be so applied and cannot be used for the payment of claims out of order, even for current necessary expense. *Freeman v. Huron*, 10 S. Dak. 368. See also *State v. Campbell*, 7 S. Dak. 568. A city cannot divide the amount levied for general city purposes into separate funds appropriated to the payment of warrants issued in any particular year so as to deprive the holder of general fund warrants issued in a prior year of

³ *Mason v. Purdy*, 11 Wash. 591; *Lorence v. Bean*, 18 Wash. 36; *Bardsley v. Sternberg*, 18 Wash. 612; *Eidemiller v. Tacoma*, 14 Wash. 376; *Potter v. New Whatcom*, 20 Wash. 589; *Northwestern Lumber Co. v. Aberdeen*, 22 Wash. 404; *N. Y. Sec. & Trust Co. v. Tacoma*, 21 Wash. 303; *Shannon v. Huron*, 9 S. Dak. 356.

When a statute directs that warrants shall be paid in the order of their issuance, and another statute provides that warrants shall draw interest from the date of presentation and non-payment, a warrant holder is entitled to the payment of his warrant *and interest* in the order of the issue, although payment of interest may prevent the payment of subsequent warrants held by others. *State v. St. John*, 30 Wash. 630. A city may be enjoined from paying warrants out of their order. *Hull v. Ames*, 26 Wash. 272. In *Washington* it has been held that the remedy of a warrant holder in case of refusal to pay his warrant in its order, is by *mandamus*. *Cloud v. Sumas*, 9 Wash. 399; *La France Fire Engine Co. v. Davis*, 9

§ 860 (505). **Warrants Payable out of a Particular Fund.** — It is apparent from what has been said that the means provided by law for the payment of the debt control the manner in which the warrants drawn to pay it shall be paid. If the debt be *payable from the general funds* of the municipality, then the warrants should be drawn payable from the general funds.¹ And it has been held that when a debt is incurred, which is a *general liability*, the city cannot, without statutory authority, direct in the *warrant that such debt shall be paid from a specified fund, e. g. "expense fund," or "advertising fund,"* which is created by it for its own convenience, and not by direction of law. If warrants are so drawn, the reference to the fund will be regarded either as surplusage, or as describing the purpose for which the debt was created, and the warrants will be held to be payable from the

the right to use his warrants in payment of his taxes. *Western Town Lot Co. v. Lane*, 7 S. Dak. 1. In *Washington*, it is held that a statute declaring that county taxes shall be based upon estimated county expenses for the ensuing year, is not to be construed as restricting the funds arising from the annual tax levy in any given year to the payment only of such obligations as may be incurred during the fiscal year following the levy. *Mason v. Purdy*, 11 Wash. 591; *State v. Hopkins*, 12 Wash. 602; *State v. Hopkins*, 14 Wash. 59; *Eidemiller v. Tacoma*, 14 Wash. 376, 380.

In *State v. Cornell*, 60 Neb. 694, the court held that legislative authority to draw money for the satisfaction of just claims is not extinguished by the wrongful refusal of the auditing officers to act within the proper time, a constitutional provision that "all appropriations shall end with such fiscal quarter" being made on the assumption that the authority given will be exercised in favor of all persons having valid claims on the treasury. Where, therefore, a State officer refused to approve a claim before the end of the fiscal quarter, the court granted a *mandamus* to compel the issuance of a warrant for the amount of the claim.

When warrants are payable in the order of presentment for registration, it was held that the holder of a warrant, which is one of a large number registered at the same time, may require the *distribution of such funds as are available* among the different warrant holders, and that it is not necessary that there should be sufficient funds on

hand to pay all the warrants simultaneously registered. *United States v. Macon County Court*, 75 Fed. Rep. 259. To the same effect, *Potter v. Black*, 15 Wash. 186. But in *State v. Grant*, 31 Oreg. 370, it was held that when the city charter requires the treasurer to receive and safely keep all moneys and pay the same out on warrants and orders, he is under no duty and cannot be compelled to make a partial payment on a warrant, though he is directed to do so by the city council. He is entitled to have the warrant delivered to him as evidence of the payment.

¹ A city order "payable out of the general fund not otherwise appropriated," is payable out of the general funds of the municipality. *Reeve v. Oshkosh*, 33 Wis. 477. A school district order "payable out of any moneys in the school fund, not otherwise appropriated," is an order payable out of the general funds of the school district, and is not payable from a special fund. *Brown v. Jacobs School Board*, 77 Wis. 27. A town order in similar terms is payable from the general funds of the town. *Brown v. Jacobs*, 77 Wis. 29.

An instrument in this form: "City of Brooklyn, ss. To the City Treasurer. Pay A. L., or order, \$1500 for award No. 7, and charge to Bedford road assessment, &c.," held not to be payable out of any special fund. *Kelley v. Brooklyn*, 4 Hill (N. Y.), 263. An order or warrant of a city concluding with the words "and charge the same to the account of Union Avenue" is payable out of the particular fund indicated, and is not a general claim against the corporation. *Lake v.*

general funds of the municipality.¹ But when a city has authority to create and contract with reference to a *particular fund*, and to make the debt payable therefrom only, or when by law the debt or obligation is chargeable against, and payable only out of the particular fund, a warrant drawn on such fund is chargeable against and *payable from that fund only*, and there can be no recovery from the city, unless there is some breach of duty on its part.² And if by law a

Williamsburgh, 4 Denio (N. Y.), 520. A city warrant was drawn payable "out of the 20th Street sewer fund." It was held that this was a direction to the city treasurer to make payment out of the particular fund which by statute was required to be raised by assessment, and that recovery could only be had in the event that there was money in the fund to pay it. *Travelers' Ins. Co. v. Denver*, 11 Colo. 434.

But a distinction must be observed between orders payable out of a particular fund and those which evidence a general corporate liability, but are directed to be charged to a particular account. *Clark v. Des Moines*, 19 Iowa, 199, 222. See also *Bayerque v. San Francisco*, 1 McAllister, 175; *Campbell v. Polk County*, 3 Iowa, 467; *Union County v. Mason*, 9 Ind. 97; *Pease v. Cornish*, 19 Me. 191; *Montague v. Horan*, 12 Wis. 599. An order payable "out of any funds belonging to the city not before specifically applied, the same having this day been allowed for dredging and chargeable to general city fund," is a direction to make payment out of the general funds of the city. *Bull v. Sims*, 23 N. Y. 570, cited more fully *supra*, § 858, note.

¹ *Carter v. Tilghman*, 119 Cal. 104; *Dakota County v. Bartlett*, 67 Neb. 62; *Abrahams v. Omaha*, 80 Neb. 271; 114 N. W. Rep. 161; *Kane v. Hughes County*, 12 S. Dak. 438; *Montague v. Horan*, 12 Wis. 599; *Marvin v. Jacobs*, 77 Wis. 31; *School Dist. No. 3 v. Western Tube Co.*, 5 Wyo. 185; s. c. 13 Wyo. 304. A county order was drawn payable "out of the unappropriated money belonging to said county, for jail purposes." By law the entire funds of the county were created as one fund out of which all liabilities were to be discharged. It was held that the county was generally liable; that it could not plead lack of money in a specified fund; and that under the circumstances the words "for jail purposes" were to be regarded

as descriptive of the purpose for which the debt was created. *Montague v. Horan*, 12 Wis. 599. When the general fund is the only lawful source of payment for the publication of a tax list, and there is no "advertising fund" known to the law, a warrant drawn on the "advertising fund" is in effect drawn against the general fund. *Dakota County v. Bartlett*, 67 Neb. 62; *Kane v. Hughes County*, 12 S. Dak. 438. When the warrant is by law payable from any funds in the treasurer's hands applicable thereto, the municipality cannot, by dividing the general fund against which it is chargeable into several separate funds, defeat payment. The entire fund remains applicable under the law, and so long as any of that money remains in the hands of the treasurer, the warrants must be paid therefrom. *Carter v. Tilghman*, 119 Cal. 104.

² *Campbell v. Polk County*, 49 Mo. 214; *Cook v. Putnam County*, 70 Mo. 668; *Moody v. Cass County*, 74 Mo. 307; s. c. 85 Mo. 477; *Campbell v. Polk County*, 76 Mo. 57; *Loomis v. Brown County*, 15 S. Dak. 606; *German American Sav. Bank v. Spokane*, 17 Wash. 315; *Wilson v. Aberdeen*, 19 Wash. 89; *Northwestern Lumber Co. v. Aberdeen*, 22 Wash. 404.

If the particular fund against which the warrant is drawn has been exhausted without the fault or neglect of the city, and no means of replenishing the fund exist, there can be no recovery. The general fund is not liable. *Cook v. Putnam County*, 70 Mo. 668; *Moody v. Cass County*, 74 Mo. 307; s. c. 85 Mo. 477; *Campbell v. Polk County*, 76 Mo. 57; *Northwestern Lumber Co. v. Aberdeen*, 22 Wash. 404.

If a claimant against a special fund has neglected to present his claim until the fund has been lawfully exhausted, he cannot compel a warrant to be issued against that fund for the amount of his claim. *Parks v. Hays*, 11 Colo.

particular claim *is to be paid out of a special fund*, a warrant or order issued therefor should be made payable out of such fund; if made payable from the treasury generally by the officers issuing it, the corporation is not bound by their act.¹ But a city which contracts with reference to a special fund, and issues a warrant payable therefrom, is under the duty of performing all the legal steps necessary to the raising of the fund.² In connection with the obligation of a city arising from contracts entered into by it, we have already discussed³ the duty which it owes persons contracting with it to create the fund for the payment of an obligation which is payable therefrom exclusively, the circumstances under which it becomes generally liable for the failure, neglect or refusal to perform that duty, and the remedies available to the creditor. We have there pointed out the divergence in the decisions of the different States on these subjects. A warrant being simply a means of paying the debt, what has there been said applies to the rights and remedies of the holders of warrants.⁴ If moneys belonging to the particular fund have

App. 415. It has been held that when a warrant is payable only from a fund to be provided by a special assessment, the sufficiency of the assessment to create the fund is to be determined in the proceeding to levy it before the city council and by appeal from the determination of the city council. The mere fact that the special assessment levied is not sufficient to meet the warrant does not render the city liable for the difference out of its general fund. *Potter v. New Whatcom*, 25 Wash. 207. If a warrant is drawn on a special fund, e. g., a street improvement fund, pursuant to the terms of the contract with the payee, and the city has power to contract to pay either out of the general fund or out of a special fund, the city may provide by ordinance moneys to meet a deficiency of the special fund out of the general funds of the city, and the special fund warrants will be entitled to payment therefrom. *Quaker City Nat. Bank v. Tacoma*, 27 Wash. 259.

¹ *Tippecanoe County v. Cox*, 6 Ind. 403; *Campbell v. Polk County*, 49 Mo. 214; *Boro v. Phillips County*, 4 Dillon C. C. 216, 223, citing text; *Johnson v. New Orleans*, 46 La. An. 714; *Fernandez v. New Orleans*, 46 La. An. 1130.

² *Warner v. New Orleans*, 167 U. S. 467, 478; *New Orleans v. Warner*, 175 U. S. 120, 129; *Pine Tree Lumber Co.*

v. Fargo, 12 N. Dak. 360. See *Index. Contractor; Contracts; Local Improvements*. It has been held that when a city contracts with reference to a special fund to be derived from an assessment, its obligation is only to exercise diligence in the collection of the fund and it cannot bind itself to raise the fund within a certain time. *Stephens v. Spokane*, 14 Wash. 298. If an assessment to provide a special fund for the payment of warrants is invalid, a holder of a warrant is entitled to a re-assessment if it can be made, and may enforce that right by *mandamus*. *Waldron v. Snohomish*, 41 Wash. 566.

³ *Ante*, § 827.

⁴ In *Washington*, warrants for a city improvement payable out of a special fund cannot be collected out of a general fund of the city, although the remedy to collect from the special fund is lost without the neglect of the city. *Soule v. Seattle*, 6 Wash. 315; *Wilson v. Aberdeen*, 19 Wash. 88; *Northwestern Lumber Co. v. Aberdeen*, 22 Wash. 404; *Kenyon v. Spokane*, 17 Wash. 57; *Stephens v. Spokane*, 14 Wash. 298, aff'g 44 Pac. Rep. 541; *Potter v. New Whatcom*, 25 Wash. 207. See to the same effect, *Turner v. Guthrie*, 13 Okla. 26; *Theis v. Washita County*, 9 Okla. 643; *Diggs v. Lobitz*, 4 Okla. 232; *Denver v. Nat. Exchange Bank*, 34 Colo. 387. The holder of the

been received by the city, a diversion of these moneys from the fund is a breach of contract for which the city is liable to the holder of warrants drawn on the fund.¹ Thus payment of warrants drawn on the fund and issued or presented subsequent in time to other warrants drawn thereon is, when the warrants are payable in the order of their issuance or presentation, a misappropriation rendering the city generally liable upon the earlier warrants, if the effect of such payments is to exhaust the fund and leave the prior warrants unpaid.²

warrant may compel the municipal officers to proceed to collect the fund by *mandamus*. If the remedy by *mandamus* is not adequate, a court of equity has power to make and enforce the assessment. *German American Sav. Bank v. Spokane*, 17 Wash. 315. No general liability attaches to the city in respect of a warrant so long as it is possible to raise the special fund. Mere neglect or delay on the part of the city which does not defeat the collection of the fund does not render it generally liable. *Stephens v. Spokane*, 14 Wash. 298; *German American Sav. Bank v. Spokane*, 17 Wash. 315 (overruling *McEwan v. Spokane*, 16 Wash. 212). When the city has reached its limit of debt under the constitution, a general liability cannot be imposed upon it in respect of warrants payable from a special fund. *German American Sav. Bank v. Spokane*, 17 Wash. 315.

In *Oregon*, when a warrant is payable from a special fund to be raised by assessment, the failure of the municipality to comply with any of the requirements of the charter to supply such fund, or any unreasonable delay in collecting money to pay for the improvements, gives the contractor a right of action *ex delicto* against the city for damages, notwithstanding a provision in the contract that he shall look for payment to such special fund only, and that he will not require the municipality to pay the same out of any other fund. *Jones v. Portland*, 35 Oreg. 512.

¹ *State v. Pillsbury*, 30 La. An. 705; *Valleau v. Newton County*, 81 Mo. 591; *Ayres v. Thurston County*, 63 Neb. 96; *Thurston County v. McIntyre*, 75 Neb. 135; *Pine Tree Lumber Co. v. Fargo*, 12 N. Dak. 360; *Red River Valley Nat. Bank v. Fargo*, 14 N. Dak. 88; *Potter v. New Whatcom*, 20 Wash.

589; *Quaker City Nat. Bank v. Tacoma*, 27 Wash. 259.

² *Northwestern Lumber Co. v. Aberdeen*, 22 Wash. 404; *Hemen v. Ballard*, 40 Wash. 81; *Quaker City Nat. Bank v. Tacoma*, 27 Wash. 259. In an action to charge the city with liability for the alleged wrongful diversion of a special fund the plaintiff must allege that, if the funds had not been diverted, there would have been sufficient money in the fund to satisfy warrants against the fund issued in the regular order and prior in dates and numbers to those held by the plaintiff. *Northwestern Lumber Co. v. Aberdeen*, 35 Wash. 636. But a city by misappropriating moneys belonging to a special fund does not render itself liable to pay the warrants drawn upon that fund as if they were warrants drawn upon its general funds. In other words, the act of misappropriation does not make such special fund warrants general-fund warrants of the city. Hence, the remedy of the holder of the warrants is by action for damages, and not by *mandamus* to compel the payment of the warrants out of the general fund. *Quaker City Nat. Bank v. Tacoma*, 27 Wash. 259. See also *Hockaday v. Chaffee County*, 1 Colo. App. 362. Where the treasurer is required to give notice that there are moneys in the special fund available for the payment of warrants, the limitation of action for damages by reason of a misappropriation of the funds only begins to run from the time of actual notice of the misappropriation, and not from the time when it occurs. The fact that the record shows the payment of subsequent warrants is not sufficient to put the statute in operation. *New York Security & Trust Co. v. Tacoma*, 30 Wash. 661; *Northwestern Lumber Co. v. Aberdeen*, 35 Wash. 636; *Hemen v. Ballard*, 40 Wash. 81; *Northwestern*

§ 861. **Power to call in Warrants for Examination, Cancellation and Re-issue.** — It is within the power of the legislature of a State to enact a law providing that all warrants issued by a city or other municipality *may be called in* for the purpose of examination, cancellation, and reissue, and such a law is valid as to all warrants issued after its enactment.¹ Such a statute is designed to enable the officers having charge of the financial affairs of the municipality to bring before them for review, adjustment, and renewal all the outstanding warrants of the municipality, that they may know the amount of the debt, detect forgeries and frauds, incorporate interest which has been long standing in a new warrant with the principal, assign each warrant to payment out of its appropriate fund, and make arrangements for payment according to priority or other just claim of preference. As a means of enforcing the power thus conferred, the legislature may also declare *that warrants not presented after due notice* shall no longer exist as debts against the municipality.² It has also been held that, under such a statute, the order cancelling the warrants and substituting others in their place has not the force of a judicial determination concluding either the payee or the municipality. There is no litigation between adversary parties which can give to the result any greater efficacy than the award of an ordinary board authorized to audit claims against a municipal body, and the re-issued warrants are still subject to any defence which was available to the municipality as against the original.³

§ 862. **Subrogation of Holder of Void Warrants to Debt.** — It may be laid down that, as a general rule, if the indebtedness for which a warrant is issued is a valid obligation of the municipality, the holder of the warrant, in the event that it proves to be void for any reason, *will be subrogated to the debt* to pay which it was issued.⁴

Lumber Co. v. Aberdeen, 44 Wash. 261.

¹ Ouachita County v. Wolcott, 103 U. S. 559; Parsel v. Barnes, 25 Ark. 261; Allen v. Bankston, 33 Ark. 740; Desha County v. Newman, 33 Ark. 788, 793; Cope v. Collins, 37 Ark. 649, 660. But the opinion has been expressed that such a statute is unconstitutional as to warrants issued prior to the time of its enactment, because it attempts to import into them a condition and obligation not originally contained in them. Condon v. Eureka Springs, 135 Fed. Rep. 566.

² Ouachita County v. Wolcott, 103 U. S. 559. As to the practice and pro-

ceedings under the *Arkansas* statute, see Allen v. Bankston, 33 Ark. 740; Howell v. Hogins, 37 Ark. 110; Lusk v. Perkins, 48 Ark. 238; Watkins v. Eureka Springs, 49 Ark. 131; Newton v. Askew, 53 Ark. 476; Crudup v. Richardson, 61 Ark. 259; Baker v. York, 65 Ark. 142; Miller County v. Gazola, 65 Ark. 353; Nevada County v. Williams, 72 Ark. 394; Yell County v. Wills, 83 Ark. 228.

³ Wall v. Monroe County, 103 U. S. 74.

⁴ Shirk v. Pulaski County, 4 Dillon C. C. 209; Blanchard v. Chaffee County, 15 Colo. App. 410; Butts County v. Jackson Banking Co., 129 Ga. 801;

But if the indebtedness for which the warrants were issued is in excess of the corporate powers of the municipality to incur under any circumstances, no recovery can be had either upon the debt or upon the warrants.¹

§ 863. **Statutory Provisions making Warrants Receivable for Municipal Taxes and Debts.**—A provision of a statute which declares that warrants issued by a municipality shall be received in payment of taxes and debts owing to the municipality, forms a *part of the obligation of the contract* evidenced by the warrant, and *cannot be impaired by subsequent legislation*.² When the holder of a warrant is

Coles County v. Goehring, 209 Ill. 142; Board of Education v. Foley, 90 Ill. App. 494; s. c. 88 Ill. App. 470; Johnson v. Cedar School Corporation, 117 Iowa, 319. See also Chemung Canal Bank v. Chemung County, 5 Denio (N. Y.), 517; National Surety Co. v. State Sav. Bank, 156 Fed. Rep. 21.

An unpaid and dishonored warrant on the corporation is not, *prima facie* at least, an extinguishment or novation of the original debt. Goldschmidt v. New Orleans, 5 La. An. 436; Short v. New Orleans, 4 La. An. 281. If a county incurs a lawful liability for a current expense, and issues its warrants on the treasury for its payment and subsequently procures another person to pay the same out of a loan which he makes to the county, upon disaffirmance of the illegal loan by the county, *the lender is subrogated to the rights of the warrant holder* whose warrant was paid out of proceeds of the illegal loan. Butts County v. Jackson Banking Co., 129 Ga. 801; 60 S. E. Rep. 149. If warrants are surrendered in exchange for funding bonds and the bonds prove to be invalid, the purchaser of the bonds from a person to whom they were originally issued is entitled to be subrogated to the right to enforce the indebtedness evidenced by the surrendered and cancelled warrants. Irvine v. Kearny County, 75 Fed. Rep. 765; Coffin v. Kearny County, 114 Fed. Rep. 518; Kearny County v. Irvine, 126 Fed. Rep. 689. Under such circumstances the statute of limitations does not begin to run against a suit by the holder of the invalid bonds until the municipality repudiates the bonds or the indebtedness for which the bonds were issued.

Coffin v. Kearny County, 114 Fed. Rep. 518; Kearny County v. Irvine, 126 Fed. Rep. 689.

Where the payee has accepted county orders for a debt against the county, and has parted with such orders, he cannot sue the county for the original debt. Crawford County v. Wilson, 7 Ark. 214. See Allison v. Juniata County, 50 Pa. 351.

¹ Harrison County v. Ogden, 133 Iowa, 9. See chapter on Municipal Bonds, *post*; Index, *Estoppel*; *Ultra Vires*. The purchaser of invalid warrants issued by a city for money received cannot recover against the city in respect of the money received by it, unless the city rightfully received the money and used it for legitimate purposes. Watson v. Huron, 97 Fed. Rep. 449.

² State v. Rives, 12 Ark. 721; People v. Hall, 8 Colo. 485. In Arkansas, by the constitution and by statute, all county warrants are receivable for all county taxes except those levied to pay indebtedness existing at the time of the adoption of the constitution and interest thereon. This right attaches although the taxes may have been levied for a special purpose. Stillwell v. Jackson, 77 Ark. 250. In this State, a warrant or order of the school trustees is receivable for school taxes, but not for county taxes; county warrants are receivable for county taxes, but not for school taxes. Wallis v. Smith, 29 Ark. 354.

A statutory provision giving a taxpayer the right to use city warrants in the payment of his tax is not qualified by a general provision that taxes shall be paid in gold or silver coin, or that warrants shall be paid in the order of their presentation. Prescott v. Mo-

vested with a statutory right to tender it in payment of taxes or debts owing to the municipality, the city cannot, by appropriating its tax levy into separate funds, deprive the warrant holder of his statutory right.¹ But the statutory right to tender warrants in payment of taxes and debts owing to the municipality does not prevent the city from making a lease or other contract containing a stipulation that the moneys payable to it thereunder shall be payable only in currency.²

§ 864. **Liability of Municipal Officers for Misfeasance.**—Warrants are instruments by which the money, property, or rights of the municipality may be affected, and therefore *are such instruments as may be forged*.³ A warrant may also be *the subject of larceny*.⁴ If a *municipal officer prepares and issues or disposes of warrants unlawfully*, or with intent to defraud, and such warrants are paid by the city, the act is a misfeasance in office and a remedy may be had by

Namara, 73 Cal. 236. Acceptance of warrants or orders in payment of taxes pursuant to statute, see *Marinette v. Oconto County*, 47 Wis. 216. When a county warrant contains a provision that the claim is allowed subject to all delinquent taxes owing by the payee, the county treasurer may deduct delinquent taxes from the amount called for by the warrant. *State v. Miller*, 145 Ind. 598. See also *Funk v. State*, 166 Ind. 455.

¹ The city council cannot appropriate its tax levy into a separate fund for each year, and apply it to the payment of warrants issued during the year, so as to deprive the holder of general-fund warrants issued in a prior year of the right of using his warrants in the payment of taxes in the manner prescribed by statute. *Western Town Lot Co. v. Lane*, 7 S. Dak. 1; s. c. on rehearing, 7 S. Dak. 599. To the same effect, *English v. Oliver*, 28 Ark. 317; *Reynolds v. Norman*, 114 Mo. 509. When city warrants are declared by statute to be receivable in payment of taxes for city purposes and for all debts due the city without regard to time or date of issuance, or the purpose for which issued, the city cannot provide by ordinance that warrants thereafter issued shall be paid according to the number of issue, and shall not be accepted for city debt before previous numbers have been paid or the money accumulated in the hands of the treasurer. The insertion of such stipu-

lation in the warrants themselves is unavailing to change their legal effect and prevent their tender for any city debt irrespective of number or date. *Ex parte Willis*, 74 Ark. 498.

² *Helena v. Turner*, 36 Ark. 577.

³ *Smith v. State*, 29 Fla. 408; *Woodridge v. State*, 49 Fla. 137; *State v. Fenley*, 18 Mo. 445. See also *People v. Bibby*, 91 Cal. 470; *State v. Morton*, 51 S. Car. 323. But in *Raymond v. People*, 2 Colo. App. 329, it was held that the crime of forgery cannot be predicated on an instrument purporting to be a warrant, which is void on its face for failure to show the purpose for which it is drawn as required by statute.

⁴ *State v. Morgan*, 109 Tenn. 157; 69 S. W. Rep. 970. If the auditor appropriates and converts a warrant which is in his custody ready for delivery to the creditor of the municipality, he is guilty of larceny under a statute which declares that "if any agent, clerk, officer, servant, or person to whom any money or other property shall be entrusted" shall fraudulently convert the same to his own use, he shall be guilty of larceny. By virtue of his office, he became the legal custodian and bailee of the warrant by operation of law; and also by operation of law held it as agent for the owner for purposes of delivery. *State v. Raby*, 31 Wash. 111. See also *State v. White*, 66 Wis. 343.

the city against the sureties on the official bond of the officer.¹ If the treasurer pays a warrant lawfully drawn to a person who has no authority to receive payment, he and his sureties are liable on his bond.² But no recovery can be had by the city upon the bond of the treasurer if he pays a warrant which is valid on its face, but which in point of fact was issued for a claim for which the municipality is not legally liable. The treasurer is not obliged to overrule the judgment of the city council or other officer issuing the warrant.³

§ 865. **Limitation of Actions on Warrants.** — A municipal warrant is an instrument constituting a promise to pay, or an acknowledgment

¹ In *Cricket v. State*, 18 Ohio St. 9, 23, it was held that if the auditor without lawful authority obtains money from the municipality by drawing a warrant in his own favor for a sum claimed to be due him for official services, his act is a misfeasance in office rendering the sureties on his bond liable. In *Greenville v. Anderson*, 58 Ohio St. 463, a city clerk drew warrants payable to creditors of the city or bearer for amounts greater than were due to the creditors in whose favor they were drawn and greater than had been authorized by the council. He obtained from the treasurer the whole amount represented by the warrants and appropriated the excess to his own use. He also drew other warrants payable to creditors of the city or bearer, presented them, and obtained and appropriated the whole money, and other warrants to persons to whom the city was not indebted or bearer, obtained the money called for thereby, and appropriated it. It was held that his acts constituted a breach of his official duty; that the sureties on his bond were liable to the city for the loss occasioned thereby; and that the negligence of the treasurer in paying the warrants did not excuse the misfeasance of the clerk or affect the liability of the sureties. But in *State v. Harrison*, 99 Mo. App. 57; 72 S. W. Rep. 469, the court held that the act of a county clerk in selling at a discount a county warrant forged by him, was not an act performed in an official capacity; and that a purchaser of the warrant could not recover on the clerk's official bond conditioned for the faithful performance of the duties of the office. See also to the same effect *National Surety Co. v. State Sav. Bank*, 156 Fed. Rep. 21.

The county treasurer was forbidden by law to buy, sell, or deal in county warrants. Upon payment of a warrant he did not cancel it, but marked it "not paid for want of funds" and sold it. In an action by a subsequent purchaser in good faith without notice it was held that he could not maintain an action on the treasurer's bond to recover the amount of the warrant; that the person receiving the warrant from the treasurer was chargeable with knowledge of the statute and must have known that the treasurer had no authority to deal in county warrants, and that a *bona fide* holder did not stand in any better position than the person to whom the treasurer delivered the warrant. *McConnell v. Simpson*, 36 Fed. Rep. 750.

² In *State v. Lewis*, 6 Ohio Dec. 221, the treasurer paid a warrant to an agent of the payee who was only a sales agent and had no authority to collect and receive the money. It was held that he was liable on his bond; and that *mandamus* would not lie to issue a new warrant because the auditor had exhausted his power to issue a warrant for the claim.

³ *East St. Louis v. Flannigen*, 69 Ill. App. 167. If a county treasurer pays illegal warrants notwithstanding notice from the officers drawing the same not to pay, the remedy is by action against the treasurer on his bond and not by *mandamus* by the municipality to compel him to replace the amount in the municipal treasury. *Mandamus* does not lie to redress injurious results from acts already done, but only to compel the performance of a present duty. *State v. Bowman*, 66 S. Car. 140.

of the debt upon which it is issued, and the making and delivery of the warrant *arrests the running of the statute of limitations* against the right of action upon the debt.¹ The cause of action upon a warrant comes within the operation of the statute of limitations from the time when the warrant becomes payable according to the methods and procedure prescribed by the statutes and laws of the particular State.²

A statute which is *applicable to unsealed instruments* applies to, and bars an action on municipal warrants, unless they are required by statute to be sealed.³ But *if the statute requires a seal* and the warrants are sealed pursuant thereto, they become writings obligatory or specialties, and are not within a statute applicable to unsealed instruments.⁴ In those jurisdictions where the right to sue accrues to the holder of the warrant immediately upon demand and refusal of payment, the statute of limitations runs from the date of the warrant, or the date of payment specified therein, being the dates respectively when payment may be demanded.⁵ But when a warrant

¹ *Walnut Township v. Jordan*, 38 Kan. 562, 566; *Flagg v. St. Charles*, 48 La. An. 765; *Abrahams v. Omaha*, 80 Neb. 271; 114 N. W. Rep. 161.

² A defence of the statute of limitations cannot be rendered ineffective by *taking up an outlawed order or warrant and issuing a new order or warrant in its place*. *Snyder v. Bovaird*, 122 Pa. 442; *Commonwealth v. Sholtis*, 24 Pa. Super. Ct. 487. Where warrants were destroyed by fire and duplicates were issued for the same amount, bearing the date of the original issue, which duplicates were intended to stand as evidence of the debt for which the lost warrants were issued, it was held that the statute commenced to run *from the date of original issue*, and not from the time of the issue of the duplicates. *School Dist. v. Cromer*, 52 Ark. 454.

³ *Condon v. Eureka Springs*, 135 Fed. Rep. 566; *Crudup v. Ramsey*, 54 Ark. 168. See chapter on Municipal Bonds: Index, *Limitation of Actions*.

⁴ *Condon v. Eureka Springs*, 135 Fed. Rep. 566; *Heffleman v. Pennington County*, 3 S. Dak. 162. If a seal is attached to a warrant *without authority of law*, the character of the warrant is not changed, and it is governed by the statute applicable to unsealed instruments. *Condon v. Eureka Springs*, 135 Fed. Rep. 566; *Crudup v. Ramsey*, 54 Ark. 168.

⁵ *Goldman v. Conway County*, 10

Fed. Rep. 888; *Thompson v. Searcy County*, 57 Fed. Rep. 1030; *Condon v. Eureka Springs*, 135 Fed. Rep. 566; *Crudup v. Ramsey*, 54 Ark. 168; *King v. Frankfort*, 2 Kan. App. 530; *Buffalo School Furn. Co. v. School Dist.*, 7 Kan. App. 796; *Perry v. Vermilion*, 21 La. An. 645; *Wilson v. Knox County (Mo.)*, 28 S. W. Rep. 896; *Pelton v. Crawford County*, 10 Wis. 69. When an action may be maintained on warrants without regard to the existence of assets in the fund from which they are payable they are regarded as payable on demand, and the statute of limitations begins to run against them from the date of their issue. *Bodman v. Johnson County*, 115 Iowa, 296. In this case the court relied upon the fact that the county authorities had power to raise money by assessment until expenses payable out of the fund were satisfied, distinguishing in that respect *Weimore v. Monona County*, 73 Iowa, 88, where a warrant was payable out of a specific fund and the county had no means of raising the fund. When, by the law of the jurisdiction, a cause of action accrues immediately upon demand and refusal, the fact that the fund on which warrants are drawn has been depleted has been held not to prevent the running of the statute of limitations. *Thompson v. Searcy County*, 57 Fed. Rep. 1030.

is not due and payable and a *cause of action does not accrue until there are funds in the treasury applicable to its payment*, the statute of limitations does not begin to run until money for the payment of the warrant is in the treasury, or liability on the warrant is repudiated. This rule has been applied in Nebraska, where it has been held that when a creditor accepts a warrant payable out of the general funds of the municipality, it is implied as a condition of the contract that it is only payable when there are funds in the treasury to pay it,¹ and also in other jurisdictions when the warrant is payable out of a special fund and the obligation of the city with reference thereto is limited to the duty to collect the fund and apply it,² and when warrants are not due and payable until regularly reached in the order of their presentation or registration.³ It has also been held that when orders or warrants are not payable until funds are provided, and it is by statute made the duty of the treasurer to publish a call for warrants, or notice that he is prepared to pay them, the statute does not run until the call has been made, or notice given as required by statute.⁴

¹ King Bridge Co. v. Otoe County, 66 Kan. 594, 597; Miller v. Haskell, 124 U. S. 459; Brewer v. Otoe County, 66 Kan. 730; Brannon v. 1 Neb. 373; Bacon v. Dawes County, White Lake Township, 17 S. Dak. 83. 66 Neb. 191. See also Chapman v. ² Seward County v. Shepherd, 71 Douglas County, 107 U. S. 348, 354, Kan. 61; Potter v. New Whatcom, 20 359. Wash. 589. "A warrant, under our

³ New Orleans v. Warner, 175 U. S. 120, 130; Justices v. Orr, 12 Ga. 137; Wetmore v. Monona County, 73 Iowa, 88; Fernandez v. New Orleans, 46 La. An. 1130; Rogers v. Omaha, 75 Neb. 318; Greer County v. Clarke, 12 Okla. 197; Barnes v. Turner, 14 Okla. 284. See also Lincoln County v. Luning, 133 U. S. 529.

Warrants which are *payable only out of a particular fund* and then only when there are moneys to the credit of the fund, are not within a statute of limitations applicable to "actions on bills of exchange, notes payable to order or bearer, except bank notes, those on all effects negotiable or transferable by indorsement or delivery, and those on all promissory notes, whether negotiable or otherwise." New Orleans v. Warner, 175 U. S. 120.

⁴ Grayson v. Latham, 84 Ala. 546; Forbes v. Grand County, 23 Colo. 344 (overruling Schloss v. Pitkin County, 1 Colo. App. 145); School Dist. No. 5 v. First Nat. Bank, 63 Kan. 668; Hubbell v. South Hutchinson, 64 Kan. 645; Van Auken v. Garfield Township,

66 Kan. 594, 597; Miller v. Haskell, 66 Kan. 730; Brannon v. White Lake Township, 17 S. Dak. 83. ⁴ Seward County v. Shepherd, 71 Kan. 61; Potter v. New Whatcom, 20 Wash. 589. "A warrant, under our statutes, is a promise to pay it, in its order of issue, when money applicable to it comes into the treasury; and its maturity, by analogy with a note, is the time when the treasurer gives notice of his readiness to pay it, and stops interest." Union Savings Bank v. Gelbach, 8 Wash. 497; Potter v. New Whatcom, 20 Wash. 589, 591. If the treasurer has issued a call for certain warrants stating that funds sufficient to pay them are in his hands, and that the warrants will cease to draw interest from a certain date, and the bank in which the money is deposited becomes insolvent, so that the warrants cannot be paid on presentation, the effect is the same as if the county had never provided the money, and the statute does not begin to run. Miller v. Haskell County, 66 Kan. 730. A refusal to pay a warrant on presentation for lack of funds estops the city from claiming that there was money in the fund sufficient to meet it, and the statute does not begin to run. Hubbell v. South Hutchinson, 64 Kan. 645.

In Arkansas, where warrants are, by constitution and statute, receivable in payment of taxes and debts owing to the municipality, it has been held that the statutory limitation of actions on warrants does not affect the right of the holders to have the warrants received in payment of taxes and debts. Hence, in proceedings under a statute to compel the production of warrants for examination and verification and for reissue, if found valid, the court held that outlawed warrants should be reissued, but should state that they are receivable for taxes or debts, but are not payable out of the funds in the city treasury.¹

§ 866. **Mandamus to issue Warrants.**—After a demand or claim has been audited, proved, or established by the action of the city council, or other officer designated by law, or by the judgment of a court of competent jurisdiction, the drawing of a warrant for the payment thereof is a purely ministerial duty, and does not involve the exercise of any discretion. After a claim has been audited and allowed in the manner prescribed by law, the drawing, signing, and attesting of a warrant upon the treasurer for the amount due is a duty incumbent on the proper officer; and upon a refusal to perform such duty, he may be *compelled to discharge it by mandamus*.²

¹ Hill v. Logan County, 57 Ark. 400. See also Daniel v. Askew, 36 Ark. 487; Howell v. Hogins, 37 Ark. 110; Whitthorne v. Jett, 39 Ark. 139. In Pelton v. Crawford County, 10 Wis. 69, it was held that though an action on county warrants might be barred by statute, the warrants still remained receivable for taxes. But in South Dakota, it has been held that although the statute is only directed against actions, and does not specifically preclude the receiving of warrants for taxes pursuant to statutory provision therefor, the statute of limitations bars a proceeding or action by *mandamus* to compel the treasurer to accept a warrant in payment of taxes. Coler v. Sterling, 15 S. Dak. 415 (disapproving and refusing to follow Pelton v. Crawford County, 10 Wis. 63, *supra*).
v. Hayden, 13 Colo. App. 51; Prime v. McCarthy, 92 Iowa, 569; Bank of Commerce v. Stone, 108 Ky. 427; Alberts v. Torrent, 98 Mich. 512; Clapp v. Titus, 138 Mich. 41; State v. Fraker, 166 Mo. 130; State v. Cass County, 53 Neb. 767; State v. Searle, 79 Neb. 111; 112 N. W. Rep. 380; Matter of Freed, 148 N. Y. 165; People v. Clarke, 17 N. Y. 259, rev'g 79 N. Y. App. Div. 78; People v. Coler, 56 N. Y. App. Div. 459, aff'd 166 N. Y. 144; State v. Headlee, 17 Wash. 637; American Bridge Co. v. Wheeler, 35 Wash. 40; State v. Richter, 37 Wis. 275; State v. Born, 97 Wis. 542; Appel v. State, 9 Wyo. 187; Altgelt v. Campbell (Tex. Civ. App.), 78 S. W. Rep. 96; State v. Massillon, 24 Ohio Cir. Ct. 249. See further chapter on *Mandamus, post*.

² Little Rock v. United States, 103 Fed. Rep. 418; Jack v. Moore, 66 Ala. 184; Jeffersonian Pub. Co. v. Hilliard, 105 Ala. 576; Smith v. McCutchen, 146 Ala. 455; Babcock v. Goodrich, 47 Cal. 488; McFarland v. McCowen, 98 Cal. 329; Robertson v. Alameda Library Trustees, 136 Cal. 403; Lowell v. Bonney, 14 Colo. App. 230; McMurrey v. Bonney, 14 Colo. App. 230. When the statute will lie to compel the making of a warrant, although there is no money in the treasury, but the controlling reason for the decision was that in Colorado the power to issue warrants in anticipation of the revenues is recognized. Lowell v. Bonney, 14 Colo. App. 230.

But judgment and discretion cannot be controlled by *mandamus*, and the writ will not issue to compel the making and delivery of a warrant in advance of the allowance and audit of the claim by the officer in whom the statute vests the power and duty of passing on its validity.¹ It is also laid down that, notwithstanding the audit and allowance of the claim, *mandamus* will not issue to compel the officer to draw his warrant therefor, if the claim is, in fact, of such a nature that its allowance is in excess of the authority of the auditing officers, and such a violation of the law as to justify the refusal of the officer to draw a warrant.² And in some jurisdictions *mandamus* is

requires the money to be in the treasury when the warrant is drawn, *mandamus* to compel issuance of a warrant will only lie when it is shown that the money is available for the purpose. *Patterson v. State* (Neb.), 89 N. W. Rep. 989. When the claim is payable out of a specific fund or appropriation which has been exhausted, *mandamus* will not lie to compel the issue of the warrant. *Bosworth v. Schuck*, 118 Ky. 458; *State v. Clinton*, 28 La. An. 72; *State v. Frazee*, 105 La. 250; *Weston v. Dane*, 51 Me. 461.

Where the trustees of a library board allowed claims and made warrants therefor which were entrusted to the librarian of the board for delivery but the librarian failed to deliver them, wrongfully obtained payment, and absconded, it was held that the effect was the same as though the warrants had been drawn and destroyed by the board before delivery. The claims having been allowed and approved and admitted thereby to be correct, it was held to be the plain duty of the board to draw warrants therefor, and notwithstanding the acts of the librarian, *mandamus* would lie in favor of an assignee of the claims to compel the board to draw and to deliver warrants directing the treasurer to pay the claim. *Robertson v. Alameda Library Trustees*, 136 Cal. 403.

The fact that a suit is pending on the claim does not prevent its audit and allowance, and the officer whose duty it is to sign and issue the warrant cannot refuse to do so, because of the pendency of the suit. *Jeffersonian Pub. Co. v. Hilliard*, 105 Ala. 576.

¹ *Smith v. McCutchen*, 146 Ala. 455; *Rooney v. Snow*, 131 Cal. 51; *Knopf v. Corcoran*, 112 Ill. App. 320; *Davis v. Jewett*, 60 Kan. 651; *Wilson v. State*, 53 Neb. 113; *Selby v. State*, 63 Ohio

St. 541; *State v. Hiers*, 51 S. Car. 388. *Mandamus* will not issue to compel the making and delivery of a warrant when the amount of the claim is disputed. *Kensington Electric Co. v. Philadelphia*, 187 Pa. 446. The fact that the amount of the claim can be computed by the officer who issues the warrants from documents on file in his office, does not dispense with an audit by proper board. *Smith v. McCutchen*, 146 Ala. 455. In *Washington*, it is held that the auditing of the salary of an officer which is fixed by law is unnecessary, as the auditor is without discretion to allow or reject it, and that *mandamus* to compel the issuing of a salary warrant will lie without any audit. *Abernethy v. Medicine Lake*, 9 Wash. 112; *State v. Daggett*, 28 Wash. 1; *State v. McQuade*, 36 Wash. 579. See also *Roberts v. Erickson*, 117 Wis. 324.

² *Linden v. Case*, 46 Cal. 171; *McFarland v. McCowen*, 98 Cal. 329; *Walton v. McPhetridge*, 120 Cal. 440; *Perrin v. Honeycutt*, 144 Cal. 87; *Murphy v. Bondshu*, 2 Cal. App. 249; *Ward v. Cook*, 78 Ill. App. 111; *James v. Seattle*, 22 Wash. 654.

In *New York*, an illegal audit can be attacked either directly or collaterally because it is void, but it is not so in the case of an audit that is based upon a legal power to act but is erroneous as to some matter of fact or law. The decisions of boards of audit come within the rule which forbids the re-opening of a matter once judicially determined under competent jurisdiction. *Chenango County v. Birdsall*, 1 Wend. (N. Y.) 453; *People v. Schenectady County*, 35 Barb. (N. Y.) 408; *People v. Stocking*, 50 Barb. (N. Y.) 573; *Onondaga County v. Briggs*, 2 Denio (N. Y.), 26; *People v. Clarke*, 174 N. Y. 259. But boards of audit in allowing accounts are limited

refused when the officer against whom it is sought shows any circumstances establishing that there is substantial doubt as to the validity of the claim, and the claimant is left to his remedy by action against the municipality in which the question of liability may be put in issue and tried.¹

If the claim has been disallowed by the auditing board, the remedy of the creditor is not by *mandamus*, unless the statutes or procedure of the particular State have modified the rules of the common law,² but is by appeal from the disallowance, where that remedy is given by statute,³ or by action against the municipality for the amount of the debt.

to the powers conferred upon them by the statute, and when they transgress their limitations their acts, like those of any other tribunal or jurisdiction, are void, and an audit by them is only conclusive when they act within their jurisdiction. *Osterhoudt v. Rigney*, 98 N. Y. 222; *Nelson v. Mayor, &c. of New York*, 131 N. Y. 4; *People v. Clarke*, 174 N. Y. 259. Hence, when the claim is one which might be legally audited and allowed, the determination of the board of audit is final, and the officer whose duty it is to issue a warrant cannot refuse to do so on the ground that too large a sum has been allowed. *People v. Clarke*, 174 N. Y. 259. In *James v. Seattle*, 22 Wash. 654, it was held that where a city is without power to authorize the payment to a member of the council of his expenditures while investigating municipal affairs pursuant to ordinance, the city comptroller may properly refuse to countersign the warrant directing the payment of such claim. The county auditor may defend an action for *mandamus* to compel him to issue a warrant on ground that the statute creating liability is unconstitutional. *State v. Blumberg*, 46 Wash. 270; 89 Pac. Rep. 708. But the officer alleging that the allowance of the claim was in excess of the jurisdiction or powers of the auditing board or officer must assume the burden of establishing that fact by proper evidence. The creditor is *prima facie* entitled to payment by reason of the allowance of his claim. *McGowan v. Ford*, 107 Cal. 177. The auditing by the city council of claims for street lighting and ordering the issuing of warrants therefor, held to be a ratification of the executed part of an invalid lighting contract, and it thereupon became the duty of

the mayor to sign the warrants notwithstanding the original invalidity of the contract. *Frederick v. People*, 83 Ill. App. 89. The mayor cannot insist on the deduction from a warrant payable to an alderman for a lawful claim of a sum claimed to have been illegally paid to the alderman, and withhold his signature to the warrant until such deduction is made. The proper course is to sue to recover the money wrongfully paid, and the mayor has no authority to pass on the validity or invalidity of the payment. *Alberts v. Torrent*, 98 Mich. 512.

¹ *O'Hara v. Fagan*, 56 N. J. L. 279; *Padavano v. Fagan*, 66 N. J. L. 167; *State v. Albright*, 11 N. Dak. 22; *Appel v. State*, 9 Wyo. 187.

² In *Washington*, ordinary contract debts of cities are, by statute, to be paid by issuing of warrants payable in their order with interest from date or presentation. It is not contemplated that the owner of an allowed claim shall sue the corporation generally upon the original contract, when the clerk or other officer refuses to issue a warrant; nor that the holder of a warrant which the treasurer refuses to pay shall get a judgment upon the warrant. Such a judgment, like a judgment upon a claim disallowed, would again be settled by a warrant and take its turn in the order of payment. Hence, the remedy of the owner of an allowed claim is by *mandamus* to issue a warrant, and of the holder of a warrant by *mandamus* to compel payment. Under the statute, disputed questions of fact, such as payment already made or forgery, can be tried in an action of *mandamus*. *Abernethy v. Medical Lake*, 9 Wash. 112; *Cloud v. Sumas*, 9 Wash. 399; *Bacon v. Tacoma*, 19 Wash. 674.

³ *State v. Cornell*, 54 Neb. 72.

In some jurisdictions it has been held that the officers whose duty it is to audit and allow claims *may rescind their action*, and may direct either that a warrant do not issue, or if issued that it be not paid, and under such circumstances a refusal to issue the warrant or a refusal to pay is justified, and the party is left to his remedy by action;¹ and in other jurisdictions it is held that officers issuing, or authorizing the issue of warrants, may revoke them for fraud or mistake, or because issued without legal authority, but they cannot capriciously revoke or rescind them, or recall authority for their payment after they have been issued.²

§ 867 (506). **Interest on Corporate Indebtedness.**—By reason of the sovereignty of the United States and consequent exemption from the operation of statutes not expressly made applicable to it, it is a well-settled rule that *interest is not allowed on claims against the United States*, unless the government has stipulated to pay interest, or it is given by express statutory enactment.³ For the same reason *a State is not liable* for interest on its debts, unless its consent thereto has been given by statute, or by an express stipulation in a lawful contract with one of its officers.⁴ On the liability of *counties, towns, cities,*

¹ *State v. Cook*, 43 Neb. 318; *Tucker v. Iredell County Justices*, 3 Ired. Law (N. Car.), 434; *Dey v. Lee*, 4 Jones Law (N. Car.), 238; *Abernathy v. Phifer*, 84 N. Car. 711; *Frankl v. Bailey*, 31 Oreg. 285. See also *People v. Klopke*, 92 Ill. 134.

² *Somerville v. Wood*, 115 Ala. 534, 538. In *New York*, an audit or allowance of a claim is a judicial determination which cannot be reopened, if it is within the jurisdiction of the auditing board or officer. *People v. Clarke*, 174 N. Y. 259.

³ *United States v. Sherman*, 98 U. S. 565; *Tillson v. United States*, 100 U. S. 43, 47; *Harvey v. United States*, 113 U. S. 243, 248; *United States v. Bayard*, 127 U. S. 251; *United States v. North Carolina*, 136 U. S. 211, 216; *Gordon v. United States*, 7 Wall. (U. S.) 188; *Marine v. Lyon*, 62 Fed. Rep. 153; *United States v. Barber*, 74 Fed. Rep. 483; *Watts v. United States*, 129 Fed. Rep. 222.

⁴ *United States v. North Carolina*, 136 U. S. 211; *Carr v. State*, 127 Ind. 204; *Bledsoe v. State*, 64 N. Car. 392, 397; *Attorney-General v. Cape Fear Nav. Co.*, 2 Iredell Eq. (N. Car.) 444, 454; *State v. Board of Public Works*, 36 Ohio St. 409. In *People v.*

Canal Com'rs, 5 Denio (N. Y.), 401, the court held that the State of New York was liable to pay interest upon the amount of a legal appraisal of damages for land taken for public use after demand for payment upon the officer whose duty it was to make payment. In so ruling the court was influenced by the fact that the debt was for compensation for property taken, and that failure to pay interest after demand might result in the owner of the property receiving less than just compensation. But the court used language which seemed to imply that where a debt was legally owing by the State it was liable for interest thereon, saying: "The State, as such, is not liable to pay either principal or interest, as it cannot be sued by a citizen and of course cannot be compelled to pay any debt. But where questions of public indebtedness come before the judicial tribunals through the agency of public officers over whom the courts have jurisdiction, they do not hesitate to dispose of them upon the same legal and equitable principles which govern judicial decisions as between individuals. They apply the settled rules of law to such cases, and adjudicate upon the payment of both principal and interest

and other municipal organizations for interest on debts owing by them a divergence of opinion has arisen. Thus, in some jurisdictions, counties are regarded as instrumentalities of the sovereign State, organized to promote the general welfare, and consequently cannot be made to pay interest on corporate debts in the absence of a statute or express stipulation therefor in a lawful contract.¹

This principle has also been so extended as to exempt towns from liability for interest.² And in *Illinois*, and possibly some other States, the principle has been so far extended as to hold that when there is no statute expressly imposing the liability, municipal corporations of all classes (including cities) are not chargeable with interest on claims against them in the absence of an express agreement therefor, the only exception being where money is wrongfully obtained and illegally withheld by the municipality.³ But even in

in the same manner as in other cases. It is only in such cases that the judicial tribunals can direct the payment of a public debt, and there is no reason why, in directing such payment, the public agents should not be directed to do as ample justice as an individual would be required to do. Hence, if the question of the liability of the State to the payment of a claim for damages come properly before a judicial tribunal, whether so brought up by the public officer or the other party, the tribunal in adjudicating upon the question will, if it determines the claim against the State to be just, in addition to directing its payment, also direct the payment of interest thereon, where it would in other cases direct such interest to be paid. . . . Indeed there can be no reason why the State, refusing or unable to pay a just debt, should not pay interest thereon in the same manner as individuals. The rule cannot be enforced as against the State, it is true, as it can be against individuals, because it is not amenable to the judicial tribunals; but it is practically enforced whenever it can be, when its officers properly come or are brought before such tribunals."

¹ *Jacksonville Nat. Bank v. Duval County*, 45 Fla. 496; *Pike County v. Hosford*, 11 Ill. 170; *Hall v. Jackson County*, 95 Ill. 352; *Madison County v. Bartlett*, 2 Ill. 67; *Warren County v. Klein*, 51 Miss. 807; *Clay County v. Chickasaw County*, 64 Miss. 534; *Anderson v. Issaquena County*, 75 Miss. 873; *Monteith v. Parker*, 36 Oreg. 170; *Allison v. Juniata County*,

50 Pa. St. 351; *Commonwealth v. Philadelphia County*, 4 Serg. & R. (Pa.) 126; *Camp v. Knox County*, 3 Lea (Tenn.), 199; *Ashe v. Harris County*, 55 Tex. 49. See as to interest on *Coupons*, chapter on *Municipal Bonds*, *post*; *Index*, *Coupons*; *Interest*.

In *Florida*, it has been held that as a county is not liable for interest on its debts in the absence of an express stipulation or a statute expressly imposing the liability, an agreement by the county with a third person that if he will cash the county warrants, the county will pay interest thereon until they are paid is *ultra vires* and void. *Jacksonville Nat. Bank v. Duval County*, 45 Fla. 496; *State v. Stewart*, 49 Fla. 259. In *Utah*, counties have no authority to incur indebtedness bearing interest, or to issue interest-bearing warrants without express legislative authority. *Daggett v. Lynch*, 18 Utah, 49. In *Wisconsin*, it is expressly provided by statute that county orders shall not bear interest. *Alexander v. Oneida County*, 76 Wis. 56, 61; *Mueller v. Cavour*, 107 Wis. 599, 605.

² *Dyer v. Covington*, 19 Pa. St. 200; *Snyder Township v. Bovaird*, 122 Pa. St. 442; *Bigelow v. Washburn*, 98 Wis. 553, 557; *Mueller v. Cavour*, 107 Wis. 599, 605. In *Wisconsin*, it is held that no interest can be paid on town orders, unless the voters of the town have authorized the payment thereof by vote under a statute authorizing the voters to declare whether town orders shall bear interest, and at what rate. *Mueller v. Cavour*, 107 Wis. 599, 605.

³ *People v. Tazewell County*, 22 Ill.

those jurisdictions, where the implied liability of the municipality for interest is denied, liability therefor may be incurred by reason of *stipulations in contracts lawfully made*. Thus, when the municipality has power to contract for property or services, *e. g.*, for the erection of a court-house, and there is no restriction of law as to the amount of the price or the method of its payment, it may contract to pay by delivering interest-bearing orders or warrants, and such orders will be valid and collectible, both principal and interest.¹ And in the case of cities having power to contract and to adopt ordinances for the government of their affairs, provision may, in the absence of statutory restriction, be made by ordinance for the payment of interest on warrants or orders on the city treasury after presentation for payment and refusal thereof, and thereafter interest may be recovered on these warrants.² But the more generally accepted rule, when not controlled by statute, is that the obligation to pay interest on debts owing by municipal corporations does not differ from the obligation of an individual to pay interest on his debts, and therefore that they are liable the same as individuals to pay interest thereon at the legal rate after a default in payment.³ In the case of warrants drawn on

147; *Johnson v. Stark County*, 24 Ill. 75; *Pekin v. Reynolds*, 31 Ill. 529; *People v. Salomon*, 51 Ill. 37, 52; *Chicago v. People*, 56 Ill. 327; *Cook v. South Park Com'rs*, 61 Ill. 115; *Chicago v. Alcock*, 86 Ill. 384; *South Park Com'rs v. Dunlevy*, 91 Ill. 49; *Hall v. Jackson County*, 95 Ill. 352; *Vider v. Chicago*, 164 Ill. 354; *Peoria v. Fruin-Bambrick Const. Co.*, 169 Ill. 36; *Danville v. Danville Water Co.*, 180 Ill. 235; *Coles County v. Goehring*, 209 Ill. 142, 163; *Mt. Morris v. Williams*, 38 Ill. App. 401.

¹ *Frankford, &c. Safe-Deposit Co. v. Jackson County*, 98 Fed. Rep. 942; *Jackson County v. Rendleman*, 100 Ill. 379. But warrants cannot be drawn to expressly bear interest when the contract upon which they are issued does not provide therefor. *Coles County v. Goehring*, 209 Ill. 142. See also *Hall v. Jackson County*, 95 Ill. 352.

In *Kentucky* it has been held that when a contract for a public building calls for payment in warrants, nothing being said about interest on the contract price, the warrants cannot be issued to bear interest. *Kline v. Jefferson County (Ky.)*, 101 S. W. Rep. 356. But in *Montana*, on the other hand, the court has held that under an agreement to accept warrants

in payment of a contract, the creditor is not precluded from recovering interest when the statute expressly provides that warrants shall bear interest from the time of presentation for payment and registration upon non-payment. *State v. Barret*, 25 Mont. 112.

² *Shipley v. Hacheney*, 34 Ore. 303; *Scranton v. Hyde Park Gas Co.*, 102 Pa. 382; *State v. Stout*, 43 Wash. 501.

³ *Brown v. Johnson County*, 1 G. Greene (Iowa), 486; *Buffalo School Furn. Co. v. School Dists.*, 7 Kan. App. 796; *Robbins v. Lincoln County Ct.*, 3 Mo. 57; *Isenhour v. Barton County*, 190 Mo. 163; *Murphy v. Omaha*, 33 Neb. 402; *Yellowley v. Pitt County*, 73 N. Car. 164; *Seton v. Hoyt*, 34 Ore. 266; *Shipley v. Hacheney*, 34 Ore. 303; *Monteith v. Parker*, 86 Ore. 170; *Langdon v. Castleton*, 30 Vt. 285; *Seymour v. Spokane*, 6 Wash. 362; *State v. Stout*, 43 Wash. 501. In *Kansas*, municipal warrants may provide for the payment of interest. *Buffalo School Furn. Co. v. School Dists.*, 7 Kan. App. 796. In *Kentucky*, it is held that under a contract to pay for a bridge when completed, a county is liable for interest on the contract price until paid. *Morris v. Bell County (Ky.)*, 50 S. W. Rep. 531. See also

the city treasurer there is *no default in payment until a demand has been made*,¹ and when a warrant is payable out of the general funds,

Washington County Court v. McKee (Ky.), 13 S. W. Rep. 909. Under the Missouri statute providing generally that creditors shall be allowed interest at the rate of six per cent per annum, it is held that county warrants draw interest after presentment to the treasurer and refusal by him to pay the same, the court regarding the general statute as to interest as broad enough to embrace all debtors, counties as well as individuals. Robins v. Lincoln County Court, 3 Mo. 57; State v. Pacific, 61 Mo. 155.

A city in Nebraska made a contract for certain work payable on completion. The statute provided in general terms for the payment of interest on past due demands without expressly naming cities. It was held that the city was liable for interest under the statute. Murphy v. Omaha, 33 Neb. 402. Maxwell, J., said: "The law is general in its terms, and applies to cities as well as natural persons. . . . In the absence of any contract that payment shall be delayed, the city will be liable for interest like any other debtor. . . . In ordinary business transactions a city will be required to conform to the ordinary rules."

In New York, the liability of a city for interest on a debt which is due and payable and payment of which has been demanded, is sustained by the courts, although there does not seem to have been any discussion as to the foundation of, or reason for the rule adopted. See Taylor v. New York City, 67 N. Y. 87, rev'g 5 Daly (N. Y.), 485; Sweeny v. New York City, 173 N. Y. 414, rev'g 69 N. Y. App. Div. 80; O'Keeffe v. New York City, 176 N. Y. 297, aff'g 86 N. Y. App. Div. 626; Richmond County Society v. New York City, 73 N. Y. App. Div.

607; Holihan v. New York City, 33 N. Y. Misc. 249. But when an audit of the claim is necessary before action may be begun thereon, interest can only be allowed from the time of the audit. Cooke v. Saratoga Springs, 23 Hun (N. Y.), 55. Where, however, a claim is due and payable and has been demanded, the fact that by statute no action can be brought against the city until thirty days has elapsed since the claim was presented to the comptroller, does not prevent the accruing of interest. Roebbing Sons Co. v. New York City, 110 N. Y. App. Div. 366. Liability of county to State for interest on quota of State taxes apportioned to it, see People v. New York County, 5 Cow. (N. Y.) 331; People v. Myer, 138 N. Y. 590, aff'g 66 Hun (N. Y.), 167; People v. Fitch, 148 N. Y. 71, 80. In assessing damages for a tort the jury may include interest in a verdict against the city. Orr v. New York City, 64 Barb. (N. Y.) 106. See also Greer v. New York City, 3 Robt. (N. Y.) 406; Wilson v. Troy, 135 N. Y. 96.

In Yellowley v. Pitt County, 73 N. Car. 164, the question of liability for interest on county warrants was held to come within and be governed by the general statute regulating the payment of interest on obligations.

Oregon. In this State the rule is recognized that neither the State by reason of its sovereignty, nor a county, which is an instrumentality of the State organized to promote the general welfare and to exercise some degree of sovereign power, can be made to pay interest on corporate debts in the absence of a statute or express stipulation therefor. Seton v. Hoyt, 34 Oreg. 266; Monteith v. Parker, 36 Oreg. 170. But when the statute provides that the

¹ When a warrant is issued for the payment of money by a city, the municipal corporation is not bound, like a private person, to seek its creditor to make payment of its indebtedness; the law implies, from the issue of the warrant, that it is payable upon demand at its treasury. Monteith v. Parker, 36 Oreg. 170; Pekin v. Reynolds, 31 Ill. 529; Sibley v. Pine

County, 31 Minn. 201. To the effect that the city is not bound to seek its creditor and that a demand is necessary to make interest accrue on a debt owing by it, see Taylor v. New York City, 67 N. Y. 87, rev'g 5 Daly (N. Y.), 485; O'Keeffe v. New York City, 176 N. Y. 297, aff'g 86 N. Y. App. Div. 626; Holihan v. New York City, 33 N. Y. Misc. 249.

interest only begins to run from the date of the demand, and refusal of payment.' It is generally conceded that where money has been illegally exacted by the city, — *e. g.*, for a void or illegal levy of taxes, — under such circumstances that the person paying it is entitled to recover it back, interest on such moneys is recoverable.² Some cases also hold that, as warrants are contracts to pay money, a statutory

county treasurer shall pay all orders of the county clerk when presented, if there is any money in the treasury for the purpose, but if not, he shall indorse thereon "not paid" for want of funds, it is implied that the holder of the warrant will wait for payment until sufficient money has accumulated in the usual course of public business to pay the claim, and that the county will pay the legal rate of interest upon the order. *Seton v. Hoyt*, 34 Oreg. 266. As cities are given a more complete organization, they are to be regarded as natural persons in respect to contracts, and are liable for interest in the same manner under a general statute regulating the rate of interest. *Monteith v. Parker*, 36 Oreg. 170; *Shipley v. Hacheney*, 34 Oreg. 303.

In *Washington*, in holding that cities and other municipal corporations are liable for interest at the legal rate, although the statute on the subject does not expressly apply to them, the court says that strict legal reasoning may be otherwise, but that the custom has grown up of paying interest on municipal debts and no reason in justice exists why municipalities should be exempt therefrom. *Seymour v. Spokane*, 6 Wash. 362.

¹ *First National Bank v. Arthur*, 10 Colo. App. 283; *Monteith v. Parker*, 36 Oreg. 170; *Freeman v. Huron*, 10 S. Dak. 368; *State v. Stout*, 43 Wash. 501. When the statute and the warrants themselves require that they should be presented for payment and payment demanded, interest does not begin to run until presentation; but the commencement of an action is a sufficient demand upon the city to make interest begin. *New Orleans v. Warner*, 175 U. S. 120, 146, 147. To cause warrants to bear interest a demand must be made upon the treasurer *de facto*, and not upon a mere claimant of the office who is not in possession thereof. *Valley Bank v. Brodie*, 7 Ariz. 17; 76 Pac. Rep. 617. In *Louisiana*, it has been held that when warrants are payable out of a particular fund they do not bear in-

terest until there is money in the fund available for payment. *Johnson v. New Orleans*, 46 La. An. 714; *Fernandez v. New Orleans*, 46 La. An. 1130. A city issued warrants or orders on its treasurer, payable when funds should be collected therefor from certain tax sales, with interest. The funds being collected, the common council ordered the treasurer to notify holders of warrants, by publication in the official paper, to present the same for payment, and that interest would cease after a certain day. It did not appear that plaintiff knew of such publication, though duly made. It was held that the city was liable for interest on the warrants owned by plaintiff down to the time of their presentation. A city cannot set up in bar of an action to recover a debt due from it, that it was once willing and offered to pay it; nor can it stop interest upon its obligations by publishing a notice in a newspaper that such interest will cease after a certain date, when the warrants bear interest. *Read v. Buffalo*, 74 N. Y. 463. A warrant had been presented for payment and had been indorsed by the treasurer "not paid for want of funds." It was subsequently surrendered, and others issued in its stead for the same aggregate amount and dated and indorsed as the original. It was held that the reissue did not constitute payment of the original, but was merely a change of the evidence of indebtedness, and that the holder was entitled to interest from the date of presentation of the original warrant. *Monteith v. Parker*, 36 Oreg. 170.

² *Boott Cotton Mills v. Boston*, 159 Mass. 383; *Boston & S. Glass Co. v. Boston*, 4 Met. (Mass.) 181; *Grand Rapids v. Blakely*, 40 Mich. 367; *Boston & M. R. Co. v. State*, 63 N. H. 571; *Amoskeag Mfg. Co. v. Manchester*, 70 N. H. 336; *Matter of O'Berry*, 179 N. Y. 285; *Southern R. Co. v. Greenville*, 49 S. Car. 449; *Galveston County v. Galveston Gas Co.*, 72 Tex. 509.

provision which makes the warrants bear interest at a prescribed rate from the time of presentation and refusal becomes a part of the contract, and such stipulation for interest cannot be affected by a subsequent law reducing the rate.¹

¹ *Seton v. Hoyt*, 34 Oreg. 266; 497; *Williams v. Shoudy*, 12 Wash. Shipley v. Hacheney, 34 Oreg. 303; 362.
Union Sav. Bank v. Gelbach, 8 Wash.

CHAPTER XX

MUNICIPAL BONDS

	Section		Section
ness of Indebtedness; Ne-		Improvement Bonds Payable	
ble Bonds	870	from Assessment only	893
al Bonds	871	Coupons	894
Power to borrow Money		Sale and Disposal of Bonds	895
Issue Commercial or Nego-		<i>Lis pendens</i> not Applicable	896
Paper considered	872	Course of Decision in the Su-	
Practical Power to give Acknowl-		preme Court of the United	
edgment of Debt	873	States	897
Power to issue Negotiable		Decisions of State Courts as Pre-	
curities; Decisions of United		cedents in Federal Courts	898
States Supreme Court	874	Rule in Federal Courts when De-	
isions of State Courts denying		cisions of State Courts are con-	
al Implied Power to issue		flicting	899
able Bonds	875	Railway Aid Bonds	900
Power to issue Negotia-		Iowa Municipal Bond Cases	901
curities; Indiana	876	When Bonds are deemed to be	
to make Negotiable Paper		"issued"	902
derived from Power to Borrow,		General Results stated	903
Subject; the Author's		Conditions Precedent to Exercise	
visions	877	of Power; Popular Vote; Re-	
Bonds are Negotiable Se-		recital	904
curities	878	Estoppel by Recital to show Non-	
Validity; Form of Bond;		compliance with Conditions	
tion	879	Precedent; Knox County v.	
Classes of Bonds; Im-		Aspinwall	905
plied and Express Power to issue		Knox County v. Aspinwall con-	
Bonds includes the		sidered	906
to make them Negotiable		Comments on Knox County v.	
tion of Express Power		Aspinwall	907
Bonds	882	Author's Statement of Rule	908
limited to Public Pur-		Qualification of Last Section by	
What are such?	883	Supreme Court	909
as Works of Internal Im-		Estoppel by Recital; Failure to	
plements; Validity of Bonds		give Notice of Election	910
therefor	885	Condition Precedent; <i>Onus pro-</i>	
Municipal Bonds in Fed-		<i>bandi</i> ; Estoppel by Recital	911
erations	886	Estoppel by Recital to set up De-	
f Bonds by Corporations		fence of Over-issue	912-914
Officers <i>de facto</i>	887	Estoppel by Recital of Matter of	
y Requirements as to Ex-		Fact; <i>e.g.</i> , Date of Subscription	915
n, Authentication and		<i>Rationale</i> of Estoppel	916
ry of Bonds	888	Estoppel by Recitals; Illus-	
nance with Statutory Re-		tration	917-921
ments Essential	889	Constitutional Limitations of In-	
y Requirements; State-		debtedness; When Estoppel	
of Purpose of Issue	890	will not be implied	922
y Requirement of Popu-		Constitutional Limitations of In-	
lar	891	debtedness; Circumstances un-	
Medium of Payment	892	der which Estoppel will be	
		implied	923

	Section		Section
Constitutional Limitations of Indebtedness; Result of the Decisions	924	What constitutes Completed Subscription or Contract to subscribe?	942
Estoppel by Recitals; Constitutional Requirement of Levy of Tax to pay Interest and Principal	925	Same Subject; Annulment of Power by Constitutional Provision	943
Result of Federal Decisions as to Recitals	926	Same Subject; Mode of Subscription; When Subscription Complete	944
When Officer will be deemed to have Authority to make Recital	927	Same Subject; Completed Subscription; Effect of Consolidation of Railway Companies	945
Sufficiency of Recital to import Compliance with the Law	928	Valid Legislative Act Necessary	946
Of Recital as Essential to Estoppel	929	Registration of Bonds	947
Estoppel by Recital Available only to <i>Bona Fide</i> Purchaser	930	Retrospective Statutes validating Railway Subscriptions and Bonds	948
Who are <i>Bona Fide</i> Holders?	931	Want of Power always a Defence	949
Estoppel; Genuineness of Official Signature	932	Laches; Acquiescence; Payment of Interest, &c.	950, 951
Lack of Power may be shown notwithstanding Recitals	933	General Summary of Doctrine of Supreme Court as to Estoppel by Recitals	952
<i>Bona Fide</i> Holders are not affected by Illegal Disposition of Consideration for Issue	934	State Court Decisions; Power to issue Bonds; Conditions Precedent	953
How far <i>Bona Fide</i> Holder is Chargeable with Notice of Terms of Recited Ordinances	935	State Court Decisions; Conditions Precedent	954, 955
Recital of Wrong Statute	936	Estoppel by Recitals; Rule in New York	956
Estoppel to deny Compliance with Conditions to be performed Subsequent to Making but before Delivery	937	Estoppel by Recitals; Rule in Missouri	957
Judgment or Determination as to Right to issue Bonds	938	General Results stated	958
Refunding Bonds	939	Defences; Waiver of Irregularities	959
Refunding Bonds; Estoppel to deny Validity of Original Debt	940	Where Lost or Stolen	960
Other Grounds of Estoppel	941	Void Bonds; Actions to recover Consideration	961

§ 870 (484). **Evidences of Indebtedness; Negotiable Bonds.**—

We have elsewhere discussed the power of the legislature to authorize the issue of municipal bonds in aid of railway and other like enterprises,¹ and have also considered the express and implied power of municipal corporations to borrow money and issue obligations therefor.² It appropriately belongs to this place, however, to notice more at length the *different kinds of corporate securities* and the rights and remedies of the holders thereof, and to this general subject the present chapter will be devoted.

§ 871 (486). **Municipal Bonds.**—Such bonds, negotiable in form, payable at a future day, intended for sale on the market and

¹ *Ante*, § 280 *et seq.*, and see *post*, § 886 *et seq.* ² *Ante*, § 278 *et seq.*; *supra*, § 812, note.

issued pursuant to legislative authority, are, notwithstanding they are under seal, clothed with *all the attributes of commercial paper*, pass by delivery or indorsement, and are not subject to equities (where the *power* to issue them exists) in the hands of holders for value before due, without notice. Such *bonds* usually have coupons attached, which partake of the nature of the bond, *are* likewise *negotiable*, may be detached and held separately from the bond, and the holder may sue thereon in his own name, without producing or being interested in the bonds to which they were originally attached. Such securities are made to raise money by their sale, and this object would be defeated if they were subject to equities (where the power to issue exists) in the hands of *bona fide* holders. The propositions in this section of the text are so well settled as to be no longer open to question.¹

§ 872 (507). **Implied Power to borrow Money and issue Commercial or Negotiable Paper considered.** — Much conflict of opinion has existed in the American courts touching the *implied power* of public and municipal corporations *to issue commercial or negotiable instruments*, that is, instruments free from equities in the hands of innocent holders for value. In respect of *public* or *quasi* corporations, such as counties, &c., as distinguished from *municipal* corporations proper, the general current of authority is against the proposition that, as ordinarily organized, they possess any such implied power.

' Mercer County v. Hackett, 1 Wall. (U. S.) 83, denying Diamond v. Lawrence County, 37 Pa. St. 353; Meyer v. Muscatine, 1 Wall. (U. S.) 384; Gelpcke v. Dubuque, *Ib.* 175; Moran v. Miami County, 2 Black (U. S.), 722; Clapp v. Cedar County, 5 Iowa, 15; Morris Canal Co. v. Fisher, 1 Stockt. Ch. (N. J.) 667; Craig v. Vicksburg, 31 Miss. 216; Jackson v. York & C. Railroad Co., 48 Me. 147; Chapin v. Vermont & M. R. Co., 8 Gray (Mass.), 575; Lynde v. Winnebago County (Iowa court-house bonds), 16 Wall. (U. S.) 6; Gould v. Sterling, 23 N. Y. 439; Clark v. Des Moines, 19 Iowa, 199, 213, and cases cited; White v. Vermont & M. R. Co., 21 How. (U. S.) 575; New York Bank v. New York & N. H. R. Co., 13 N. Y. 599; s. c. 4 Duer, 480; Bank of Rome v. Rome, 19 N. Y. 20; Aurora v. West, 22 Ind. 88; Bartholomew County v. Bright, 18 Ind. 93; Barrett v. Schuyler County Ct., 44 Mo. 197; DeVoss v. Richmond, 18 Gratt. (Va.) 338; Lynchburg v. Slaughter, 75 Va. 57; Durant v. Iowa County, Woolworth C. C. 69; State v. Madison, 7 Wis. 688; Clark v. Janesville, 10 Wis. 136; Maddox v. Graham, 2 Met. (Ky.) 56; Kerr v. Corry, 105 Pa. St. 282; Ackley School District v. Hall, 113 U. S. 135; New Providence v. Halsey, 117 U. S. 336; Cripple Creek v. Adams, 36 Colo. 320, 327, quoting text; Oubre v. Donaldsonville, 33 La. An. 386; Martin v. Caddo Par. Police Jury, 32 La. An. 1022; *infra*, § 956. Municipal bonds payable to bearer are negotiable by delivery. Gardner v. Haney, 86 Ind. 17; Farr v. Lyons, 13 Fed. Rep. 377. *Post*, § 879.

Municipal corporations may plead the *statute of limitations* in actions against them on their bonds payable at a fixed time. De Cordova v. Galveston, 4 Tex. 470. See Underhill v. Sonora Trs., 17 Cal. 172; Baker v. Johnson Co., 33 Iowa, 151; *post*, § 1188 *et seq.*

And the power is not incident to the authority to make specified expenditures or to make local improvements, but it has, under special circumstances, been implied, where on the whole such seems to have been the legislative intention and there is nothing to rebut it, from other powers, such as the express power to borrow money.¹

But in view of the more complex and diversified powers usually conferred upon chartered or municipal corporations proper, there has been a tendency on the part of some courts to hold that such corporations, as usually existing in this country, have an incidental or implied power to issue commercial securities. The line of argument is substantially this: Trading and commercial corporations have this power as an incidental means of effecting their objects, why not municipal corporations as well? Municipal corporations are clothed with large powers, which naturally, if not necessarily, oblige them to use credit or to create debts; therefore, if they may create debts, they may borrow the money to pay them; and if they may borrow money, they have the incidental power to do like other borrowers, namely, give a negotiable bill, note, or bond therefor. The whole argument is, in our judgment, unsound. It is true that in this country private business corporations are usually considered to have the incidental power to borrow money or give negotiable paper as an evidence of their indebtedness, but in England it is held that express power is necessary to enable even railway corporations to draw, indorse, or accept bills of exchange.² But admit that the American doctrine is otherwise,³ and that it is rightly so, still there is no resemblance between private and public or municipal corporations in this regard. The latter are simply agencies of government. They are not organized for trading, commercial, or business purposes. They have, in general, but one mode of meeting their liabilities, and that is by taxation, and it is upon this resource that creditors must be taken to rely. For hundreds of years in England such corporations have existed, without it ever being contended that they could, without express authority, issue commercial paper.

¹ *Tensas Par. Police Jury v. Britton*, 15 Wall. (U. S.) 566. The ordinary powers possessed by counties, as agencies of the State in the administration of public affairs, do not give the incidental authority to issue negotiable bonds and coupons. See *Lynde v. Winnebago County*, 16 Wall. (U. S.) 6.

Distinction between *public* and *municipal* corporations, in the sense referred to in the text, see *ante*, §§ 34, 92, 97, 109.

² See observations of *Byles, J.*, in *Bateman v. Mid-Wales Railway Co.*, Law Rep. 1 C. P. 510.

³ *Stratton v. Allen*, 16 N. J. Eq. 229; *McCullough v. Moss*, 5 Denio (N. Y.), 567; *Straus v. Eagle Ins. Co.*, 5 Ohio St. 59; 2 Kent's Com. 229; 1 *Parsons' Notes and Bills*, 165; *Desmond v. Jefferson*, 19 Fed. Rep. 483, holding that a power to purchase property — as a fire-engine — implies power to issue negotiable bonds for the purpose.

Private corporations are much more vigilant and watchful of their interests than it is possible for public or municipal corporations to be. The frauds which unscrupulous officers will be enabled successfully to practise, if an implied and unguarded power to issue negotiable securities is recognized, and which the corporation or the citizen will be helpless to prevent, is a strong argument against the judicial establishment of any such power. And the argument is unanswerable, when it is remembered that in ascertaining the extent of corporate powers such as the one now under consideration, there is no rule of safety but the rule of *strict construction*; ¹ and that such an implied power is not necessary, however convenient it may be at times, to enable the corporation to exercise its ordinary and usual express powers, or to carry into effect the purposes for which the corporation is created.

§ 873. **Incidental Power to give Acknowledgment of Debt.** — An examination of the cases seems to show that the proposition that there is an *implied power* on the part of municipal corporations *to issue negotiable securities* was first made as an incident to the power of municipal corporations to incur debt and to give evidences of indebtedness. It is the generally accepted doctrine that, when a municipal corporation has the power to contract a debt, such power carries with it, by implication where there is nothing to rebut it, the right to give an *appropriate acknowledgment of the debt* and to agree with the creditor as to the time and mode of payment; and it has been frequently declared that, in the absence of any statutory provision, there is no rule of law limiting the extent of the credit. From this broad general principle it has been laid down that where a municipal corporation has lawfully contracted a debt, and especially where it is expressly authorized to borrow money, it has the *implied power*, unless restricted by its charter or by statute, *to evidence the same by an appropriate written acknowledgment*.² The power to incur debt,

¹ *Ante*, §§ 131, 238, 239.

² *Tensas Par. Police Jury v. Britton*, 15 Wall. (U. S.) 566; *Merrill v. Monticello*, 138 U. S. 673, 687, 691; *Allen v. Intendant of Lafayette*, 89 Ala. 641; *Galena v. Corwith*, 48 Ill. 423; *Richmond v. McGirr*, 78 Ind. 192; *Rushville Gas Co. v. Rushville*, 121 Ind. 206; *Clark v. Des Moines*, 19 Iowa, 199; *Witter v. Polk County Sup.*, 112 Iowa, 380; *Wyandotte v. Zeitz*, 21 Kan. 649; *Burton v. Harvey County Sav. Bank*, 28 Kan. 390; *Buffalo School Furn. Co. v. School District*, 7 Kan. App. 796;

Slack v. Maysville & L. R. Co., 13 B. Mon. (Ky.) 1, 20; *Municipality No. 1 v. McDonough*, 2 Rob. (La.) 244, 250; *Kelley v. Brooklyn*, 4 Hill (N. Y.), 263; *Ketchum v. Buffalo*, 14 N. Y. 356 (market-house bonds given on 25 years' time held valid); *Douglass v. Virginia City*, 5 Nev. 147; *Bank of Chillicothe v. Chillicothe*, 7 Ohio, Part ii, 31; *Commonwealth v. Pittsburgh*, 34 Pa. St. 496; *Commonwealth v. Pittsburgh*, 41 Pa. St. 278, 284; *Williamsport v. Commonwealth*, 84 Pa. St. 487; *Commonwealth v. Pitts-*

to agree with the creditor as to the time and mode of payment, and to give an appropriate evidence of the existence of the debt, naturally led to discussion and controversy as to the form of acknowledgment. An acknowledgment for the debt may take various forms; it may be a warrant on the treasury; a promissory note; a single bond for the payment of the particular debt; or an issue of bonds intended to have the characteristics of negotiable paper. The right to give to the evidence of indebtedness the characteristics of negotiability was claimed as an incident to the right to contract the debt, to fix the term of credit, and to give an evidence of indebtedness. But in cases which recognize the existence of the principle that a municipal corporation may give an appropriate evidence of indebtedness for a debt lawfully incurred, it has been pointed out that a *power to contract to pay* a person a sum of money at the end of a year for doing certain work, and the *power to borrow* from another upon a credit of a year for the purpose of paying for such work, might seem at first view to be substantially identical; the amount is the same and the time of payment the same; the creditor only is different. But the *material difference* between the two powers is that when the power of the municipal corporation to use its credit is limited to contracting directly for the accomplishment of the object authorized by law, then the avails or consideration of the debt cannot be diverted to any illegitimate purpose, whilst if the money is borrowed the corporation will be liable to repay it, although no part of the money may have been applied to the object for which it was obtained.¹ A

burgh, 88 Pa. 66, 84; *Clarke v. School District*, 3 R. I. 199; *Adams v. Memphis & M. R. Co.*, 2 Coldw. (Tenn.) 645. See also and compare *Bateman v. Mid-Wales R. Co.*, L. R. 1 C. P. 510.

¹ *Ketchum v. Buffalo*, 14 N. Y. 356. In this case the city of Buffalo had charter power "to establish and regulate markets." The Court of Appeals, as well as the lower courts, held that this gave the city the power to purchase market grounds, and they further held that there being nothing in the charter or general laws of the State forbidding the purchase to be made on credit, the city had power to make the purchase on credit. The opinion thus states the facts of the case: "The complaint then states that on the 26th of December, 1853, the common council of Buffalo passed a resolution accepting an offer of the defendant, Austin, to sell the city two lots for market grounds, at the price of \$35,000, and take from the city its

bond for that amount, payable in twenty-five years, with half-yearly interest at the rate of seven per cent per annum. That Austin, on the same day, conveyed the lots to the city for the consideration of \$35,000, and that on the day following the city gave Austin its bond, as follows:

"Issued pursuant to a resolution of the common council of the said city:

"BUFFALO, December 27, 1853—

"\$35,000.00.

"Be it Known, that the City of Buffalo owes to the bearer the sum of thirty-five thousand dollars, bearing interest at the rate of seven per cent per annum, payable semi-annually, at the comptroller's office in the said city, and the principal reimbursable at the same place on the 27th of December, 1878.

"In testimony whereof, I, the undersigned, mayor of the City of Buffalo, have, pursuant to a

distinction has been drawn in the cases cited between the *power to contract a debt* or even to borrow money and to give a suitable ac-

[L. s.] resolution of the common council of said city, passed the 26th day of December, 1853, hereto subscribed my name and affixed the seal of the said city, the day and year above mentioned.

"[Signed] ELI COOK, Mayor.
"[Countersigned] M. CADWALLADER, Comptroller."

The suit was one brought by taxpayers, making the city and Austin, the vendor of the land, parties, and praying a decree that the city had no right to make the purchase or execute the obligation, and that the conveyance from Austin be declared null and void, and that the bond be surrendered for cancellation, and the city be perpetually enjoined from levying any tax or assessment on the taxable property of the city for payment of the bond or interest thereon. No question as to *bona fide* holders existed.

The lower court, and the Supreme Court at general term, and the Court of Appeals all concurred in deciding, as stated in the head-note, that: "The city of Buffalo has power, under the provision in its charter authorizing it 'to establish and regulate markets,' to purchase market grounds; and there is nothing in its charter or in the general law of the State forbidding the purchase to be made on credit. Accordingly, where the city of Buffalo, in pursuance of a resolution of the common council, purchased grounds for a market site for the sum of \$35,000, and gave its bond for that amount payable in twenty-five years, with semi-annual interest; Held, that the bond was binding on the city."

In the opinion of *Selden, J.*, it is said: "But admitting that the city had a right to make the purchase, it is denied that it could purchase upon credit and execute the bond given for the purchase money. The power of corporations in general to make contracts and incur debts in the prosecution of their legitimate business would seem to be firmly established, not only by universal practice, but by repeated judicial decision. *Mott v. Hicks*, 1 Cow. (N. Y.) 513; *Moss v. Oakley*, 2 Hill (N. Y.), 265; *Kelley v. Brooklyn*, 4 Hill (N. Y.), 263; *Moss v. McCullough*, 5 Hill (N. Y.), 131; Attorney-

General v. Life and Fire Insurance Company, 9 Paige (N. Y.), 470; *McCullough v. Moss*, 5 Denio (N. Y.), 567. . . . But it is useless to multiply arguments upon this point. The power of a corporation to contract upon its credit cannot reasonably be denied; and if it may do so at all, there is, I think, no rule of law which limits the length of such credit. If a corporation may make an executory contract for property or services, it must, of necessity, have power to agree upon the mode and terms of payment; and to say that it cannot also agree as to the time of payment is to make a distinction which rests upon no sound principle, and is not warranted by any authority.

"If, then, the city of Buffalo had power, under its charter, to purchase ground for a market, it had authority, so far as the charter is concerned, to do so upon a credit to which there was no limit but its own discretion, and the right to give the single bill in question would follow as a necessary consequence. Power to contract the debt must carry with it power to give a suitable acknowledgment of the indebtedness, in the form either of a promissory note or a single bill. I can conceive no well-grounded rule which would concede one of these powers and deny the other, and no such distinction is warranted by the cases."

In the concurring opinion of *Wright, J.*, it is said: "I think it must be conceded that the city had power to purchase ground for a public market. If so, there is nothing in the charter or general law of the State forbidding the purchase to be made on credit. It has never been doubted that a municipal corporation may become a debtor for property which it is authorized to acquire. Whether the credit be long or short is not a question of power, but of discretion on the part of the corporation; and the parties may contract on that subject as they shall deem proper. A corporation authorized to do an act has, in respect to it, the power to make all contracts that natural persons could make." See also *Hubbard v. Sadler*, 104 N. Y. 223. The only doubt, if any exists, as to the decision in the *Ketchum Case*, is whether a mere general charter power, among many others,

knowledge therefor and the power to *issue negotiable bonds* and put them on the market as evidence of a debt or loan. To contract a debt by borrowing or otherwise and to give a bond or obligation therefor which may circulate in the market as a negotiable security free from any equities or defences that may be set up by the maker of it are, it is said, in their nature and legal effect, *different transactions*.¹ The result of the decisions at the present time is that whilst the courts of some States appear to recognize the right to give to evidences of indebtedness issued by municipalities the characteristics of commercial paper by virtue merely of an implied power arising from the power to contract debt and to give an appropriate evidence thereof, the great weight of authority is, as we shall see, to the effect that the power of a municipal corporation to issue commercial paper is not an ordinary incident to the exercise of the usual corporate functions, and must be expressly or otherwise plainly conferred by legislative enactment.²

§ 874. **Implied Power to issue Negotiable Securities; Decisions of United States Supreme Court.** — The modern tendency of decision is well exemplified in the decisions of the Supreme Court of the United States on the subject of the implied power to issue negotiable securities. That court is now committed to the view that the power to *borrow money or to contract a loan does not necessarily, at least, include the implied power to issue*, as evidence of such loan, negotiable bonds or commercial securities conferring upon *bona fide* holders immunity from legal or equitable defences,³ but when the question first came before it, it held that a power given in a city charter to borrow money

"to establish and regulate markets," contemplated anything more than that if the power was exercised and market property acquired, it should be paid for out of the current taxation and current resources of the city. Such a power is, we think, much less extensive and very different from an express power "to borrow money." Negotiable paper is almost always required and issued for money borrowed.

¹ *Merrill v. Monticello*, 138 U. S. 673, referred to *infra*; *Brenham v. German American Bank*, 144 U. S. 173, referred to *infra*.

² In *Seward County (Kan.) v. Aetna Life Ins. Co.*, 90 Fed. Rep. 222, *Sanborn, C. J.*, says: "The power to borrow money, to incur indebtedness, to make contracts, to issue bonds on behalf of the people of the State, or on behalf of any political subdivision thereof, —

all these are *essentially legislative powers* which it is the province of the representatives of the people assembled in the legislature to exercise themselves or to delegate to municipal or quasi-municipal corporations to be exercised free from every restriction not expressly imposed by the constitution of the State or the inalienable rights of man."

It seems to the author that express power "to borrow money" stands or may stand in a different category as to its extent and implications, from the ordinary power to incur debt in the exercise of the usual municipal functions. See *infra*, § 874.

³ See *ante*, §§ 278–296, where the subject of the general nature and extent of the power to borrow money is treated.

for any public purpose conferred upon a city the power to issue negotiable bonds to raise the money.¹ In the cases which immedi-

¹ In *Rogers v. Burlington*, 3 Wall. (U. S.) 654, it was held that statutory power granted to the city of Burlington, Iowa, "to borrow money for any public purpose" gave authority to the city to borrow money to aid a railroad company in building a road for public travel and transportation; and that, as a means of borrowing money to accomplish such purpose, the city might issue its bonds to be sold by the railroad company to raise the money. Bonds were issued and delivered to the company. They were coupon bonds in the usual form, and were secured by first-mortgage bonds of the company. Suit was brought by a bona fide holder for value to recover against the city on coupons, and the case came up on a demurrer to the petition. The demurrer was sustained by the Circuit Court and judgment rendered for the city; but the Supreme Court reversed that judgment. As to the power to issue negotiable bonds it was said: "Common experience shows that the issuing of bonds by a municipal corporation as material aid in the construction of a railroad is merely a customary and convenient mode of borrowing money to accomplish the object; and it cannot make any difference, so far as respects the present question, whether the bonds as issued by the defendants were sold in the market by their officers or were first delivered to the company and were by their agents sold for the same purpose. . . . Technically speaking, it may be said that the transaction, as between the company and the defendants, was, in form, a contract of lending; but as between the defendants and the persons who purchased the bonds in the market, it was undeniably a contract of borrowing money; and the same remark applies to the transaction in its practical and legal effect upon all subsequent holders of the securities who have since become such for value and in the usual course of business." Justice Field delivered a dissenting opinion in which Chief Justice Chase and Justices Grier and Miller concurred, and which said, as to the authority of the city to issue the bonds, that there was no such authority either in the charter of the city or in any other legislation of the State; that the authority conferred was to borrow money; that no

money was borrowed but the bonds of the city were loaned; and that borrowing money and loaning credit were not convertible terms. This case was followed in *Mitchell v. Burlington*, 4 Wall. (U. S.) 270. These decisions are expressly overruled, on this point, in *Brenham v. German American Bank*, 144 U. S. 173.

The power "to borrow money for any public purpose" ought not, we think, ever to have been held to authorize the city to borrow money to aid a railway company, and to that extent the case of *Rogers v. Burlington*, 3 Wall. (U. S.) 654, is clearly overruled, but we do not understand the Supreme Court of the United States to have decided that express power "to borrow money" will not under any circumstances include the right to issue bonds negotiable in form. Other legislative provisions and the circumstances may negative such right as in the *Brenham Case*, *infra*. On the other hand the other legislative provisions and circumstances may be such as clearly to show that the power may exist by implication from the powers granted, the object to be attained, and the usual method pursued in such cases. No universal rule can, we think, be laid down. Each case must be decided on its own exact circumstances, the ultimate object being to ascertain the legislative intention.

Express authority to a city to subscribe for stock, to be paid for by "certificates of loan," authorizes it to issue negotiable bonds with coupons attached, such "certificates of loan" and "bonds" being considered identical. *Amey v. Allegheny City*, 24 How. (U. S.) 364. Power by public corporations to issue negotiable bonds may be inferred from the power to subscribe for stock in railroad companies and to make payment for it in bonds. *Curtis v. Butler County*, 24 How. (U. S.) 435; *Bushnell v. Beloit*, 10 Wis. 195. Express legislative authority to a city to subscribe for stock in a railroad "as fully as any individual" authorizes the issue by the city of negotiable bonds in payment therefor. *Seybert v. Pittsburgh*, 1 Wall. (U. S.) 272, approving *Commonwealth v. Same*, 41 Pa. St. 278.

ately followed this decision, the Supreme Court modified or limited these views. Thus it held ¹ that the trustees or representative officers of a parish, county, or other such local jurisdiction, invested with the usual powers of administration in specific matters, and the power of levying taxes to defray the necessary expenditures of the jurisdiction, had *no implied authority to issue negotiable securities* payable in the future of such a character as to be unimpeachable in the hands of *bona fide* holders for the purpose of raising money or funding a previous indebtedness. In the opinion of the court it is stated that the police jury of a parish of Louisiana, which issued the negotiable bonds in question in that case, had no express authority to issue them; that the power could not be implied from the ordinary powers of local administration and police, which were conferred upon the boards and trustees of political districts; that it was one thing for county and parish trustees to have the power to incur obligations for work actually done in behalf of the county or parish and to give proper vouchers therefor, and a totally different thing to have the power of issuing unimpeachable paper obligations, which might be multiplied to an indefinite extent; and that although the authority of such bodies to issue negotiable paper might be implied in some cases from other and express powers granted, those implications should not be extended beyond the fair inferences to be gathered from the circumstances of each case. In the next case in which the court had occasion to consider the question,² it held that the *power to issue commercial paper was foreign* to the objects of the creation of the political divisions of counties and townships and was not to be conceded to such organizations unless by virtue of express legislation, or by very strong implication from such legislation; and that the power conferred by the statutes of Tennessee upon a county to erect a court-house, jail, and other necessary county buildings, did not authorize the issue of commercial paper as evidence of, or security for, a debt contracted for the construction of such a building. Thereafter, the court further held ³ that a grant to a municipal corporation of power to appropriate moneys in aid of the construction of a railroad, accompanied by a provision directing the levy and collection of taxes to meet such appropriation, and prescribing no other mode of payment, did not authorize the issuing of negotiable bonds in payment of such appropriation. Subsequent decisions ⁴ held that

¹ *Texas Par. Police Jury v. Britton*, 15 Wall. (U. S.) 566.

² *Claiborne County v. Brooks*, 111 U. S. 400.

³ *Concord v. Robinson*, 121 U. S. 165.

⁴ *Kelley v. Milan*, 127 U. S. 139; *Norton v. Dyersburg*, 127 U. S. 160.

the power granted to a municipal corporation to become a stockholder in a railroad company did not carry with it the power to issue negotiable bonds in payment of the subscription, unless the latter power was expressly, or by necessary implication, conferred by the statute; and ¹ that a municipality has no power to issue its bonds in aid of a railroad except by legislative permission. In the next case ² the court held that the power conferred by a statute on a municipal corporation to subscribe for the stock of a railroad company did not include the power to issue negotiable bonds representing a debt, in order to pay for that subscription; and it was said that that rule was well settled. In the opinion of the court (delivered by Mr. Justice Field), the court said, "The inability of municipal corporations to issue negotiable paper for their indebtedness, however incurred, unless authority for that purpose is expressly given or necessarily implied for the execution of other express powers, has been affirmed in repeated decisions of this court."³ Thereafter, in the course of the opinion it was said that implied power of a municipal corporation to borrow money to enable it to execute the powers expressly conferred upon it by law, if existing at all, did not authorize it to create and issue negotiable securities to be sold in the market and to be taken by the purchaser freed from the equities that might be set up by the maker; and that to borrow money, and to give a bond or obligation therefor, which might circulate in the market as a negotiable security, freed from any equities that might be set up by the maker of it, were *essentially different transactions in their nature and legal effect.*⁴ Still more recently the Supreme Court of the

¹ Young v. Clarendon Township, 132 U. S. 340.

² Hill v. Memphis, 134 U. S. 198.

³ Citing Tensas Par. Police Jury v. Britton, 15 Wall. (U. S.) 566; Claiborne County v. Brooks, 111 U. S. 400; Kelley v. Milan, 127 U. S. 139; Young v. Clarendon Township, 132 U. S. 340.

⁴ Merrill v. Monticello, 138 U. S. 673.

In this case it appeared that towns in Indiana had express power "to borrow money or incur any debt," on certain conditions. The town of Monticello owed a valid debt evidenced by bonds which had matured, and on which the town was liable to be sued and to have judgment go against it. To pay this debt the town issued ten-year *refunding bonds* negotiable in form, placed them with an agent to sell, who sold them and absconded with the proceeds. The action was upon these refunding bonds by a good faith pur-

chaser for value. The court held the bonds to be void. The opinion, Lamar, J., admits that if the town had borrowed the money to pay the old bonds and issued the refunding bonds to evidence the obligation, such bonds would have been valid (p. 687); but the opinion seems to base its conclusion that the refunding bonds were void upon the ground that what was done was not a "borrowing" of money, but was the "issue for sale in open market of bonds as commercial securities with immunity in the hands of a *bona fide* holder for value from equitable defences," which the opinion holds to be essentially different transactions. But *quære* on this point. Why was not what was done a "borrowing"? It is a usual mode of municipal borrowing to offer its securities for sale in the market. What better mode could the town have adopted under the circum-

United States had occasion to consider the validity of bonds alleged to have been made under the provisions of a charter of a city having very limited powers of taxation "that the city council shall have the power and authority to borrow for general purposes not exceeding fifteen thousand dollars on the credit of the city." Pursuant to ordinance, negotiable bonds, payable to bearer, were made and issued. An action was begun upon the coupons attached to the bonds, and was contested by the city on the ground that the city, although it had the power to borrow money, had not the power to issue negotiable bonds therefor, and that they were void for all purposes, and in the hands of all persons. The court declared that it was clear that in exercising its power to borrow on its credit, for general purposes, the city could give to the lender, as a voucher for the repayment of the money, evidence of indebtedness, in the shape of non-negotiable paper; but that did not cover the right to issue negotiable paper or bonds, unimpeachable in the hands of a *bona fide* holder. The power to borrow would not be nugatory when unaccompanied by the power to issue negotiable bonds therefor. The confining of the power in the case before the court to a borrowing of money for general purposes on the credit of the city, would limit it to the power to borrow money for ordinary governmental purposes, such as are generally carried out with revenues derived from taxation; and the presumption is that the limited grant of the power in the charter was intended to confer the right to borrow money in anticipation of the receipt of revenue taxes, and not to plunge the corporation into a debt on which interest must be paid at a high rate for a term of years. It is easy for the legislature to confer upon a municipality, when it is constitutional to do so, the power to issue

stances of this case? Was it to sit still, be sued, and have judgment go against it, to be enforced by taxation for the whole debt at once? One portion of the opinion seems to rest the judgment of the court that the refunding bonds were void, not for want of consideration, but because although power "to borrow money" was conferred there was no "express power to issue negotiable bonds as evidence of such loan and no implied power because the existence of it is not necessary to carry out any of the purposes of the municipality" (p. 692). Three judges did not sit, and the exact ground of the court's judgment against the validity of the refunding bonds is not very clear. Perhaps it may be that the court was of opinion that the express power "to borrow money or incur any debt" did not include the power to borrow for the purpose of refunding the old bonds, and hence *quoad* the case before the court there was not even power to borrow money, and consequently no implied power as incident to the power to borrow to issue the negotiable ten-year refunding bonds. The town had express power "to borrow money" for purposes not specified, and whatever may be the limitations on such a power, why should it not include the power to borrow money to pay the matured valid outstanding bonds of the town? This is a very different thing from recognizing that the borrowing power extended to selling its securities to pay the current expenses of the town.

negotiable bonds; and under the well-settled rule that *doubt as to the existence of such power ought to be determined against its existence*, it ought not in the case before the court to be held to exist as an incident to a simple power to borrow money for general purposes. The court in its opinion reviewed the previous cases, and held that there was no authority to issue negotiable bonds; and even a *bona fide* holder could not recover upon them or their coupons.¹

¹ *Brenham v. German American Bank*, 144 U. S. 173. In the opinion of the court in this case Justice *Blatchford* referred to §§ 507 and 507a of the 4th edition of this work (§§ 872, 878, of this edition) in support of the proposition that the power to borrow money, unaccompanied by the power to issue negotiable bonds, would not have been nugatory. A dissenting opinion was read by Justice *Harlan*, in which Justices *Brewer* and *Brown* concurred. In the dissenting opinion, Justice *Harlan* referred to the views of the author of this work as expressed in §§ 507 and 507a (4th edition) describing as unsound and dangerous the doctrine "that a public or municipal corporation possessing the *implied power* to borrow money for its ordinary purposes, and as *incidental* thereto, the power to issue commercial securities, that is, paper which cuts off defences when it is in the hands of a holder for value acquired before it is due"; and expressed approval of the views laid down by the author in the 4th edition of this work, § 125, that "*Express power to borrow money*, perhaps in all cases, but especially if conferred to effect objects for which large or unusual sums are required, as, for example, subscriptions to railroads and other public improvements, will ordinarily be taken, if there be nothing in the legislation to negative the inference, to include the power (the same as if conferred upon a corporation organized for pecuniary profit) to issue negotiable paper with all the incidents of negotiability."

Brenham v. German American Bank, 144 U. S. 173, *supra*, is cited, approved, and followed in *Barnum v. Okolona*, 143 U. S. 393; *Atchison Board of Education v. DeKay*, 148 U. S. 591; *Washington County v. Williams*, 111 Fed. Rep. 801, 806; *Coffin v. Kearney County Com'rs*, 57 Fed. Rep. 137, 141; *Ashuelot Nat. Bank v. School District*, 56 Fed. Rep. 197, *aff'd* 41 Fed. Rep. 514; *Coffin v. Indianapolis*, 59 Fed. Rep. 221, 227; *Lehman v. San Diego*, 83 Fed. Rep. 669; *Oquawka v. Graves*, 82 Fed. Rep. 568; *German Ins. Co. v. Manning*, 95 Fed. Rep. 597, overruling 78 Fed. Rep. 900; *Watson v. Huron*, 97 Fed. Rep. 449; *Gilman v. Fernald*, 141 Fed. Rep. 941, 942. See also *Bangor Sav. Bank v. Stillwater*, 46 Fed. Rep. 899; *Hopper v. Covington*, 8 Fed. Rep. 777, *aff'd* 118 U. S. 148. See *ante*, § 287.

Brenham Case commented on: In respect of the *Brenham Case* the author, in view of its great importance, ventures to observe that it has sometimes, as he thinks, mistakenly been supposed to lay down the doctrine that express power to a municipal corporation to borrow money, without more, will not *under any circumstances* authorize the issue of bonds in negotiable form, and that if bonds are so issued they are void, even in the hands of *bona fide* holders. The decision of the majority of the court in that case asserts no such general or universal doctrine. On the contrary, the court carefully confined its decision to the facts in "the present case," which facts were peculiar, and as appears in the report of the case, are as follows: The City of *Brenham*, chartered February 4, 1873, had a population of "over 4000 and less than 10,000 inhabitants" (p. 178). The Constitution of Texas of 1876 (art. xi. §§ 3 to 7), contained provisions applicable to various classes of municipal corporations. Section 4 of art. xi. deals with cities and towns having, like *Brenham*, a population of 10,000 inhabitants, or less. It provides that they may be chartered only by general law, and that they may levy, assess, and collect an annual tax to defray the *current expenses of local administration*, but such tax shall never exceed in any one year one-fourth of one per cent. Section 5 of art. xi. deals with cities of more than 10,000 inhabitants, and gives larger powers. Section 3 of

§ 875. Decisions of State Courts denying General Implied Power to issue Negotiable Bonds. — The decisions of the Supreme Court of the

art. xi. applies to all municipal corporations, and is as follows: "No county, city, or other municipal corporation shall hereafter become a subscriber to the capital of any private corporation or association, or make any appropriation or donation to the same, or in anywise loan its credit; but this shall not be construed to in any way affect any obligation heretofore undertaken pursuant to law."

The charter conferred upon the city the following powers: "Art. iii. § 2. That the city council shall have the power and authority to borrow for general purposes not exceeding (\$15,000) fifteen thousand dollars on the credit of said city. Art. vii. § 1. Bonds of the corporation of the City of Brenham shall not be subject to tax under this act." Under these constitutional restrictions and charter powers the city, on June 7, 1879, passed an ordinance "to provide for the issue and sale of \$15,000 in coupon bonds of the city, to borrow money for general purposes," and under that authority issued bonds dated July 31, 1879, of various denominations, aggregating \$15,000. These bonds were entitled "Bonds for General Purposes, \$15,000." They were payable to bearer twenty years after date, redeemable after ten years, bearing ten per cent interest, and with coupons attached. The bonds contained no recital, except that they were authorized by the ordinance of June 7, 1879.

The action was upon 504 coupons of these bonds. The city defended on the ground that the bonds were issued without authority and were void, setting up in support of this plea that \$12,000 of the \$15,000 bonds were issued to aid a railroad company, in direct violation of § 3, art. xi. of the Constitution, above quoted, and that \$3000 of the bonds only were used for proper city purposes. At p. 182, the Supreme Court of the United States says: "It appears by the record that depot grounds in and the right of way through the City of Brenham were bought for the Gulf, Colorado, and Santa Fé Railroad Company with money realized from the sale of bonds issued under the ordinance of June 7, 1879, and that \$3000 of such bonds were used by the city for fire department purposes."

The defence to the bonds, under the

Constitution, was complete, if that defence was not cut off by the negotiable character of the bonds; that is to say, the city, in direct violation of the Constitution, issued bonds to aid a railroad, and concealed and misstated the facts in the ordinance and in the bonds by stating that they were issued for "general purposes." When the city issued these bonds it disposed of the same, as stated by the court at pages 181 to 182, as follows: "In the present case it appears that Mensing bought from the defendant \$5000 of the bonds at 95 cents on the dollar, and that the other \$7000 of the bonds were sold by the city for the same price, it thus receiving only \$11,400 for \$12,000 of the bonds, and suffering a discount on them of \$600. The city thus agreed to pay \$12,000, and interest thereon, for \$11,400 borrowed."

These bonds were afterwards bought by the plaintiff, the German American Bank, without actual notice of any facts other than those disclosed on the bonds. The majority of the court (four judges dissenting) held that under the foregoing constitutional and charter provisions, the form of ordinance and form of bond, the plaintiff was not entitled to recover. The majority did not undertake to lay down any rule as applicable to any other case, and confined their opinion strictly to the case before them, and made it turn upon the very peculiar and limited charter powers of the city of Brenham, under the Constitution of the State and the charter of the city. This appears by the following extract (p. 182): "The power to borrow the \$11,400 would not have been nugatory unaccompanied by the power to issue negotiable bonds therefor [citing authorities]. The confining of the power in the present case to the borrowing of money for general purposes on the credit of the city limits it to the power to borrow money for ordinary governmental purposes, such as are generally carried out with revenues derived from taxation; and the presumption is that the grant of the power was intended to confer the right to borrow money in anticipation of the receipt of revenue taxes, and not to plunge the municipal corporation into a debt on which interest must be paid at the rate of ten per centum per

United States on this subject seem to be either consonant with, or to have had a controlling effect upon, the decisions of many of the States upon the same subject. In *Illinois*, for example, in one of the earlier cases, the court used language to the effect that municipal corporations, like any other corporation, had the *inherent right to pay its debts* or provide for their payment, — to fund them if it seemed that to be the best policy, and issue the necessary evidences hereof, and as a corollary it said that a city being in debt, which is evidenced by scrip or by promissory notes, might change the form of indebtedness to interest-bearing bonds without any express authority in its charter. But later decisions of the same court have not adhered to these views, and the court has found it necessary to limit

annum, semi-annually, for at least ten years."

The decisive question in the case was whether the city had power to issue bonds negotiable in the sense that they would cut off equities in the hands of *bona fide* holders. The city of Brenham being a small municipality, and being by the constitution expressly restricted to the levy of an annual tax to defray the current expenses of the local government of not exceeding one-fourth of one per cent a year, and the bonds containing no recital to estop the city, and the bonds having been issued to aid a railroad in direct violation of § 3 of art. xi. of the Constitution, the Supreme Court, under these peculiar circumstances, held that the city had no authority to clothe the bonds which it issued with a negotiable character in such a sense that they would cut off equities.

It was expressly admitted in the majority opinion that the city of Brenham had the power to issue bonds. The only question was whether it could clothe them with a negotiable character which would cut off defences when the bonds were in the hands of a holder or value who acquired them before they were due. The court said (p. 181): "That in exercising its power to borrow money not exceeding \$15,000 on its credit, for general purposes, the city could give to the lender, as a voucher or the repayment of the money, evidence of indebtedness in the shape of non-negotiable paper, is quite clear; but that does not cover the right to issue negotiable paper or bonds unimpeachable in the hands of a *bona fide* holder."

The fact that the municipality is

indebted does not *per se* confer authority to issue renewal or refunding negotiable bonds. *Oquawka v. Graves*, 82 Fed. Rep. 568. In *Bangor Savings Bank v. Stillwater*, 46 Fed. Rep. 899, a case which involved the power of a city in *Minnesota* to issue a negotiable certificate of indebtedness, the Circuit Court held that municipal corporations have no power to utter commercial paper unless it is expressly conferred upon them by law, or is clearly implied from some other power expressly given; and that in the absence of such statutory authority, it cannot issue negotiable bonds even in payment for property which it has purchased under its charter powers.

Summarizing the effect of the decisions of the United States Supreme Court upon this question, it has been said that they establish the following propositions: *First*, that an express power conferred upon a municipal corporation to borrow money for corporate purposes does not in itself [necessarily] carry with it an authority to issue negotiable securities; *second*, that the latter power will never be implied, in favor of the municipal corporation, unless such implication is necessary to prevent some express corporate power from becoming utterly nugatory; and *third*, that in every case where doubt arises as to the right of the municipal corporation to execute negotiable securities the doubt should be resolved against the existence of any such right. *Ashuelot Nat. Bank v. School Dist.*, 56 Fed. Rep. 197, aff'g 41 Fed. Rep. 514.

and qualify such *dicta*. It is now the settled law in this State that as municipalities are created for governmental purposes, the *borrowing of money*, the purchase of property on long time, and the *giving of commercial paper*, are not *inherent* or even powers usually conferred, and unless endowed with power in their charter or other statutes, they have not authority to make and place on the market such paper, and persons dealing in it must see that the power exists.¹

¹ *Illinois*. In *Galena v. Corwith*, 48 Ill. 423, the city had power to borrow so much money as it might deem necessary and expedient, not exceeding twenty thousand dollars in any one year, and to issue bonds, &c., therefor. In an action upon two bonds made by the city it was contended that the city was prohibited from funding its existing debt and giving written evidences thereof either by bonds bearing interest and on long time, or in any other form the parties might agree upon. It was held that the city had power to provide for its existing debt, although it might exceed the amount which it was authorized to borrow, and that the bonds were valid. *Breese*, C. J., said: "Every corporation, or every natural person, has the undeniable and inherent right to pay its debts, or provide for their payment — to fund them, if that be deemed the best policy, and issue the necessary evidences thereof. It will not be denied municipal corporations have power to contract debts, and without limit, unless restricted by their charters. Having this power, it follows they can provide for their payment, in such mode as they and the holders of the indebtedness may agree upon. We believe it to be well settled doctrine, that corporations have all the powers of ordinary persons, as respects their contracts, except when they are expressly, or by necessary implication, restricted, and that they have all the powers necessary to carry out an expressly granted power. The right bestowed by the charter to borrow, by no means nullifies the power, vital to every corporation, to pay its debts or provide for their payment by postponing the payment to a future day, and issuing evidences thereof. We do not think the citation of any authority necessary to establish a proposition so plain. A city being in debt, which is evidenced by scrip or by promissory notes, may surely change the form of the indebtedness to interest-bearing bonds, and this

without any express authority in its charter. It is an inherent power and vital, without which such organizations could not live." In *Hardin County v. McFarlan*, 82 Ill. 138, it is said that the decision in *Galena v. Corwith*, 48 Ill. 423, *supra*, was rendered upon the ground that the city by its charter had power to borrow money, and, not having been restricted as to the means of exercising this power, could issue the bonds, and the court added that it was held in *Chestnut Highway Com'n v. Newell*, 80 Ill. 587, that more was said in the *Galena Case* than the subject justified, and that it needed modification confining it to cases where the charter of incorporation expressly grants the power, for a corporation cannot exercise any powers, save those granted, or necessarily implied in order to carry into effect a granted power.

In *Folsom v. School Directors*, 91 Ill. 402, a school district was authorized to borrow money for its necessary purposes and to issue bonds executed by two officers or two members of the board. It borrowed money and made an order upon the treasurer payable one year after date with interest payable semi-annually. The court held that its power to execute acknowledgments of the debt was not confined to the issuing of bonds, saying "power to borrow money carries with it at common law the power to give evidence of the loan, — usually carries with it the power to execute promissory notes and simple contracts incident to the loan; but mere power to borrow money does not carry with it as an incident the power to issue a bond or issuing an instrument under seal." In *Lippincott v. Pana*, 92 Ill. 24, it was held that where a law authorizes the donation of money by a municipal corporation to aid in the construction of a railroad and provides for levying a tax to raise the amounts donated as they become due, neither the corporation nor its officers have the power to borrow

In *Iowa*, the decisions of the Supreme Court took a somewhat similar course, and although *dicta* are to be found in the early cases, which seem to support the existence of an implied power to issue negotiable securities, the Supreme Court has now definitely held that such implied power does not exist.¹ A similar rule is adopted

money or to issue bonds in payment of such donation, and bonds issued in payment thereof, are void. See also *Middleport v. Aetna Life Ins. Co.*, 82 Ill. 562; *Dixon County v. Field*, 111 U. S. 83. In *Hewitt v. Normal School Dist.*, 94 Ill. 528, it was said that in *Illinois* municipal corporations are not usually endowed with power to enter into traffic or general business, and are only created as auxiliaries to the government in carrying into effect some special government policy, or to aid in preserving the order and in promoting the well-being of the locality over which their authority extends. Where a corporation is created for business purposes, all persons may presume such bodies, when issuing their paper, are acting within the scope of their power. Not so with municipalities. Being created for governmental purposes, the borrowing of money, the purchase of property on time, and the giving of commercial paper, are not inherent, or even powers usually conferred; and unless endowed with such power in their charter or by statute, they have not authority to make and place on the market such paper, and persons dealing in it must see that the power exists. See also *Harding v. Rockford, R. I. & St. L. R. Co.*, 65 Ill. 90; *Marshall County v. Cook*, 38 Ill. 44; *Hardin County v. McFarlan*, 82 Ill. 138.

In *Coquard v. Oquawka*, 192 Ill. 355, the court held that municipal corporations, organized as they are for restricted governmental purposes, have no power to issue commercial paper unless such power has been conferred by statute; and without such power such paper is void, even in the hands of an innocent holder for value before maturity. See also *Bourdeaux v. Coquard*, 47 Ill. App. 254. In this State, therefore, the decisions appear to be adverse to the existence of any implied power to issue bonds or other negotiable securities which in the hands of *bona fide* holders for value will be free from any equities against the person to whom they were originally issued. See also on the general subject, *Smith*

v. Peoria County, 59 Ill. 412; *Bissell v. Kankakee*, 64 Ill. 249; *Burr v. Carbondale*, 76 Ill. 455; *Law v. People*, 87 Ill. 385, 394.

¹ *Swanson v. Ottumwa*, 131 Iowa, 540; s. c. ante, § 284.

In *Iowa*, a charter provision authorizing a city council "to borrow money for any object or purpose in their discretion and to pledge the faith of the city for the payment thereof," which also authorizes the city to levy taxes for the payment of such debts, does not empower the city to issue long-time interest-bearing bonds in payment of current debts evidenced by city warrants. *Heins v. Lincoln*, 102 Iowa, 69. Followed in *Witter v. Polk County*, 112 Iowa, 380; *German Ins. Co. v. Manning*, 95 Fed. Rep. 597; *Reed v. Cedar Rapids*, 136 Iowa, 191; 113 N. W. Rep. 773; *Gilman v. Fernald*, 141 Fed. Rep. 941. In *Clark v. Des Moines*, 19 Iowa, 199, — an action upon certain city warrants, — it was held that, when the officers in a city have no express power to issue for current ordinary debts negotiable paper which shall be free from equities in the hands of purchasers and it is not necessary as an incident to those granted, or to carry out the purposes or objects of the corporation, it cannot be held to exist by implication. The court said that it is held that banking and trading corporations have the implied or incidental power to make negotiable paper, and it declared that to this doctrine, as applied to commercial corporations, it could see no objection, but it did see many and serious objections to treating the ordinary warrants of counties and cities as possessing all of the incidents and qualities of commercial paper. In *Clark v. Polk County*, 19 Iowa, 248, it was held that county warrants are not ordinarily negotiable, and that the clerk of the board of supervisors has no power to make them so, the court saying: "The clerk of the board of supervisors, whether he is the special or general agent of the county, would have no authority to bind the county by a negotiable instrument, unless he is expressly

in *Alabama*,¹ *Louisiana*,² *Maine*,³ *New Jersey*,⁴ and *Texas*.⁵ In other States, *dicta* are frequently to be found which tend to show

authorized by statute so to do, or unless it is necessary for him to do so in order to execute the power conferred or to that enjoyed. In *Dively v. Cedar Falls*, 21 Iowa, 565, it was held that scrip issued by a municipal corporation for the purpose of being used and circulated as money was absolutely void, and incidentally the court said that it had held that, without express power in the charter so to do, municipal corporations have no power to bind themselves by negotiable paper with all the incidents to negotiability. In *Austin v. Colony*, 51 Iowa, 102, the court held that the directors of a school district have power to borrow money to discharge a debt which has been legiti-

mately created and are authorized to pledge the credit of the district for that purpose. This decision was rendered upon the principle that the borrowing of money and the discharge therewith of the original indebtedness was merely a formal change in a liability already legitimately created, and that it was within the implied power of the school district to borrow money therefor.

In *Sioux City v. Weare*, 59 Iowa, 95, the city issued negotiable bonds to a judgment creditor in satisfaction of the judgment. The city was authorized to negotiate loans, and the court held that the transaction in question, while not strictly a loan, came within the spirit of

¹ *Cleveland School Furn. Co. v. Greenville*, 146 Ala. 559.

² In *Louisiana*, the court has declared that the question of the right to issue and put in circulation interest-bearing negotiable instruments, — whether government, State, or municipal, — depends solely and alone upon a proper and efficient grant of sovereign power. *State v. Mayor of Lafayette*, 49 La. An. 1748. See also *Snelling v. Joffrion*, 42 La. An. 886; *Sterling v. West Feliciana Par.*, 26 La. An. 59; *Louisiana & N. W. Railroad Co. v. Police Jury*, 48 La. An. 331; *Smith v. Madison*, 30 La. An. 461; *Bertrand v. Vermilion*, 28 La. An. 588; *Lodds v. Vermilion*, 28 La. An. 618; *Mathe v. Plaquemines*, 28 La. An. 77. In *Municipality No. 1 v. McDonough*, 2 Rob. (La.) 244, the city had authority to purchase real estate. It contracted to purchase certain lands for a large sum payable in the bonds of the municipality twenty-five years after date with interest. It was held that having the power to purchase, the power to give the evidence necessary to secure the price followed; that whether the credit be long or short was a matter of indifference; and that the contract was valid. *Quare*, whether this decision is qualified and limited by the later cases cited *supra*?

³ In *Parsons v. Monmouth*, 70 Me. 262, the action was brought upon a promissory note made by the treasurer of a town. The court held that no officer of a town has authority to issue promissory notes in its behalf without

express permission of the town in its corporate capacity; and that towns themselves cannot borrow money and issue notes of a commercial character for the execution of their ordinary business unless expressly or impliedly authorized by statute. As to limited powers of New England towns, *see* chap. ii.

⁴ In *Knapp v. Hoboken*, 39 N. J. L. 394, an action was brought upon certain improvement certificates under seal made by the defendant city. It was held that the certificates in question were not negotiable, and in the opinion of the court, after referring to the opinions of Mr. Justice *Bradley* in *Nashville v. Ray*, 19 Wall. (U. S.) 468, and Chief Justice *Beasley* in *Hackettstown v. Swackhamer*, 37 N. J. L. 191. *Depue, J.*, said: "In both these opinions ground is taken decidedly against the power of municipal corporations to invest their obligations with the character and incidents of commercial paper, so as to render them in the hands of *bona fide* holders, unassailable by defences to which they would be subject in the hands of the immediate parties, unless such power is conferred by legislative enactment, either express or clearly implied. The securities sued on in this case are not shielded from such defences by any legislative authority, either expressly granted or arising from an implication derived from the objects for which they were issued." See *ante*, § 285.

⁵ In *Robertson v. Breedlove*, 61 Tex. 316, it was held that the commu-

the adherence of the courts of these States to the same rule.¹ The weight of these *dicta* must not be underestimated. They

the provision authorizing loans, that the issuance of bonds to the judgment creditor in payment of the judgment imposed upon the city the same obligation that it would have imposed if they had been issued for money borrowed to pay the judgment creditor; and the court said: "Where a municipal corporation procures money on time or does an equivalent act as in this case, negotiates for time in the payment of indebtedness, it may doubtless give its written obligation, and there can, we think, be no objection to the obligation being given in the form of a bond or bonds." This case is limited and distinguished in *Heins v. Lincoln*, 102 Iowa, 69, 79, where it is said that the court did not intend to adopt the broad rule that if a municipal corporation had the power to bor-

row money it therefore had the power to issue its negotiable bonds therefor in the absence of express authority so to do. In *German Ins. Co. v. Manning*, 95 Fed. Rep. 597, overruling 78 Fed. Rep. 900, the circuit court held, following *Heins v. Lincoln*, 102 Iowa, 69, that the authority conferred by the Iowa statute of 1873, which provides that loans may be negotiated by any municipal corporation in anticipation of the revenue thereof, does not confer authority on such corporation to issue negotiable bonds in payment of such loans. This decision was rendered on the principle that the above mentioned express authority to borrow did not include the implied authority to issue negotiable securities for the money borrowed. See also *Gilman v. Fernald*, 141 Fed. Rep. 941, 943.

sioners' court of a county, although it had power to erect a court-house, had no implied authority to borrow money or issue bonds for the purpose of paying therefor. This decision was rendered partly upon the principle that a county is not a municipal corporation with full powers in the same sense that a chartered city is, and partly upon the ground that the policy of the State as disclosed by legislation was adverse to the existence of the implied power. Although the court denied the existence of implied power, it expressed the opinion that the weight of authority, so far as the decisions of the State courts were concerned, seemed to favor its existence. In *Waxahatchie v. Brown*, 67 Tex. 519, a town purchased a school site with buildings thereon, executing bonds payable to bearer. It had statutory authority "to purchase building sites, construct school-houses, and generally to promote free public education" within its limits. It was held that in the absence of an express statutory provision conferring power to create debts, the town could not issue bonds for the purpose of school building. In reaching this conclusion the court pointed out that in the case of cities, the Constitution imposed certain restrictions upon the power to borrow money or issue bonds, such as requiring provision by tax for the payment of interest and the creation of a sinking fund. The Constitution contained no

such provision in regard to towns. Under those provisions of the Constitution, the statutes strictly regulated the powers of cities to issue bonds, and the court expressed the opinion that the legislature did not intend to confer, by implication, upon minor municipalities such as towns, unlimited authority to create debts for any purpose. It therefore held that the power to borrow money or to create a debt was not a necessary incident of the power to buy grounds and build school-houses, and should not be implied against the spirit and policy manifested by contemporaneous legislation, as well as by the organic law. In *Austin v. Nalle*, 85 Tex. 520, 540, where the question before the court was whether a power to issue bonds included the power to make the bonds negotiable, the court declared that before a city in this State can create a bonded indebtedness, the power must be conferred by statute. It further said that the provision of the Constitution prohibiting cities from incurring debt unless provision should be simultaneously made to assess and collect a sufficient sum to pay the interest thereon and create a sinking fund, "does not confer authority upon a city to create a bonded indebtedness. It merely authorizes the legislature to grant the power and prescribes a limitation upon the grant." See *ante*, § 287.

¹ *Colorado*. In *Thomas v. Grand Junction*, 13 Colo. App. 80, language is

reveal the attitude and tendency of the courts and may be accepted as fairly indicative of the rules which will be applied

used by the court in deciding a cognate question which tends to support the view that a simple power to borrow money does not necessarily confer upon the municipality power to issue bonds for the money borrowed. The court said: "Borrowing money, strictly and ordinarily speaking, would simply empower the city to negotiate a loan in the usual and ordinary manner prevalent in commercial circles, that is, to secure a loan from some individual or company, and execute its warrant or note or some similar evidence of indebtedness for it. . . . The power to borrow necessarily gives by implication the power to execute the usual evidences of indebtedness therefor. It was evident to the legislature, however, that this power alone would not be sufficient. . . . The city was therefore, in addition to being given the right to borrow, also empowered to contract the necessary indebtedness and to secure the money needed by the issuance of its bonds."

Florida. In *Hillsborough County v. Henderson*, 45 Fla. 356, 33 So. 997, a case which involved the power of a municipal corporation to make its bonds payable in gold coin, the court said, in its opinion, "The power of both municipal corporations proper, and *quasi* corporations such as counties to issue bonds, depends upon express statutory grant of authority."

Kansas. In *State v. Kansas City*, 60 Kan. 518, the court had before it for consideration the validity of certain bonds of a city which it held to be invalid because the statutory authority conferred upon the city had not been substantially complied with, and in discussing the question of the power of municipality to issue bonds, it said, "The power to issue municipal bonds exists only when expressly conferred, or when necessarily implied; that is, when it is a necessary means to the execution of some other power which is expressly conferred." See also *Shawnee County v. Carter*, 2 Kan. 115.

Minnesota. In *Goodnow v. Ramsey County*, 11 Minn. 31, it was held that, in the absence of express statutory authority, counties have no power to make and issue bonds or negotiable paper of any kind the consideration or validity of which cannot be inquired

into in the hands of any person. The court appears to have relied upon the fact that counties are only *quasi* corporations, and it did not indicate what its opinion was as to the power of municipal corporations such as cities. See also *Rogers v. Le Sueur County*, 57 Minn. 434, 440.

Nebraska. In *State v. School Dist. No. 24*, 13 Neb. 78, it was held that under a statute giving to school districts power "to borrow money" the authority to do this by the issue and sale of negotiable bonds was implied. This decision was rendered largely upon the ground that for many years it had been the custom to raise money under this authority by the issue and sale of bonds at various rates of discount, and that this had been done without question, not only by the people of the districts themselves, but also with the acquiescence and evident approval of the legislative authority of the State. The court in addition cited the cases of *Rogers v. Burlington*, 3 Wall. (U. S.) 654; *Texas Par. Police Jury v. Britton*, 15 Wall. (U. S.) 566, and *Kelley v. Brooklyn*, 4 Hill (N. Y.), 263. In *State v. School Dist. No. 4*, 13 Neb. 82, a similar decision was rendered in which the argument was advanced that the term "to borrow" meant to contract for the use of money; and that the power to borrow necessarily implied authority to determine the time of payment and the character of the evidence of indebtedness to be issued, whether in the nature of notes or bonds payable in the future. In support of its ruling the court cited *Philadelphia & R. R. Co.'s Appeal* (Pa.), 13 Reporter, 475, and *Evansville, &c. R. Co. v. Evansville*, 15 Ind. 395. Under a statute conferring upon certain cities the right to construct sewers and regulate their use it was held that when it became necessary for a city to construct a sewer, it had the power to provide the necessary money to pay for the same by the issuance of its bonds, such power being incident to and necessary for the carrying out of the authority expressly granted. *State v. Babcock*, 22 Neb. 614; *quere?* But in *Brinkworth v. Grable*, 45 Neb. 647, the Supreme Court of Nebraska, in discussing the applicability of a statute to the bonds in litigation, said, "The

when the same or similar question comes before the courts for adjudication.

statute applies to all bonds, and it is settled law that a municipal corporation has no power to issue its bonds in aid of a work of internal improvement unless expressly authorized by statute to do so." Citing *Young v. Clarendon Township*, 132 U. S. 340.

N. Dakota. In *Martin v. Tyler*, 4 N. Dak. 278, 289, the court had under consideration the question of the constitutionality of a statute for establishing, constructing, and maintaining drains. This statute was attacked as unconstitutional on the ground that its subject was not expressed in the title, the specific objection being that it conferred power to issue negotiable bonds without mention thereof in the title of the act. In answer to this contention the court, after citing the cases in the United States Supreme Court, said: "These cases hold that authority to a municipality to make improvements or incur indebtedness does not carry with it by implication the power to issue negotiable paper. This proposition may be granted. The case here is different."

Oregon. In *Klamath Falls v. Sachs*, 35 Oreg. 325, where the question before the court was whether a power to "issue bonds" conferred authority to issue negotiable bonds, the Supreme Court of Oregon incidentally discussed the decisions of the Supreme Court of the United States on the subject of implied power to issue negotiable instruments, and after citing the authorities, said: "These cases are mainly relied on by plaintiff in support of its position (that the city had no authority to issue negotiable bonds under a power to 'issue bonds'), and we do not question their soundness, but their application to the present controversy may well be doubted." The court held rightly, we think, that express power to issue bonds carried with it the power to make them negotiable, if there is nothing in the legislation to negative such inference.

Tennessee. In *Adams v. Memphis & M. R. Co.*, 2 Cold. (Tenn.) 645, the city of Memphis had authority to purchase, receive, and hold real property for city purposes and to sell or dispose of the same for the use and benefit of the city. It appropriated certain real estate belonging to it to aid the

construction of a railroad, and in connection therewith made a deed of trust of the property to secure mortgage bonds to the amount of three hundred thousand dollars. It was held that the purpose for which the property was appropriated was a legitimate city purpose; that the power to sell the property included the power to mortgage it or execute a deed of trust; and that the bonds were valid obligations of the city. *Quare.* See s. c. cited in chapter on Corporate Property. In *Taxpayers of Milan v. Tenn. Central R. Co.*, 11 Lea (Tenn.), 330, it was held that municipal corporations can only subscribe to the stock of a railroad company and issue bonds therefor under an act of the legislature conferring authority to do so. In *Colburn v. Railroad Company*, 94 Tenn. 43, the court held that although a county court (the local county authority) had authority to construct bridges, it had not the power, in the absence of a statute expressly conferring it, to issue the negotiable bonds of the county to raise the money to pay therefor. The court cites, approves, and follows *Claiborne County v. Brooks*, 111 U. S. 400, and *Tensas Par. Police Jury v. Britton*, 15 Wall. (U. S.) 566. It also distinguishes the case of *State v. Anderson County*, 8 Baxter (Tenn.), 249, where it was said that a county, like any other corporation, having a right to create debt, has the incidental right to issue the customary evidence of it in such form as may be satisfactory to the parties in so far as that language might be held to imply the power to issue bonds in evidence of the indebtedness. See also *Burnett v. Maloney*, 97 Tenn. 697, 714. In *Moss v. Harpeth Academy*, 7 Heisk. (Tenn.) 283, the directory of an educational institution borrowed money on the security of the corporate property, and it was held that the power to borrow money was implied as an appropriate means to accomplish the objects of the charter of the institution.

Virginia. In *Richmond & W. P. Land, &c. Co. v. West Point*, 94 Va. 668, the action was brought upon a non-negotiable note given by a town for the purchase price of certain real estate acquired by it pursuant to statutory authority. Discussing the

§ 876. Implied Power to issue Negotiable Securities; Indiana.—

In *Indiana*, no uniform rule as to the existence of an implied power to issue negotiable securities seems to have been adopted. Under some circumstances it seems to be recognized, whilst under others it appears to be denied.¹ The implied power of municipal corporations to issue and sell negotiable securities has been recognized when it was claimed as an incident to an express power to borrow money;² or when the power is sought to be exercised for the purpose of paying a debt lawfully contracted pursuant to statutory authority.³

validity of this obligation, the court said: "The purchase may be upon credit, for while a municipal corporation may not borrow money and issue its obligations therefor without authority of the legislature, it may purchase property necessary for the discharge of the duties and functions reposed in it, and, as a consequence of that power, may bind itself for the payment of the purchase money and execute all proper evidences of debt *except a negotiable instrument*."

¹ See *ante*, § 280; also § 874.

² In *Evansville, I. & C. S. L. Railway Co. v. Evansville*, 15 Ind. 395, the city had authority to subscribe to the stock of a railroad company and to borrow money for the payment of the stock. It was held that the power to borrow money necessarily implied the power to determine the time of payment, and also the power to issue bonds or other evidences of the indebtedness. In *Thompson v. Peru*, 29 Ind. 305, the city had express authority to subscribe to the stock of railroads running into or through the city and to borrow money to pay such subscriptions, and it was held that, as the issuing and sale of bonds was the usual method adopted by corporations to borrow money, the city might exercise the power to borrow money by issuing and selling bonds. Why not in such a case, if there was no restriction on the mode of exercising such express powers? In *Evansville v. Woodbury*, 60 Fed. Rep. 718, the court held that under a statute authorizing the city "to borrow money for the use of the city," the city had the power to issue bonds for money so borrowed; following *Evansville, I. & C. S. L. R. Co. v. Evansville*, 15 Ind. 395, *supra*. See also *Portland Sav. Bank v. Evansville*, 25 Fed. Rep. 389; *Evansville v. Dennett*, 161 U. S. 434.

³ In *Miller v. Dearborn County*,

66 Ind. 162, it was held that it was an incident to all corporations, including municipalities, to borrow money to meet a debt when necessary and proper. In *Richmond v. McGirt*, 75 Ind. 192, the city purchased land for the purpose of constructing public buildings, and issued its bonds in payment thereof. The city had general power, without restriction, to purchase real estate for the purpose of constructing public buildings; and it was held that this authority gave it, by implication, the exclusive right to determine the expediency of the purchase, the power to purchase on credit, and also to issue its negotiable bonds for the purchase money. The court said that there was a difference between borrowing money and the paying of an indebtedness; and that having created indebtedness lawfully, from the very nature of the case, the city had the right to execute evidences of that indebtedness and obligations to pay the same; and as to the kind and form of the evidences and obligations to be executed, the city in the exercise of a sound discretion must determine, and its determination, in the absence of fraud, is final. After reviewing the authorities the court added: "Under the foregoing authorities we think the doctrine is well established in this State that corporations possess all the necessary incidental powers to carry into full operation all their expressly granted powers, and for such purposes may legally execute commercial paper, such as negotiable bonds, in the absence of any restriction in the charter of fraud in the parties."

In *Rushville Gas Company v. Rushville*, 121 Ind. 206, it was held that the power to issue and sell bonds in order to obtain money for a public improvement is different from the power to issue bonds in payment of property

But, on the other hand, it seems to have been held that the mere fact that a municipal corporation is authorized and empowered to engage in a work of internal improvement does not authorize it to issue, negotiate, and sell bonds of the city for the purpose of raising money therefor.¹

§ 877. **Power to make Negotiable Paper implied from Power to borrow, etc.** — In previous editions of this work it was said ² that "*Express power* to municipal corporations 'to borrow money' is usually held to include the power to issue its negotiable bonds or other se-

purchased, and that a municipal corporation with authority to purchase property may issue its bonds in payment unless there is some statutory or constitutional prohibition. *State v. Hauser*, 63 Ind. 155, *infra*, is distinguished on the ground that that case did not decide that the city could not issue bonds to pay for water works purchased, but did decide that a city might not issue and sell bonds in order to obtain money to construct water works. In *Floyd County v. Day*, 19 Ind. 450, it was held that a county being a corporation with power to contract debts, the auditor might audit a claim against it and draw his warrant or order upon the treasurer for payment, and such order when drawn was in legal effect a [non-negotiable] promissory note of the county and presumed to be upon a consideration. In *Sheffield School Township v. Andress*, 56 Ind. 157, a promissory note was made by the trustee of the township in payment for work done on a school building. It was held that, as the township had authority to incur the debt, it had authority to make a promissory note for the debt. In *Albany Second National Bank v. Danville*, 60 Ind. 504, a town had authority to organize a fire company and to provide for all necessary apparatus for the extinguishment of fires. It was held that, having authority to incur debt for a fire engine, the town had authority to make a promissory note payable to the person furnishing the apparatus. In *Daily v. Columbus*, 49 Ind. 169, it was held that where a city negotiated its bonds to raise means to construct water works and the city treasurer misapplied a part of the funds so realized, leaving debts unpaid on account of such works, the city council might issue and sell

other bonds to make up the deficiency. In this case, the city had authority to issue and sell all such bonds as might be necessary to carry out and perform any and all contracts made in and about the construction of the water works, and to fully complete the works.

¹ In *State v. Hauser*, 63 Ind. 155, the city of Columbus was authorized "to construct and establish works for supplying the city with wholesome water." It was held that this provision did not authorize the city to issue, negotiate, and sell bonds of the city for the purpose of raising money for the construction of water works, the court saying, "A municipal corporation cannot, without express legislative authority, issue, negotiate, and sell its corporate bonds for any purpose." In *Rushville Gas Co. v. Rushville*, 121 Ind. 206, this case is distinguished from those cases which hold that a city has implied power to issue bonds to pay for debts lawfully contracted on the ground that it did not decide that the city could not issue bonds to pay for water works purchased, but it did decide that a city might not issue and sell bonds in order to obtain money to construct water works. In *Aurora v. West*, 22 Ind. 88, it was held that the municipal corporation could not, without special authority, subscribe to stock of a railroad company and issue bonds in payment of the subscription; and when authority was granted to do so, it must be executed in strict conformity to the conditions prescribed in the statute. See also *Hopper v. Covington*, 118 U. S. 148; *Merrill v. Monticello*, 138 U. S. 673; *ante*, §§ 280, 874; *Coffin v. Indianapolis*, 59 Fed. Rep. 221.

² Fourth edition, § 127; Third edition, § 83.

curities to the lender." This is the view to be deduced from the earlier decisions both of the State courts and of the United States Supreme Court, but it can no longer be affirmed as an unquestioned statement of the law. It is still the rule in some States. We have seen,¹ that in *Pennsylvania*, the power to contract debt is regarded as implying the power to borrow money for the purpose of paying the debt, and under the decisions of the Supreme Court of that State, the rule seems to be that a power, express or implied, conferred on a municipal corporation to incur debt, or to borrow money, includes, as an incident thereto, the power to give negotiable bonds or other commercial securities to the lender.² In *Massachusetts*, the rule also is that express power to borrow, — at all events in cases where large or unusual sums of money are to be raised, — carries with it the power to issue bonds therefor.³ Thus a town was authorized to subscribe for shares in the capital stock of a railroad, and to raise by loans or taxes any sums of money which should be required to pay the instalments on the subscription. The legislature did not prescribe any terms or method to be observed in raising the money by loan. It was held that in the absence of any restriction upon the method, the town might adopt any method that was usual; that it had long been the custom for municipal corporations in *Massachusetts* to borrow money by an issue of bonds; and that therefore power given to a town to raise a large or unusual sum of money by loan, no conditions or restrictions being imposed, carried with it the power to issue bonds, a method which enables the town to seek the best markets.⁴ The existence of power to issue negotiable securities derived by implication from authority to borrow or to contract debt,

¹ *Ante*, § 281.

² This was so held in a case where bonds of a city payable to bearer were issued for money borrowed. *Commonwealth v. Pittsburgh*, 34 Pa. 496. See also to the same effect, *Commonwealth v. Allegheny County Com'rs*, 37 Pa. St. 237; *Commonwealth v. Pittsburgh*, 41 Pa. St. 278; *Commonwealth v. Pittsburgh*, 88 Pa. St. 66; *Williamsport v. Commonwealth*, 84 Pa. St. 487; *Snyder v. Kantner*, 190 Pa. 440.

³ *Commonwealth v. Williamstown*, 156 Mass. 70, citing § 125 of the fourth edition of this book (§ 289 of this edition).

⁴ *Commonwealth v. Williamstown*, 156 Mass. 70. With these limitations and under these circumstances, we think this view is sound. Non-negotiable securities are unusual for sale

in the markets, and their issue unknown for the purpose of borrowing money, and if a municipal borrower of money cannot issue negotiable securities for an authorized borrowing, it is placed at a great disadvantage. *Infra*, § 956. In *Smith v. Cheshire*, 13 Gray (Mass.), 318, the selectmen of a town drew an order payable to A or bearer which was accepted by the town treasurer. It was held that selectmen of towns in *Massachusetts* had not the power, by virtue of their office, without any special authority from the town, to issue to persons having claims on the town, negotiable notes, bills of exchange, or orders on which the town could be held to indorsees or holders other than to those to whom they were originally issued.

seems also to be sustained by decisions of other States.¹ We have heretofore suggested that express power "to borrow money" stands,

¹ *Arkansas*. In *Schmutz v. Little Rock Special School Dist.*, 78 Ark. 118, it is said that express power to borrow money and issue evidences of indebtedness therefor includes the power to issue negotiable bonds with interest coupons attached, citing § 127 of the fourth edition of this work.

Georgia. In *Griffin v. Inman*, 57 Ga. 370, the court held that authority to subscribe for stock of a railroad company, borrow money and impose taxes, embraces an implied power to employ the usual and appropriate securities for engaging municipal credit, and in such cases the usual securities are corporate bonds bearing interest and negotiable by delivery. See also *Griffin v. City Bank*, 58 Ga. 584.

Kentucky. In *Slack v. Maysville & L. R. Co.*, 13 B. Mon. 1, 20, the county authorities were authorized to subscribe to the stock of a railroad company and to provide for the payment thereof either by taxation or by borrowing the money, and it was held that the power to borrow money implied the power of furnishing some evidence of indebtedness, and authorized the county authorities to issue bonds for the money borrowed.

Nevada. In *Douglass v. Virginia City*, 5 Nev. 147, the city leased of the plaintiff certain rooms for city purposes, and the lease provided that the notes of the city bearing interest should be received by the lessors in payment of the rent. In an action by the lessors on these notes, it was held that a municipal corporation, like a trading corporation, may, unless restricted by charter, enter into any contract necessary to enable it to carry out the powers conferred upon it; that it may incur debts and execute and give promissory notes in the discharge of its legitimate powers; and that the notes were valid.

New York. In *Kelley v. Brooklyn*, 4 Hill (N. Y.), 263, the mayor of the city signed, and the clerk countersigned, an order addressed to the treasurer to pay to A or order. The instrument was held to be a negotiable bill of exchange, and it was held that as there was nothing in the statute expressly or by implication prohibiting the issuing of negotiable paper, the negotiable instrument in question was valid under the principle that a corporation may

issue negotiable paper for a debt contracted in the course of its proper business. But in *Wells v. Salina*, 119 N. Y. 280, it was held that power "to raise money" was intended to be exercised by taxation, and did not authorize the borrowing of money by the issuing of bonds.

North Carolina. In *Tucker v. Randolph*, 75 N. Car. 267, it was held that when a body is authorized to contract a debt it is implied that the usual evidence or security may be given. Hence, having contracted a debt for necessary expenses, a city can issue a bond payable to the creditor or bearer as evidence thereof and as security therefor. The opinion does not contain any discussion of the law or any citation of authorities.

Rhode Island. In *Clarke v. School Dist.*, No. 7, 3 R. I. 199, a school district had incurred debt in the building of a school-house and borrowed money upon promissory notes for the purpose of paying the debt. It was held that for the purpose of paying the original debt contracted, the school district had the power to make its negotiable promissory note, that upon the negotiation of such note the liability of the school district to the original creditor was extinguished and a third person became its creditor, that a direct borrowing for the purpose of paying the debt could do no more, and that it was within its power to borrow money for the purpose of paying the debt and to issue its promissory notes therefor.

Wisconsin. In *State v. Madison*, 7 Wis. 688, the city had authority to purchase burial grounds, and it was held that, if it was unable to pay cash therefor, it might issue its bonds in payment. No reasons were assigned by the court for so holding. In *Mills v. Gleason*, 11 Wis. 470, there was no special act or provision in the charter authorizing the city to obtain a loan or issue its bonds therefor, but the charter conferred power to purchase fire apparatus and cemetery grounds, to establish markets, and to do other things; and the court held that, in the absence of any restriction, the power to borrow money would pass as an incident to the execution of these general powers, according to the well-settled rule that corporations may re-

or in many cases may stand, upon a very different footing from the ordinary power to contract a debt as incidental to the execution of some authorized municipal purpose. But, in giving effect to these decisions, the tendency of the courts in recent years must be carefully considered, and that tendency is to require the power to issue *negotiable* securities to be expressly conferred, or if resting upon implication, the implication must be clear and unmistakable.

§ 878 (507 a). **Same Subject; the Author's Conclusions.** — We regard as alike unsound and dangerous the doctrine that a public or

sort to the usual and convenient means of executing the powers granted; and that no means are more usual for the execution of such objects than that of borrowing money. It was further held that the fact that the legislature had at various times passed statutes authorizing municipal corporations to borrow money for municipal purposes, although entitled to consideration, was not conclusive upon the question of the right of the municipality to borrow money by virtue of its charter alone; and that the power of taxation conferred by charter upon a municipal corporation did not exclude the power of borrowing money. The court further held that the city having contracted to purchase a cemetery lot and to pay for the same by an issue of its bonds, and such contract being authorized by its charter, a subsequent act of the legislature forbidding the issuing of bonds did not deprive it of its power to carry out its contract. In *Rogan v. Watertown*, 30 Wis. 259, the court expressed the opinion that a constitutional provision making it the duty of the legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, borrowing money, contracting debts and loaning their credit, so as to prevent abuses, recognized the power of these corporations under some circumstances and for some purposes to loan their credit, saying: "The constitution, speaking in general language, does not specify the purposes for, nor the circumstances under which, such credit may be loaned. These are left open to be ascertained by construction, but that loans of credit for some purposes and under some circumstances were intended is

too clear to admit of doubt or argument. It will not do in such a case, because the purposes are undefined and the power recognized only in general terms, and so may be susceptible of misapplication or abuse, to say that therefore the power does not exist."

In *Bennett v. Nebagamon*, 122 Wis. 295, it was held that a town which has statutory authority to provide a system of fire protection may, as an incident to the right to raise money for that purpose, do so by borrowing through an issue of town bonds. The court reaffirmed its previous decisions to the effect that the money may be raised by borrowing as an incident to the proper execution of a municipal function requiring the contracting of debt or the expenditure of money, saying: "The case is not a doubtful one in this State. This court at an early day passed upon it in the case of *Mills v. Gleason*, 11 Wis. 470, and since then has reaffirmed the doctrine of that case in the following cases: *State v. Milwaukee*, 25 Wis. 122; *State v. Regents of University*, 54 Wis. 159; *Kilvington v. Superior*, 83 Wis. 222; *Oconto City Water Supply Co. v. Oconto*, 105 Wis. 76; *Ellinwood v. Reedsburg*, 91 Wis. 131." After referring to the fact that there was no restriction on the powers conferred upon towns to provide a system of fire protection within the limits of the law fixing the maximum amount of municipal indebtedness, the court added: "It obviously follows that they have the right to procure money properly to carry out this municipal function and to issue the bonds therefor in the manner and upon the conditions prescribed by the statutes."

municipal corporation possesses the *implied power* to borrow money for its ordinary purposes, and as *incidental* thereto the power to issue commercial securities, that is, paper which cuts off defences when it is in the hands of a holder for value acquired before it is due. The cases on this subject are conflicting, but the weight of authority is towards the view above presented. The opinion of Mr. Justice *Bradley*, in a case before referred to,¹ evinces a thorough comprehension of the whole question, and, in our judgment, is sound in every proposition it advances, and must become the law of this country. This view is confirmed by the almost invariable legislative practice in the States to confer, when it is deemed expedient, upon municipalities and public corporations, in *express* terms, the power to borrow money or to issue negotiable bonds or securities; and it is of instruments thus authorized that we now proceed to treat. It is an undisputed doctrine that the power of public and municipal corporations to subscribe to the stock of railway companies and to issue bonds therefor must be *expressly* conferred.² The Supreme Court of the United States has repeatedly adjudged that the grant of power to a municipal corporation to appropriate moneys in aid of the construction of a railroad, where the power is accompanied with a provision directing the levy and collection of taxes to meet such appropriation and

¹ *Nashville v. Ray*, 19 Wall. (U. S.) 468. It is difficult to understand on what ground the dissenting judges in this case regarded the corporation warrants as "negotiable securities of a commercial character." The cases are almost uniform to the effect that such instruments do not partake of the nature of commercial paper, except that by usage and custom, and sometimes by legislative enactment, they pass by delivery. *Post*, § 881.

² The cases on this point are collected in § 321, note. See further on this subject, *ante*, § 278 *et seq.*

Particular Statutes construed. Illinois: *Harter v. Kernochan*, 103 U. S. 562; approved *Pana v. Bowler*, 107 U. S. 529; *Kankakee v. Aetna Life Ins. Co.*, 106 U. S. 668; *Prairie v. Lloyd*, 97 Ill. 179; *Windsor v. Hallett*, 97 Ill. 204; *Douglas v. Niantic Sav. Bank*, 97 Ill. 228. *Kansas*: *Lewis v. Barbour Co. Com'rs*, 105 U. S. 739; *Bard v. Augusta*, 30 Fed. Rep. 906. For construction of the general statute of *Kansas* concerning the subscription by municipalities for stock of railroads and the issue of bonds in payment therefor, see *McClure v. Oxford*, 94 U. S. 429; *Anderson County v. Beal*, 113 U. S. 227; *Crow v. Oxford*, 119 U. S. 215. *Tennessee*: *Kelley v. Milan*, 127 U. S. 139; *s. c.* below, 21 Fed. Rep. 842; *Taylor v. Ypsilanti*, 105 U. S. 60 (where by the vote authorizing a subscription, consent was given upon certain conditions). *Nebraska*: *Read v. Plattsmouth*, 107 U. S. 568; *State v. Babcock*, 19 Neb. 230; *s. c.* *Id.* 223. As to liability of *counties* in *Nebraska* for bonds issued by *precincts* and the remedy in such cases, see *Davenport v. County of Dodge*, 105 U. S. 237; *Blair v. Cumming County*, 111 U. S. 363; *Rosenbaum v. Bauer*, 120 U. S. 450; *Nemaha County v. Frank*, 120 U. S. 41; *infra*, § 881. *California*: *Liebman v. San Francisco*, 24 Fed. Rep. 705. *Missouri*: *Ogden v. Daviess County*, 102 U. S. 634; *Tipton v. Rogers Loc. Works*, 103 U. S. 523. *New York*: *Thompson v. Perrine*, 103 U. S. 806; approved *Same v. Same*, 106 U. S. 589; *Red Rock v. Henry*, 106 U. S. 589. *Louisiana*: *Hall v. New Orleans*, 19 Fed. Rep. 870 (a special law relating to New Orleans). *Alabama*: *Winters v. Montgomery*, 65 Ala. 403 (special law relating to Montgomery).

prescribing no other mode of payment, gives no power, but excludes it, to issue negotiable bonds in payment of such appropriation.¹

§ 879 (513). **Such Bonds are Negotiable Securities.** — The following doctrines are too well settled to be any longer open to question. A bona fide purchaser of negotiable paper for value, before maturity, takes it freed from all infirmities in its origin, unless it is absolutely void for want of power in the maker to issue it, or its circulation is by law prohibited. *Municipal bonds*, payable to bearer, are subject to the same rules as other negotiable paper.² A purchaser of a municipi-

¹ *Claiborne County v. Brooks*, 111 U. S. 400, 406; *Wells v. Pontotoc Co. Sup.*, 102 U. S. 625; *Ogden v. Daviess County, Ib.*, 634, 639; *Concord v. Robinson*, 121 U. S. 165.

² *Cromwell v. Sac Co.*, 96 U. S. 51; *ante*, § 880; *Baes v. Hewitt*, 20 Wis. 460; *Gorgier v. Mienville*, 3 B. & C. 45; *Brooks v. Mitchell*, 9 M. & W. 15; *Goodwin v. Robarts, L. R.* 1 App. Cas. 476; *Goodman v. Harvey*, 4 A. & E. 870; *Burnham v. Brown*, 23 Me. 400; *Oridge v. Sherborne*, 11 M. & W. 374; *United States v. Union Pacific R. R. Co.*, 91 U. S. 72; *Miller v. Race*, 1 Burr. 452; *White v. V. & M. R. Co.*, 21 How. 575; *Moran v. Miami County*, 2 Black. 722; *Mercer County v. Hackett*, 1 Wall. 83; *Gelpcke v. Dubuque*, 1 Wall. 175; *San Antonio v. Lane*, 32 Tex. 405; *Lexington v. Butler*, 14 Wall. 282; *St. Joseph Tp. v. Rogers*, 16 Wall. 644; *Humboldt Tp. v. Long*, 92 U. S. 642; *Macon Co. v. Shores*, 97 U. S. 272; *Calhoun Co. Sup. v. Galbraith*, 99 U. S. 214; *Block v. Bourbon County*, 99 U. S. 686; *Marshall County v. Schenck*, 5 Wall. (U. S.) 772; *New Providence v. Halsey*, 117 U. S. 336; *Ottawa v. First Nat. Bank of Portsmouth*, 105 U. S. 342; *Wilson County v. Third Nat. Bank of Nashville*, 103 U. S. 770; *Burleigh v. Rochester*, 5 Fed. Rep. 667; *Derby v. Modesto*, 104 Cal. 515, citing text; *Clifton Forge v. Brush El. Co.*, 92 Va. 289; *Gamble v. Rural Independent School Dist.*, 132 Fed. 514; *Manhattan Sav. Bank v. N. Y. Nat. Bank*, 42 N. Y. App. Div. 147; *infra*, § 956; *Pompton v. Cooper Union*, 101 U. S. 196; *Cumberland County v. Randolph*, 89 Va. 614. A municipal bond in the usual form is not rendered non-negotiable by a provision that it should be "payable at the pleasure of the obligor at any time before due." *Ackley School District v. Hall*, 113 U.

S. 135; *supra*, § 880. Bonds payable on the completion of a railroad and to bearer only, held not negotiable as being payable on a contingency which might never happen and for want of certainty as to the payee. *Blackman v. Lehman*, 63 Ala. 547.

Federal Jurisdiction: An ordinary municipal bond, negotiable in form, payable to bearer, is "a promissory note negotiable by the law merchant," within the meaning of the Act of March 3, 1875, which allows instruments of that class to be sued on in the Federal courts, by an assignee, notwithstanding the assignor could not have sued thereon in such courts if no assignment had been made. *New Providence v. Halsey*, 117 U. S. 336; *Ackley School District v. Hall*, 113 U. S. 135; *New Orleans v. Quinlan*, 173 U. S. 191. In *Loeb v. Columbia Township*, 179 U. S. 472, Mr. Justice Harlan, giving the opinion of this court, says (p. 486): "As, therefore, the bonds in suit were executed by the defendant township, a corporation, and are payable to bearer, the present holder, being a citizen of a State different from that of which the township was a corporation, was entitled to sue upon them without reference to the citizenship of any prior holder." *Thompson v. Perrine*, 106 U. S. 589, 592, 593. Colorable and collusive transfers by a citizen of the State where the suit is brought to citizen of another State of bonds and coupons will not give the Federal court jurisdiction. *Farmington v. Pillsbury*, 114 U. S. 138.

It is no objection to the maintenance of an action in the Federal court that the plaintiff did not pay any money consideration for the assignment to him of any of the bonds or coupons, or that bonds and coupons were assigned to plaintiff for collection only in cases where all the holders of the bonds

pal bond from a *bona fide* holder, who obtained it for value before maturity, takes it free from equities, though he himself may have had notice thereof.¹ An overdue and unpaid coupon for interest, attached to a municipal bond which has several years to run, does not render the bond and the subsequently maturing coupons dishonored paper, so as to subject them, in the hands of an innocent purchaser for value, to defences good against the original holder.²

were non-residents and not citizens of the State where the action is brought. See *Bernards Township v. Stebbins*, 109 U. S. 341; Index, titles *Contracts*; *Federal Courts*.

Municipal bonds and securities, when properly executed, assume a concrete form which gives to them a tangible status and makes them more than mere evidences of debt. They constitute a species of property which may have a *situs* for purposes of taxation other than the domicile of their owner. *State v. Fidelity & Deposit Co.*, 35 Tex. Civ. App. 214; *post*, chapter on Taxation. Exemption of municipal bonds and certificates of indebtedness from taxation, see *State v. Board of Assessors*, 111 La. 982.

A statute authorized a municipality to issue either coupon bonds, or coupon bonds registered as to principal only or registered bonds without coupons. In the case of registered bonds it was provided that the bonds should be payable to the person to whom they were issued instead of to bearer; that a certificate showing the registration should be indorsed thereon, and that the bonds, as sold by the payees, might be registered in the name of the purchasers, the new name in each case to be shown in the certificate of the register. It was held that registered bonds issued under the statute were negotiable instruments and protected by the law merchant in the hands of *bona fide* holders. It was further held that the omission of the name of the payees from the bond contrary to the provisions of the statute only imposed upon the purchaser the duty of seeing that the bond had actually been issued by the municipality and did not otherwise affect the validity or negotiability of the instrument. *D'Esterre v. Brooklyn*, 90 Fed. Rep. 586. In *Scollans v. Rollins*, 173 Mass. 275, a bond payable only to a person named and not to such person or order or assigns, and transferable only at the office

of the city treasurer, was held to be non-negotiable. To the same effect, *Benwell v. Newark*, 55 N. J. Eq. 260, where the nature and characteristics of registered bonds, coupon bonds, convertible coupon bonds and registered coupon bonds are discussed and defined. A statute providing that municipal bonds should be registered in the city clerk's office was held not to import that the bonds should be issued to registered payees, nor that they should be issued as registered bonds in contradistinction to coupon bonds and as non-negotiable in character. *Manhattan Sav. Inst. v. New York National Exchange Bank*, 170 N. Y. 58, aff'g 53 N. Y. App. Div. 635.

When issue is properly joined as to the making and execution of a municipal bond or coupon, the fact that it has a negotiable character does not, in the absence of a statute to that effect, entitle it to be received in evidence without proof that the signatures to the paper are those of the persons they purport to be. *Apache County v. Barth*, 177 U. S. 538, 545. If there is no plea under oath denying the execution of coupons as required by statute, they become admissible in evidence without any further proof of their execution. *Coles v. Santa Fe County*, 6 N. Mex. 88, 118.

¹ *Cromwell v. Sac Co.*, 96 U. S. 51; *ante*, § 871; *McClure v. Oxford Township*, 94 U. S. 429. If the previous holders of the bonds in suit were *bona fide* holders for value, the plaintiff can avail himself of such previous holders' position without showing that he himself has paid value. *Montclair v. Ramsdell*, 107 U. S. 147.

² *Cromwell v. Sac Co.*, 96 U. S. 51; *Goodman v. Simonds*, 20 How. 343; *Murray v. Lardner*, 2 Wall. 110; *Nat. Bank of N. A. of Boston v. Kirby*, 108 Mass. 497.

In *Buffalo, &c. Deposit Co. v. Medina Gas, &c. Co.*, 162 N. Y. 67, the court held that corporate bonds do not stand

A *bona fide* purchaser for value of negotiable securities before their maturity may recover against the maker the full amount of them, though he may have paid for them less than their par value.¹

§ 880 (512). **Negotiability; Form of Bond; Condition.** — Municipal bonds, in the usual form, containing words of negotiability, with coupons attached, are absolute, and not conditional, promises to pay, and hence *are negotiable with all the incidents of negotiability*. Such bonds are held to be negotiable notwithstanding they contain such a recital as the following: "This bond is issued for the purpose of subscribing to the capital stock of the Fort Scott and Allen County Railroad, and for the construction of the same through the said township, in pursuance of and in accordance with an act of the legislature of the State of Kansas, entitled 'An Act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same, approved February 25, 1870'; and for the payment of the said sum of money and accruing interest thereon, in manner aforesaid, upon the performance of the said condition, the faith of the aforesaid Humboldt Township, as also its property, revenue, and resources, is pledged"; the court holding that the construction of the road through the township was not a condition upon which payment was to be made.²

dishonored upon their face and deprived of their negotiability so as to prevent a transferee from acquiring the status of a *bona fide* holder, because eight coupons representing past due, unpaid instalments of interest are attached thereto, notwithstanding that the bonds provide that they shall become due, principal and interest, upon default in payment of any instalment of interest for six months after maturity and demand. The opinion of the court says by way of *dictum* in that case, that "the presence of due and unpaid coupons on the bond is sufficient to put the purchaser on inquiry." The court adds, however, "But they do not of themselves make the bond to which they are attached dishonored paper." This was distinctly held in *Cromwell v. County of Sac*, 96 U. S. 51.

¹ *Cromwell v. Sac Co.*, 96 U. S. 51; *Lay v. Wissman*, 36 Iowa, 305; *Nat. Bank of Mich. v. Green*, 33 Iowa, 140; *Park Bank v. Watson*, 42 N. Y. 490; *Fowler v. Strickland*, 107 Mass. 552; *Stoddard v. Kimball*, 6 Cush. (Mass.) 469; *Allaire v. Hartshorne*, 21 N. J. L. 665; *Williams v. Smith*, 2 Hill (N. Y.),

301; *Chicopee Bank v. Chapin*, 8 Met. (Mass.) 40. As to power of a city or municipality to sell, or to agree to sell, or dispose of its bonds or obligations for less than their par value, see *Memphis v. Brown*, 20 Wall. 289; *Shirk v. Pulaski County*, 4 Dillon C. C. 209; *Nashville v. Ray*, 19 Wall. (U. S.) 468; *Wheeler's Appeal*, 108 Pa. St. 162, 197, holding that power to sell bonds at not less than par does not warrant a commission to the purchaser of the bonds from the city at par; and this we think is unquestionably right.

² *Humboldt Township v. Long*, 92 U. S. 642; *infra*, § 879, and note. In giving its judgment, in the case above cited, the court says: "Relying upon this clause of the certificate, the township contends that the construction of the railroad through the township was a condition upon which the payment was agreed to be made. We think, however, this is not the true construction of the contract. The construction of the road as well as the subscription for stock was mentioned in the recital as the reasons why the township entered into the contract, not as condi-

§ 881 (509). **Different Classes of Bonds; Implied and Express Power to issue; Recitals; Mode of Pleading.** — Negotiable securities of the kind here referred to have been issued by *municipal corporations proper* (generally under an *express* power to aid railways, or for gas-works, water works, or specified local improvements, but sometimes under an *implied* power); and *by counties*, usually under express power (generally to aid railways, or for public buildings, bridges, or improvements¹); and *by organized townships* which are parts of

tions upon which its performance was made to depend. It was for the purpose of subscribing, and to aid in the construction of the road, that the bond was given. The words 'upon the performance of the said condition' cannot, then, refer to anything mentioned in the recital, for there is no condition there. A much more reasonable construction is, that they refer to a former part of the bond, where the annual interest is stipulated to be payable at a banker's, 'on the presentation and surrender of the respective interest coupons.' Such presentation and surrender is the only condition mentioned in the instrument. But that stipulation presents no such contingency as destroys the negotiability of the instrument. It is what is always implied in every promissory note or bill of exchange, that it is to be presented, and surrendered when paid. As well might it be said that a note payable on demand is payable upon a contingency, and therefore non-negotiable, as to affirm that one payable on its presentation and surrender is, for that reason, destitute of negotiability." See also *Hotchkiss v. Nat. Banks*, 21 Wall. (U. S.) 354. *As to form of bonds, seal, place of payment, and delivery*, see cases cited, *Daniel on Neg. Instr.*, §§ 1492-1499. Cannot be issued in blank as to date. *Jackson Co. Sup. v. Brush*, 77 Ill. 59.

Municipal bonds payable to — or assigns — are negotiable instruments according to the law merchant. *Brainerd v. New York & H. R. Co.*, 25 N. Y. 496. In that case it was held that a bond of a railroad corporation payable to an individual or his assigns is commercial paper negotiable by delivery under an assignment in blank, and not a specialty subject to equities between the corporation and the person named in the bond as primary payee. This question was more recently before

the Court of Appeals of New York in *Chase Nat. Bank v. Faurot*, 149 N. Y. 532, 535. The language of the Court of Appeals is borne out by all the authorities, to the effect that no distinction is made in this respect between private corporations and those which are created for governmental or municipal purposes. See opinion of *Bartlett, J.* (p. 535), where the cases are cited. *The payee's name being left in blank, any holder has the implied authority to fill up the blank with the insertion of his own name.* *White v. Vermont & M. R. Co.*, 21 How. (U. S.) 575. This case is also expressly approved by the Court of Appeals of New York in *Brainerd v. New York & H. R. Co.*, 25 N. Y. 496, 500, where that court said: "The case of *White v. Vermont and Massachusetts Railroad Company* (21 How. (U. S.) 575) was an action to recover on a bond issued by a railroad corporation, the payee's or obligee's name being left blank. It was held that the instrument was negotiable, and that the plaintiff, to whom it had been transferred, might insert his own name in the blank." *Infra*, § 956. Power to substitute other bonds. *Lynde v. Winnebago County*, 16 Wall. 6; *McKee v. Vernon County*, 3 Dillon C. C. 210.

Mistakes corrected in equity. Where a town voted to issue railway aid bonds to run twenty years, with the right to pay them in ten years, and the bonds were printed and issued, by mistake, without the option clause, a proceeding in equity to correct them, brought by the town against holders who had purchased them with full knowledge of the facts, was sustained. *Town of Essex v. Day*, 52 Conn. 483.

¹ In several of the States power is given to municipalities or counties to issue bonds to aid works of "internal improvement." And under this generic term the question has arisen, What are

counties, under express authority, and usually as a means of aiding the construction of railways; and *by school districts*, under express power, to raise money to erect school-houses. In some of the Western States, counties have been legislatively made the agents for the *inhabitants of non-incorporated townships*, and in Missouri for "strips of territory" to issue bonds in the name of the county, but to be paid out of the property within the specified township or designated territorial limits or strip of country.¹ Reference is made to this subject here in order to observe that where the bonds or securities are issued under an express power, the legislative act, being the only source of the authority, measures and limits the power it confers,² and the

works of internal improvement? The Supreme Court of *Alabama*, in defining the phrase "internal improvements," says: "Where internal improvements under State authority are spoken of, it is universally understood that works within the State, by which the public are supposed to be benefited, are intended; such as the improvements of highways and channels of travel and commerce." *Wetumpka v. Winter*, 29 Ala. 651.

The legislature of *Nebraska* passed an act "that any county or city in the State of *Nebraska* is hereby authorized to issue bonds to aid in the construction of any railroad or other work of internal improvement, to an amount to be determined by the county commissioners of such county, or the city council of such city, not exceeding ten per cent of the assessed valuation of all taxable property in said county or city, provided the county commissioners or city council shall first submit the question of issuing bonds to a vote of the legal voters of said county or city, in the manner provided by chap. ix. of the Revised Statutes of the State of *Nebraska* for submitting to the people of a county the question of borrowing money." Session Laws of 1869, p. 92. Under this act, a county and a precinct issued bonds to build a bridge across the Platte River, and on an application by a taxpayer to restrain the collection of taxes levied to pay interest on such bonds, the Supreme Court of *Nebraska*, construing the above act in the light of the legislation of the State, held that a bridge was a work of "internal improvement" within the meaning of the statute, and that under the power to aid, the county might itself construct the bridge. *Union Pac.*

R. Co. v. Colfax County, 4 Neb. 450; *infra*, § 885, and note.

In *Montana* it is held that the legislature may authorize the creation of county indebtedness for public roads. *Wilcox v. Deer Lodge Co.*, 2 Mont. T. 574.

¹ Construction of the *Missouri* township railway aid act of March 23, 1888, and the rights and remedies of the bondholder. *Jordan v. Cass Co.*, 3 Dillon C. C. 185; *Same v. Same*, *Id.* 245; *Washburn v. Cass Co.*, *Id.* 251; *Harshman v. Bates County*, *Id.* 150; 92 U. S. 569; referred to at large, *infra*. Construction of *Kansas* legislation. *Thayer v. Montgomery Co.*, 3 Dillon C. C. 389, and note.

Precinct bonds, *supra*, § 872, note.

² Thus a power to issue bonds of \$1000, each bearing interest at six per cent, will not authorize the issue of bonds of a different amount and at a greater rate of interest, as eight per cent. *Taxpayers of Milan v. Tennessee Central R. R. Co.*, 11 Lea. 329. A power to subscribe to the stock of a railroad a certain sum "payable in not exceeding four years by annual assessments," and authorizing the issue of bonds in anticipation of the collections, held not to warrant the issue of bonds payable in ten years. *Norton v. Dyersburg*, 127 U. S. 160. In this case it was contended that the town should be held liable as upon non-negotiable bonds or notes, treating the issue of the negotiable bonds as an excess of authority only, and not invalidating the loan as agreed upon. But the court said: "It is a sufficient answer to this proposition to say that this suit is brought solely for a recovery upon the bonds and coupons, and no question growing out of the liability of the town for the

same principle applies to the instruments issued under statutory authority by *any* of these classes of corporations, or *quasi* corporations. But in respect to all these corporations and *quasi* corporations, there is, we suppose, no solid ground to contend that they have any inherent or general implied power to issue commercial securities, and the true doctrine is that they can only do so by virtue of express legislative authority, which *must* exist in fact and which ought regularly to be recited in the bond. And in respect to municipal or chartered corporations, our opinion, as shown in this chapter, is that they also have no such inherent power, and no power whatever except so far as conferred expressly or by fair implication. This is an important principle; and it results therefrom that there is no presumption in favor of the power to issue such securities, especially on the part of *quasi* corporations; and it would seem to follow that if the bonds of municipal or public corporations contain no recital as to the authority for their issue or their purpose, there is no presumption in favor of their validity, and it devolves on the holder to aver and show by evidence *aliunde* that the bonds were issued for some purpose authorized by statute. And hence, also, *as a matter of pleading*, the authority or power to issue the bonds in suit ought to appear on the face of the declaration, or by some recital in the bonds made part thereof; that is, it should thus appear that they were issued for some purpose authorized by statute.¹

subscription to the stock can be inquired into in this suit."

¹ *Thayer v. Montgomery Co.*, 3 Dillon C. C. 389, and note; *Kennard v. Cass County*, *Ib.* 147; *Nashville v. Ray*, 19 Wall. 468.

Mode of declaring on bonds and coupons. *Kennard v. Cass County*, 3 Dillon C. C. 147, and cases cited in note on p. 150; *Thayer v. Montgomery County*, *supra*. A declaration on bonds against a municipal corporation having no general authority to issue commercial paper, to be sufficient on demurrer, must show, either by averment or in the copies of the bonds annexed, that the defendant had power to issue them. It is not sufficient to allege generally that it had full power and authority to execute the bonds. *Hopper v. Covington*, 118 U. S. 148.

Mode of pleading defences. The plea of the general issue in *assumpsit* in States where that mode of pleading is yet allowed, puts in issue the question of the authority of the officers to issue the bonds and the *bona fides* of the

plaintiff, but presumptively the plaintiff is a holder for value before maturity, without notice; the contrary must be shown by the defendant. *Chambers County v. Clews*, 21 Wall. 317; *Pendleton County v. Amy*, 13 Wall. 297. Special plea erroneously held bad considered as amounting to the general issue; and as the erroneous ruling was harmless, the judgment was not reversed. *Ib.* Answer denying that plaintiff is the owner, holder, or bearer of the coupons in suit good on general demurrer. *Pendleton County v. Amy*, 13 Wall. 297. *Proof of execution* of bond when denied under oath. Under the legislation of *Alabama*, *non assumpsit* does not involve the *factum* of the bonds. *Chambers County v. Clews*, 21 Wall. 317. Corporation may plead *nil debet* and *non est factum*. *Grand Chute v. Winegar*, 15 Wall. 355. Defence of *non est factum* sustained. *Coler v. Cleburne*, 131 U. S. 162. Here the statute provided for the issue of bonds by cities, and directed that such bonds should be signed by the mayor, and by

§ 882. **Power to issue Bonds includes the Power to make them Negotiable.** — If *express power* be conferred upon a municipality to issue bonds bearing interest, this contemplates and by necessary or reasonable implication *authorizes the issue of negotiable bonds*. A non-negotiable bond is no more serviceable to the holder than the ordinary warrant, — the usual voucher issued in liquidation of ordinary expenditures of the municipality, — and if a bond is to be endowed with an enlarged value, the only manner in which it can be done is to give it negotiability so as to impart to it the quality of commercial paper, and thereby cut off equities in the hands of innocent purchasers for value. Therefore if there must be a distinction between bonds and warrants, it must be that which distinguishes the ordinary warrant or non-negotiable instrument from the negotiable municipal bond which cuts off equities. The general power to issue “bonds” must be taken to authorize bonds in the usual form of such well-known commercial obligations. The usual form embodies a contract and obligation negotiable in its terms. Money may be borrowed by a city upon a non-negotiable instrument, but in order to obtain advantageous terms and to enter the markets of the world in fair competition for the use of money it must issue commercial paper. Therefore, when power to issue bonds is expressly conferred, the municipality has of necessity, or by fair construction, the power to give to these bonds the *usual commercial attributes of negotiability*.¹

him forwarded to the Comptroller of the State for registration, and a city, by proper ordinance, authorized the issue of bonds for water works. The bonds were dated January 1, 1884. The term of the mayor then in office expired in April following, and he was succeeded by a new officer. In July, 1884, the common council, by resolution, requested the ex-mayor, whose name had been engraved on the coupons, to sign the bonds. He did so, adding the word “Mayor” after his signature, and forwarded the bonds to the Comptroller, who duly registered them. In an action upon coupons brought by a *bona fide* holder for value, the Supreme Court of the United States held that as the statute provided for the signing and forwarding of the bonds by the mayor, *the mayor at the time of signing* was the only officer having power to sign and forward them, and that the city could not designate any other person to act in his stead. “*Bona fide* purchasers of municipal bonds must,” said the court, “take the risk of the official character of those who execute them.” The city is not estopped from defending upon the facts, and these facts established its plea of *non est factum*. This case is controlled by the principle of *Anthony v. County of Jasper*, 101 U. S. 693, and is to be distinguished from *Weyauwega v. Ayling*, 99 U. S. 112, and is held to be analogous to *Amy v. Watertown*, No. 1, 130 U. S. 301.

Remedy at law. A corporation cannot be relieved against its bond in equity if the ground for relief shows a complete defence or an adequate remedy at law. *Grand Chute v. Winagar* (case in equity), 15 Wall. 373.

¹ *Carter County v. Sinton*, 120 U. S. 517, 525; *Cadillac v. Woonsocket Ins. for Savings*, 58 Fed. Rep. 935; *Ashley v. Presque Isle Co. Supervisors*, 60 Fed. Rep. 55, 66; *West Plains Township v. Sage*, 69 Fed. Rep. 943, 948; *Howard v. Kiowa County*, 73 Fed. Rep. 406; *D’Esterre v. Brooklyn*, 90 Fed. Rep. 586; *Rathbone v. Hopper*, 57 Kan.

§ 883. **Construction of Express Power to issue Bonds.** — We have seen that the power of municipalities to issue bonds and other negoti-

240; *Vicksburg v. Lombard*, 51 Miss. 111, 125; *Lexington v. Union Nat. Bank*, 75 Miss. 1; *Klamath Falls v. Sachs*, 35 Oreg. 325; *Austin v. Nalle*, 85 Tex. 520; *Winston v. Fort Worth* (Tex. Civ. App.), 47 S. W. Rep. 740; *Jefferson v. Jennings Banking, &c. Co.*, 35 Tex. Civ. App. 74.

In *Klamath Falls v. Sachs*, 35 Oreg. 325, 341, where the municipality had express power to "issue bonds" *Wolverton*, C. J., who delivered the opinion of the court, said: "Manifestly, a distinction was intended to be made between the two kinds of vouchers or obligations (*i. e.*, ordinary warrants and bonds), and it was designed, no doubt, that one should possess more of value to the holder than the other, else why should the different kinds of obligations be designated in the self-same section of the charter? Now, a non-negotiable bond is no more serviceable to the holder than the ordinary warrant, the usual voucher issued in liquidation of ordinary expenditures of the municipality; and, if we would endow it with an enlarged value, the only manner by which it could be done is to give it negotiability, so as to impart to it the quality of commercial paper, and thereby cut off equities in the hands of innocent holders for value; so that, if we must make a distinction, it must be that which distinguishes the ordinary warrant or non-negotiable from the negotiable municipal bond, which cuts off equities. We conclude, therefore, that the bonds authorized by the charter are those possessing the greater commercial value, issued in the usual commercial form, with protection to innocent purchasers." In *Austin v. Nalle*, 85 Tex. 520, 543, *Gaines*, J., who delivered the opinion of the court, holding that power to issue bonds implies power to make them negotiable, said: "A municipal bond, in its ordinary commercial sense, means a negotiable bond. Hence, if the legislature intended to authorize the city council of Austin to issue mere evidences of debt, why did they use the word 'bond'? The word implies something more than mere promises to pay; that is to say, it implies bonds having the commercial quality of negotiability. Money may be borrowed by a city upon a non-negotiable instrument, but in order to

obtain advantageous terms, and to enter the markets of the world in fair competition for the use of money, it must issue commercial paper. The power to issue bonds was granted to the city of Austin for the purpose of enabling it to raise money, and it is not to be presumed that it was intended to restrict the power to the issuing of obligations that would not be effective for the purpose of, and advantageous to the city." See on this subject the remarks of Mr. Justice *Harlan* in *Gunnison County Com'rs v. Rollins*, 173 U. S. 255, 276: "Indeed it is entirely competent for a State to provide by statute that all obligations, in whatever form executed by a municipality existing under its laws, shall be subject to any defence that would be allowed in cases of non-negotiable instruments. But for reasons that every one understands no such statutes have been passed. Municipal obligations executed under such a statute could not be readily disposed of to those who invest in such securities."

The *Supreme Court of the United States* seems to have tacitly recognized the principle that power to issue negotiable bonds may be implied from an express power simply to issue bonds. In *Amey v. Allegheny City*, 24 How. (U. S.) 364, the legislature of *Pennsylvania* had authorized Allegheny City to subscribe to the stock of a certain railway company, and to issue "certificates of loan" therefor. The city subscribed to the stock, and issued in payment what are now known as negotiable bonds. The court held that the bonds were valid, and were not subject to be attacked for irregularity in the hands of a *bona fide* transferee. Speaking of the certificates of loan, the court say: "Such certificates are well and distinctly known and recognized in the usages and business of lending and borrowing money, in the transactions of commerce also, and for raising money upon the contract in them for industrial enterprises and internal improvements. They were formerly more generally known than otherwise as 'certificates of loan,' with certificates of interest attached, payable to bearer at particular times within the year, at some particular place, being a part of the contract, from which they must be cut off

able securities is legislative in its origin, and *depends upon a grant of authority from the legislature*. A municipality can only act under and in accordance with the statutory authority which is conferred upon it. If the power is limited, it cannot exceed the prescribed limit, and its power is exhausted when the limit is reached. If it requires further powers, it must obtain these by a further grant from the legislature. In granting such authority the power of the legislature is supreme, except in so far as it is limited and controlled by constitutional provisions. It has even been held that the legislature *cannot stipulate away its power to authorize* a municipal corporation to borrow money for public purposes by an issue of bonds, as by inserting a provision in a statute for an issue of bonds that the municipality shall issue no bonds thereafter until the bonds authorized by the particular statute are paid. One legislature cannot prohibit a subsequent legislature from changing, altering, or annulling existing laws affecting public interests. The fact that persons have purchased bonds issued pursuant to statutory authority containing such a prohibition does not prevent the legislature from authorizing a further issue, at all events in those cases where the bonds are issued for a strictly public purpose of the municipality, *e. g.*, for the support of schools.¹

to be presented for payment. But now in their use they are called bonds with coupons for interest — a coupon bond; coupons being interest payable, separable from the certificate of loan for the purpose of receiving it. But neither the instrument nor the coupon has any of the legal characteristics of a bond, either with or without a penalty, though both are written acknowledgments for the payment of debt." There, although the authority given was merely to issue "certificates of loan," the court assumed to know that negotiable certificates, such as are now known as negotiable bonds, were meant, and held them binding obligations. In *Hackett v. Ottawa*, 99 U. S. 86, the power delegated to the council of the city was, "to borrow money on the credit of the city, and to issue bonds therefor, and to pledge the revenues of the city for the payment thereof." Bonds of the city, negotiable in form, were issued really to aid in the development of manufacturing enterprises, but they appeared upon their face to have been issued for lawful municipal purposes. The court, all the judges concurring, held, that an innocent holder was entitled to recover upon the bonds. In *Ottawa v. Portsmouth First Nat.*

Bank, 105 U. S. 342, other bonds of the same issue came in question, and the ruling in the previous case was adhered to without dissent. In *Ottawa v. Carey*, 108 U. S. 110, there was an attempt to recover upon still other bonds of the same series. It was held unanimously that the plaintiff was a *male fide* holder, and could not recover.

¹ *Leavenworth Board of Education v. Phillips*, 67 Kan. 549. In this case a statute authorizing the refunding of bonds by a board of education contained a provision that "such board shall issue no bonds thereafter except the refunding bonds provided for by this act." The refunding bonds were issued, and thereafter the legislature authorized the board of education to make a further issue. It was held that the clause contained in the earlier statute was beyond the power of the legislature to enact; and that the fact that persons purchased bonds relying on it did not preclude the legislature from authorizing a further issue, because the power in connection with which the bonds were issued was one of a peculiarly public nature, — *viz.*, the maintenance of schools, — and one legislature could not limit the authority of a subsequent legislature to legislate on such a subject.

But it has elsewhere been otherwise held.¹ The rule seems to be that whenever the power to issue bonds is called in question, the *authority* to issue *must be clearly shown*, and will not be inferred from uncertain data, and can only be conferred by language which leaves no reasonable doubt of an intention to confer it.² But it has nevertheless been held that when a statute under which a municipal corporation has exercised the power of issuing municipal bonds is fairly susceptible of different interpretations, and its right to issue the bonds is in a measure doubtful, the fact that they were issued by the municipality without protest on the part of any of its citizens and sold for value, and that they have been recognized by the municipality and the inhabitants as valid for a term of years, and that the interest payable thereon has been levied and collected in the meantime without objection, will entitle an innocent holder of the bonds to a more liberal interpretation of the powers of the municipality than would have been permissible if the right to issue the bonds had been challenged when they were issued or shortly thereafter.³ Express

¹ In *Smith v. Appleton*, 19 Wis. 468, 469 (referred to *ante*, § 113), a statute authorizing a city to issue refunding bonds prohibited the council from issuing the bonds of the city thereafter "for any other purpose whatever except in payment of the bonded debt of the city." It was held that the limitation upon the power of the city to issue further bonds was a material element of the contract; that holders of bonds could not be deprived thereof without their assent; and that they might restrain a further issue of bonds under a subsequent statute. The court seems, however, to have assumed, without deciding, that the restriction in question was within the legislative authority. See *ante*, chap. iv., as to extent of legislative authority over municipalities.

The legislature may, by *mandatory statute*, *compel* a county to make and *issue its bonds* for the purpose of funding debt incurred for necessary expenses. The terms "authorize and empower" in a bonding act construed as mandatory under the circumstances of the case and the scheme embodied in the statute. *Jones v. Madison County*, 137 N. Car. 579 (overruling on rehearing, 135 N. Car. 218, and *Battery Park Bank v. Madison County*, 135 N. Car. 230). See also *President, &c. v. State*, 45 Ala. 399; *Jefferson County v. People*, 5 Neb. 136.

² *Brenham v. German American Bank*, 144 U. S. 173, 182; *Ashuelot Nat. Bank of Keene v. School Dist.*, 56 Fed. Rep. 197; *Rathbone v. Kiowa County*, 73 Fed. Rep. 395, 399; *State v. Moore*, 45 Neb. 12.

³ *Washington County v. Williams*, 111 Fed. Rep. 801; *Keith County v. Citizens Sav. & Loan Assoc.*, 116 Fed. Rep. 13, 17; *Wetzell v. Paducah*, 117 Fed. 647; *Schmitz v. Zeh*, 91 Minn. 290; *Washington County v. David* (Neb.); 89 N. W. Rep. 737.

That where two different constructions as to the power to issue bonds are possible, the city, as against *bona fide* holders for value, will be held bound by its own construction and acts, is well illustrated by *Van Hostrup v. Madison City*, 1 Wall. 291. This was an action brought against the City of Madison, Indiana, on certain coupons attached to bonds issued by the city, which bonds (p. 291) "promised to pay the president of the *Columbus and Shelby Railroad Company, or bearer, \$7000*," &c., &c. The city charter authorized the city to borrow money and subscribe stock (p. 292) "for making a road or roads to said city" — i. e., to Madison. (p. 292:) "The *Columbus and Shelby Company* (the company to which the subscription was made) was organized to construct a road from Columbus to Shelby County, terminating at Shelbyville. *But Columbus was*

statutory authority to issue bonds and to sell them necessarily implies the right to pledge the credit of the municipality for the payment of the bonds.¹ In construing an express statutory authority to issue bonds no comprehensive rule can be laid down which will apply to all cases and under all circumstances. Each case must be determined upon the language used in conferring the authority, the purposes for which it is proposed to exercise that authority, and the circumstances out of which the necessity for or expediency of the issue arises.² When express authority is conferred upon a city to

forty-six miles from Madison; Shelbyville being about twenty-three miles north of it. Through Columbus, and by means of the connection with the Madison and Indianapolis road, the Columbus and Shelby road did lead to Madison, and nowhere else; though if regarded as an independent and isolated road, and as one between Shelby and Columbus only, it could not be said to be a road to the city designated. The diagram [printed in the record, p. 292] will elucidate the matter."

The defence to the coupons was that the (p. 293) "said *Columbus and Shelby* Railroad Company was not a chartered company for the purpose of making a road to the city of Madison aforesaid, but to make a road from Columbus to Shelbyville, the nearest terminus of said road being forty-six miles distant from Madison."

It was shown, too, on the face of these bonds (p. 291) that they were issued to "the *Columbus and Shelby* Railroad Company, or bearer." The Supreme Court, however, held these coupons valid and reversed the judgment of the lower court, which held them invalid. Mr. Justice *Nelson*, giving the opinion of the court, after stating that although the said *Columbus and Shelby* Railroad did not run to Madison, yet it might possibly be construed as "a road or roads to the said city," within the meaning of the charter, said (p. 297): "Our conclusion upon the whole case is, that full power existed in the defendants to issue the bonds, and that the plaintiffs are entitled to recover the interest coupons in question. Even if the case had been doubtful, inasmuch as the city authorities have given this construction to the charter, and bonds have been issued and in the hands of *bona fide* purchasers for value, we should have felt bound to acquiesce in it."

As to the effect of *failure to enjoin*

the issue of the bonds and of acquiescence in the irregular exercise of the power, see *Rogers v. Burlington*, 3 Wall. (U. S.) 654, 667. Compare dissent on this point, *ib.* p. 672; *Bissell v. Jeffersonville*, 24 How. (U. S.) 287; *Cooley on Taxation*, 548, 549; *ante*, § 522 note; *Butler v. Dunham*, 27 Ill. 474; *Steines v. Franklin County*, 48 Mo. 167, 185; *State v. Van Horne*, 7 Ohio St. 331; *Barrett v. Schuyler County Court*, 44 Mo. 197; *Shoemaker v. Goshen Tp. Trs.*, 14 Ohio St. 587. See *post*, § 950.

¹ *Gross Point Township v. Finn*, 134 Mich. 529.

² Power to issue bonds for the *construction or purchase of necessary municipal buildings* construed to include power to issue bonds for the purchase of a *site* therefor. *Linn v. Omaha*, 76 Neb. 552; 107 N. W. Rep. 983. But see to the contrary *Witter v. Polk County*, 112 Iowa, 380. Authority to municipalities "to issue bonds in aid of *works of internal improvements*, improving streets in cities of the second-class, and villages, highways, railroads, bridges, court-houses, jails, city and town halls, and the drainage of swamp and wet lands," does not authorize a city to issue bonds as a donation for the use and benefit of a State normal school, to be located in the municipality. The enumerated purposes are a limitation of the power to issue bonds in aid of works of internal improvement and in the absence of any specification of State normal schools in such enumeration, power to issue bonds in aid thereof does not exist. *State v. Weston*, 69 Neb. 695. *Infra*, § 885, as to works of *internal improvement*. The Nebraska statute which authorizes municipalities "to issue bonds in aid of works of internal improvement, highways, bridges, railroads, court-houses, jails in any part of the county, and the draining of swamp and wet lands,"

borrow money and issue bonds "only for the purpose of procuring money to be used in the legitimate exercise of the corporate powers

held to authorize an issue of bonds for canals for irrigation purposes, the enumeration *not* constituting a limitation upon the general term "works of internal improvement." This was so held in view of the contemporaneous construction placed upon the statute by municipalities and by the officers of the State. *Keith County v. Citizens' Savings & Loan Ass'n*, 116 Fed. Rep. 13. See Index, *Internal Improvements*.

The fact that the waters of an irrigating canal are drawn from a river or from other sources without the State does not deprive it of its character of an internal improvement within this statute. *Perkins County v. Graff*, 114 Fed. Rep. 441. *Irrigating canals* are of such public character as justifies the legislature in conferring the power of eminent domain to aid in their construction. *Cummings v. Hyatt*, 54 Neb. 35. The fact that an irrigating canal which is primarily constructed for and devoted to these purposes incidentally uses its water power for the purpose of generating electricity or to operate railroads, mills, &c., for the purpose of private gain, does not deprive the canal of its general character of a "work of internal improvement." *Kearney v. Woodruff*, 115 Fed. Rep. 90.

Power to highway commissioners to issue bonds to build bridges, and for "other distinct and expensive work" on the roads, does not authorize an issue of bonds for raising the grade of a road and widening it. The general words following the mention of bridges are limited to other improvements of the same kind as bridges. *Stites v. Wiggins Ferry Co.*, 97 Ill. App. 157. A system of sewers is an "improvement" within the meaning of a statute authorizing a city to issue bonds for permanent improvements; and bonds may be issued for that purpose although the charter also authorizes an annual tax levy to create a special fund to be used in the construction of a general system of sewerage. *Law v. San Francisco*, 144 Cal. 384.

Municipal officers cannot obviate the lack of power of a corporation to borrow money or issue bonds by issuing warrants upon the treasury and selling them. *Kellogg v. School District*, 13 Okla. 285. Even when a city has ex-

press power to borrow money and to issue warrants therefor drawing interest at a fixed rate percent, it cannot issue its warrants at a discount in payment of a debt or for the purpose of borrowing money. *Arnott v. Spokane*, 6 Wash. 442. See *Clark v. Des Moines*, 19 Iowa, 199; *ante*, § 851. Index, *Orders and Warrants*. Power to issue bonds "for the purpose of purchasing a site for, and erecting thereon a school-house or school-houses, and furnishing the same," authorizes an issue for the single purpose of erecting a school-house. *School Dist. No. 11 v. Chapman*, 152 Fed. Rep. 887, 897. An issue of bonds made *after the completion of a public work* for the purpose of paying the contractor therefor, is within statutory authority authorizing the city to borrow money for the prosecution or completion of the work. *Gladstone v. Throop*, 71 Fed. Rep. 341.

Express power to issue bonds for certain specified purposes, carefully limited and controlled by restrictions and conditions, may have the effect of excluding implied power to issue bonds for other purposes, or free from the restrictions and conditions imposed. *Farr v. Grand Rapids*, 112 Mich. 99. Statutory authority to issue bonds to purchase lands for school purposes to build school-houses and to make additions, alterations, repairs, or improvements on school-houses does not confer authority to issue bonds for the purpose of purchasing ordinary furniture for school-houses which is not permanently affixed to and a part of the building. *Chamberlain v. Cranbury Board of Education*, 58 N. J. L. 347. Failure to comply with a statutory requirement that each bond shall show upon its face the class of indebtedness of the municipality to which it belongs and from what fund it is payable, is not available as a defence when the bonds represent a valid indebtedness. *Gladstone v. Throop*, 71 Fed. Rep. 341. Where a charter provides that the city council "shall have authority to issue bonds for the following purposes only," enumerating the purposes, and the enumeration does not include the improvement of streets, other provisions of the charter which declare that *in the first instance* the improvement of any street shall be chargeable to the abut-

of such city and for the payment of legitimate corporate debts," such power does not authorize the city to *issue and sell bonds for the purpose of putting back in the treasury* a sum of money equal to what had been used in the payment of a debt of the city. The issuance and sale of bonds for such a purpose is not within the scope of its legitimate corporate powers or within the contemplation of the statutory authority conferred upon it.¹ Power to borrow money "for corporate purposes" and to issue bonds therefor, must always be construed and applied with reference to the corporate powers conferred upon the municipality, and, outside of those matters which are generally recognized as within the primary purposes of the municipal organization, each case must be determined on its own peculiar features.² When the power to borrow money or incur debt

ting lots, that contracts to do the work may provide that payment may be made in certificates against the lots or in improvement bonds, and which use language relating to the form of the bonds which shows that they are intended to be chargeable against assessments, street improvement bonds cannot be made a general charge upon the city, although the express statutory provisions authorizing their issue do not in terms prohibit bonds imposing general liability on the municipality. The power to *issue street improvement bonds* must be construed in conjunction with the limited and restricted power to issue municipal bonds for specified purposes. *Uncas National Bank v. Superior*, 115 Wis. 340.

Legislative authority is necessary to authorize municipal corporations to borrow money in aid of any public enterprise. Authority to *provide a supply of water* for the use of a municipality by the purchase, erection, or construction of water works, and power to issue bonds for these purposes, does not authorize the municipality to issue bonds as a donation to private parties to enable them to construct such works. *Grant v. Sherrill*, 71 Neb. 219. Issue of bonds for the construction of an *electric light system* for lighting the streets of a town held valid under the town's power by its charter to contract for necessary expenses. *Davis v. Fremont*, 135 N. Car. 538. Power under general laws to *borrow money for street improvements* is not inconsistent with a provision in the charter of a village that money cannot be borrowed by the trustees on the credit of the

village, nor any debt or liability incurred by the village except as is provided by law for the ordinary expenses of the village within the income of the current year applicable to that purpose. *Canandaigua v. Hayes*, 90 N. Y. App. Div. 336. In *Georgia*, it is held to be within the purpose and scope of a municipal corporation to apply the corporate funds or to create a corporate debt for the purchase of an interest in a building to be used as a *public school or college* for the accommodation of the people of the town; and the fact that superintendence of the school is left in the hands of trustees not elected by the corporation does not render the appropriation of the corporate funds illegal, it appearing that the enterprise is not for any private gain, and that the trustees contract to keep up, in the building, a public school. *Quare?* *Danielly v. Cabanias*, 52 Ga. 211. In *Nebraska*, county bonds may be issued to raise money to meet current expenses in case of a deficit in the county revenue, but this must first be authorized by a vote of the electors of the county. *Dawson Co. v. McNamara*, 10 Neb. 276.

¹ *Coffin v. Indianapolis*, 59 Fed. Rep. 221. Power to make extraordinary expenditures "for the benefit of" the city, and, after a vote, to issue bonds therefor, does not authorize a city to issue bonds to pay for the construction of a sewer, when an assessment therefor, which has already been levied, has been sustained in an action. *Oncida v. King*, 116 N. Y. App. Div. 35.

² *Stone v. Chicago*, 207 Ill. 492. An issue of bonds for the *erection of a school-house*, held to be for the corpor-

and issue bonds therefor is by statute limited to obligations in connection with the "*internal affairs*" of a *municipal corporation*, the power is confined to such business as municipalities of like character are usually required to engage in to fulfil their proper functions and to effectuate the object of their charters. For example, in the case of counties, these are ordinarily to provide a court-house for the administration of justice; a jail for the confinement of prisoners; a poor-house for the sustenance of paupers (where by local law they are made chargeable upon the county); offices for the various officials of the county and under certain circumstances highways and bridges for the accommodation of the public.¹ But under a power so limited it is not contemplated that a county may incur obligations by the issue of bonds in favor of a railroad operated by a private corporation, for private gain, although subserving a public purpose.² When officers of a corporation are acting within the limits of authority conferred upon them by law, they have discretion as to the method of exercising that authority, and acts done in good faith in correcting mistakes in instruments executed or exchanged one for another to carry into effect the intention of the agreement between the parties will be upheld by the court. Hence, *bonds of a municipality issued upon the surrender or cancellation of original instruments* for the purpose of changing the place of payment or the denominational amount, without increasing the obligation imposed upon the municipality, are not affected by the fact that the officers of the municipality have once exercised the powers conferred upon them by making the original issue, and have again, in a sense, exercised the same powers in making the reissue.³

§ 884 (508). **Taxation limited to Public Purposes; what are Such; Aid to Railways; Bonds to be paid by Taxation, for what Purposes authorized.** — After the numerous judgments of courts of the highest authority to that effect, it may be regarded as a settled doctrine of American law that *no tax can be authorized by the legislature* for any purpose which is essentially *private*, or, to state the proposition in other words, for any but a *public purpose*.⁴ What is a public pur-

te purposes of an incorporated town, 57. Validation of these bonds, see *Utter v. Franklin*, 172 U. S. 416.

separate and independent officers. ¹ *Lynde v. Winnebago County*, 16 Wall. (U. S.) 6; *Solon v. Williamsburgh Sav. Bank*, 114 N. Y. 122; *Kunz v. School Dist.*, 11 S. Dak. 578.

² *Lewis v. Pima County*, 155 U. S. 4, 57. ⁴ *Loan Assoc. v. Topeka*, 20 Wall. (U. S.) 655; *Curtis v. Whipple*, 24 Wis.

³ *Lewis v. Pima County*, 155 U. S. 54, 350; *Whiting v. S. & F. R. Co.*, 25 Wis.

pose may not always be easy to determine; but when determined, it constitutes the boundary of the power of taxation. Whether taxation to aid in the building of railways owned by private corporations is taxation for a *public* purpose is a question which has been decided by the courts of last resort in almost every State in the Union, and by the Supreme Court of the United States.¹ Although the doctrine of the constitutionality of such taxation has been vigorously combated, still it must be admitted that the great preponderance of the judicial judgments has been on the side of the competency of such legislation, in the absence of special constitutional restraint.² And therefore it must be regarded as settled that the legislature may, unless specially restrained, authorize subscriptions by municipalities to the stock of railway corporations, or donations to them, and provide for the payment of such subscriptions or donations³ by the issue and sale of the negotiable bonds of the municipality. But a statute which authorizes the issue of bonds to be paid by taxation

167; *Allen v. Jay*, 60 Me. 124; *Jenkins v. Andover*, 103 Mass. 94; *Lowell v. Boston*, 111 Mass. 454; *Pray v. Northern Liberties*, 31 Pa. St. 69; *Mayor of New York, In re*, 11 Johns. (N. Y.) 77; *Camden v. Allen*, 26 N. J. L. 398; *Sharpless v. Philadelphia*, 21 Pa. St. 147; *Hanscom v. Vernon*, 27 Iowa, 28; *Cooley, Const. Lim.*, 129, 175, 214; *Parkersburg v. Brown*, 106 U. S. 487 (manufactories); *Eufaula v. McNab*, 67 Ala. 588; *Geneseo v. Geneseo Natural Gas, &c. Co.*, 55 Kan. 358; *infra*, § 885. Bonds issued under a statute to aid a company in improving the water-power of the river for the purpose of propelling public grist mills, held to be issued to aid in constructing a "work of internal improvement," within the meaning of the statute in question. *Blair v. Cuming County*, 111 U. S. 363. *Aliter* as to steam grist mills, *Osborne v. County of Adams*, 106 U. S. 181; s. c. 109 U. S. 1; see and compare *Township of Burlington v. Beasley*, 94 U. S. 310; *post*, § 1351, and cases cited; *Cooley on Taxation*, chap. iv., "where the purposes for which taxes may be laid" are enumerated, and illustrated by the adjudicated cases.

¹ *Ante*, §§ 313, 317; *Rogers v. Burlington*, 3 Wall. (U. S.) 654; *Marshall Co. Sup. v. Schenck*, 5 Wall. (U. S.) 772, 779; *Olcott v. Fond du Lac*, 16 Wall. (U. S.) 678; *Burlington & Mo. River R. Co. v. Otoe Co.*, 16 Wall. (U. S.) 667; *Citizens' Sav. & Loan Assoc. v. Topeka*, 20 Wall. (U. S.) 655.

Pine Grove Tp. v. Talcott, 19 Wall. (U. S.) 666.

² In *Pine Grove Township v. Talcott*, 19 Wall. 666, 677, Mr. Justice Swayne says that such legislation has been sustained in nineteen out of twenty-one States. As respects legislative power, *donations* and subscriptions for stock stand on the same ground. *Town of Queensbury v. Culver*, 19 Wall. 83.

³ *Wood v. Oxford*, 97 N. Car. 227; *Schmitz v. Zeh*, 91 Minn. 290; *Germania Sav. Bank v. Darlington*, 50 S. Car. 337; *Kingman County v. Cornell University*, 57 Fed. Rep. 149. The Constitution of *Texas* prohibits municipal corporations from making appropriations or donations, or loans of credit to private corporations. *Cleburne v. Gulf, Colorado, & S. F. R. Co.*, 66 Tex. 457; *ante*, § 317. Statutory power to aid in the construction of "any road or bridge" and to "aid any enterprise designed for the benefit of the county" when authorized by popular vote, was held to include power to vote to issue bonds to aid in the construction of a railroad. *Washington County v. Williams*, 111 Fed. Rep. 801. Statutory power to aid "in the construction of railroads" includes power to issue bonds for the purchase of land for depot purposes. *Jefferson v. Jennings Banking & Trust Co.*, 35 Tex. Civ. App. 74. A general act authorizing bonds in aid of railroads held to apply to a village incorporated after the act took effect. *Schmitz v. Zeh*, 91 Minn. 290.

aid certain individuals or classes, or in aid of the *manufacturing* *enterprise* of individuals or private corporations, is void, this being, in the meaning of the rule, a *private*, as distinguished from a *public* purpose, although in a remote or collateral way the local public might be benefited thereby.¹ The execution of the powers of local government and administration ordinarily conferred upon municipal corporations, such as improving highways and streets, constructing water works, gas works, markets, preserving the public health, and the like, are of course public purposes; and upon legislative authority being given, negotiable bonds may be issued there-

What will constitute sufficient authority for the issue of such bonds is considered in the present chapter and elsewhere, as shown in the notes to this chapter.

§ 885 (510). **Bridges as Works of Internal Improvement; Validity of bonds issued therefor.** — In many States negotiable securities have been issued under statute provisions authorizing *the making of internal improvements*. In a case in the Supreme Court of the United States² the question arose as to whether *a toll bridge was a work of*

Genesee v. Genesee Natural Gas Co., 55 Kan. 358; *Cleveland Nat. Bank v. Iola*, 9 Kan. 689; *McConnell v. Amm*, 16 Kan. 228; *Central Branch P. R. Co. v. Smith*, 23 Kan. 745. Also *Grant v. Sherrill*, 71 Neb. 219. Authority to borrow money "to be expended in developing the *natural advantages of a city for manufacturing purposes*," does not warrant the issue of bonds as a donation to an individual in developing the water power of the city. One who holds such bonds with notice of the facts cannot recover on them. *Ottawa v. Carey*, 108 Ill. 110; *ante*, § 321.

Dodge County v. Chandler, 96 S. 205. Municipal power as to *works, ante*, § 275. *Works of internal improvement defined*. *Fremont Building Assoc. v. Sherwin*, 6 Neb. 48; *Burton Tp. v. Beasley*, 94 U. S. 310; *Mosey v. Burlington Tp.*, 4 Dillon. *Lewis v. Sherman Co.*, 5 Fed. Rep. *ante*, §§ 881, 883. In the opinion of the court in *Dodge County v. Chandler*, it is said: "In approaching a solution of these questions, the first inquiry that naturally presents itself is, *whether a toll-bridge, like that referred to, is a public bridge, and hence a work of internal improvement*. And we can only refrain from expressing sur-

prise that there should be any doubt on the subject. What was the bridge built for, if not fit for public use? Certainly not for the mere purpose of spanning the Platte River as an architectural ornament, however beautiful it may be as a work of art; nor for the private use of the common council and their families; nor even for the exclusive use of the citizens of Fremont. All persons, of whatever place, condition, or quality, are entitled to use it as a public thoroughfare for crossing the river. The fact that they are required to pay toll for its use does not affect the question in the slightest degree. Turnpikes are public highways, notwithstanding the exaction of toll for passing on them. Railroads are public highways, and are the only works of internal improvement specially named in the act; yet no one can travel on them without paying toll. Railroads, turnpikes, bridges, ferries, are all things of public concern, and the right to erect them is a public right. If it be conceded to a private individual or corporation, it is conceded as a public franchise; and the right to take toll is granted as a compensation for erecting the work, and relieving the public treasury from the burden thereof. Those who have such franchises are agents of the public.

internal improvement for which bonds might under the statute legally be issued to aid in building. The court held that "all bridges intended and used as thoroughfares are public highways, whether subject to toll or not, and that county bonds which have been issued under a statute authorizing the issue of such bonds in aid of an internal improvement are valid when given for the building of a bridge which is a thoroughfare, though tolls are charged thereon by the county. Whether the county has the right to demand tolls over a bridge which is a thoroughfare will not affect the validity of county bonds issued to aid in the construction of the bridge."

They have, it is true, a private interest in the tolls; but the works are public and subject to public regulation, and the entire public has the right to use them. These principles are so elementary in the common law that we can hardly open our books without seeing them recognized or illustrated. Of course there may be private bridges as there may be private ways, and they are put in the same category by the text-writers; but all bridges intended and used as thoroughfares are public highways, whether subject to toll or not. Regularly, all public bridges are a county charge, and the county is bound to erect and maintain them; but others may be charged with this duty, and a toll is the commonest of means for obtaining compensation for its performance. In Angell on Highways it is said that public bridges may be divided into three classes: 'First, those which belong to the public, as State, county, or township bridges, over which all people have a right to pass without or with paying toll; these are built by public authority at the public expense, either of the State itself or of a district or portion of the State. Secondly, those which have been built by companies (like turnpike and railroad companies), or at the expense of private individuals, over which all persons have a right to pass on the payment of a toll fixed by law. Thirdly, those which have been built by private individuals, and which have been surrendered or dedicated to the use of the public.' Chancellor Kent says: 'The privilege of making a road or establishing a ferry, and taking tolls for the use of the same, is a franchise, and the public have an interest in the same; and the owners of the franchise are answerable in damages if they should

refuse to transport an individual without any reasonable excuse, upon being paid or tendered the usual rate of fare.' In the same connection he enumerates in this class of franchises, ferries, bridges, turnpikes, and railroads. In our judgment the bridge in question is a public bridge and a work of internal improvement within the meaning of the statute."

A canal for irrigating lands held to be an "internal improvement" under Nebraska statute for which bonds may be authorized to be issued although its waters are drawn from sources without the State. *Perkins County v. Graff*, 114 Fed. Rep. 441. Also *canals for water-power purposes*. *Kearney v. Woodruff*, 115 Fed. Rep. 90. In *Dawson Co. v. McNamara*, 10 Neb. 276, it was held that under the statute of Nebraska a court-house is not an internal improvement, and that a recital in the bonds that they were issued under authority of the aforesaid "internal improvement acts" did not invalidate the bonds, inasmuch as there was implied authority found elsewhere in the act, whose provisions had been substantially observed. *Steam grist mill* not an internal improvement. *Supra*, § 884, note. *Water power for public grist mill* is such a work. *Supra*, § 884, note. Although the location of a county seat within the corporate limits of a city is a public purpose which may justify the legislature in authorizing the expense incident thereto to be levied upon city property, such location is not a "public improvement" or a "public work" within the meaning of a statute authorizing cities to donate money or bonds in aid of public improvements or public works. *Schnack v. Jeffersonville*, 152 Ind. 204. See also *Myers v. Jeffersonville*, 145 Ind. 431.

§ 886 (511). **The Law of Municipal Bonds as developed in the Federal Courts.** — Where the policy of issuing bonds payable in the future has been sanctioned by the legislature, the courts have to deal with the legal rights of the municipality on the one hand and with those of the holders of its obligations on the other. The determination of their legal rights often involves inquiries as complicated as they are important. The law on this subject is substantially of recent growth. The decisions in the various State and Federal courts are very numerous, and on some points conflicting.¹ It is impossible, were it even desirable, to compass within the limits of a single chapter all the learning, and to refer to all the cases in all of the States upon the subject of municipal securities. By reason of the greater favor with which the rights of the holders of such securities have been regarded by the Supreme Court of the United States, the volume of municipal bond litigation has taken place in the

¹ *Ante*, chap. vi, § 313 *et seq.* Since the decision of the Supreme Court of *Michigan*, in *People v. Township Board of Salem*, 20 Mich. 452, before mentioned (*ante*, § 317), the question arose in the United States Circuit Court for the Western district of *Michigan*, in an action on municipal railway aid bonds, whether the Federal Court was concluded by the judgment of the Supreme Court of the State, and if not, whether the holder of bonds issued in full compliance with the statute could recover thereon. *Emmons*, Circuit Judge, in an elaborate opinion holds, as to bonds issued before the decision of the Supreme Court of the State, that the Federal courts are not concluded thereby, and that the constitutional power of the legislature to authorize their issue, in the absence of special limitations, must be regarded as settled, at least as respects the Federal tribunals. The opinion displays great research and learning, and will be found reported under the name of *Talcott v. Township of Pine Grove*, vol. i. Bench and Bar (N. S.), 50. The Supreme Court of *Michigan* adhered to its opinion on this subject in the later case of *People v. State Treasurer*, 23 Mich. 499. The course of reasoning of *Emmons, J.*, in this case is coincident with that of the Supreme Court of the United States in the case of *Olcott v. Fond du Lac*, 16 Wall. (U. S.) 678. In the case just mentioned the Circuit Court of the United States, sitting in *Wisconsin*, decided that since the Supreme

Court of that State had held a certain act under which the bonds in question were issued to be unconstitutional, and had never holden otherwise, that this construction, though given after the bonds were issued, was binding upon or should be followed by the Federal courts. But the Supreme Court of the United States was of the opinion that, inasmuch as the decision of the State Supreme Court was not based upon any special and peculiar provision of the State Constitution, but upon general principles of law, and related to contracts, the case was not one in which the decision of the State court had any other than a persuasive force; and it reversed the judgment of the Circuit Court, and held that the bonds could be enforced.

In *Gilchrist v. Little Rock*, 1 Dillon C. C. 261, and in *Ranlett v. Leavenworth*, *Id.* 263, the Circuit Court of the United States for the eighth circuit, prior to any decisions of the Supreme Courts of the States of *Arkansas* and *Kansas* as to the constitutional validity of municipal railway aid bonds, declined to pronounce such bonds in the hands of *bona fide* holders to be void for the want of authority in the State legislature to authorize their issue. *History of the well-known Iowa municipal bond cases.* *King v. Wilson*, 1 Dillon C. C. 555. The word "aid" as used in the statute of *Nebraska* includes the power to make "donations" to railroads. *State v. Babcock*, 19 Neb. 230.

Federal courts. It is therefore necessary to consider the law on this subject as determined by the Supreme Court of the United States; and our object will be to show exactly the doctrines and principles which have received the sanction of that tribunal, and to illustrate, as far as needful, their application in particular instances, referring incidentally and as far as necessary to the decisions of the State courts on the subjects or topics discussed. The Supreme Court of the United States has upheld the rights of the holders of municipal securities with a strong hand, and has set a face of flint against repudiation, even when made on legal grounds deemed solid by the State courts, as well as by the municipalities. That such securities have any general credit and marketable value left is largely due to the course of adjudication in respect thereto by the Supreme Court, and the reliance which is felt by the public that it will stand firmly by the doctrines, equally just to the investor and beneficial to municipalities in general and to the public, which it has so frequently asserted.¹

§ 887. **Issues of Bonds by Corporations and Officers de facto.** — If an attempt be made to organize a municipality pursuant to the provisions of a valid law, but the organization is defective in some respect, and if, notwithstanding such defective organization there has been an actual user of the corporate franchise, accompanied by an assertion of the right to exercise it, for purposes of municipal government, the corporation falls within the rule that *its existence can only be attacked by the State*.² If the corporation *de facto*, pursuant to authority conferred by a valid statute upon municipalities properly and regularly organized, issues bonds for its corporate purposes, the validity of such bonds cannot be disputed by the municipality on the ground that it was irregularly organized, in an action by the holder of the bonds to recover the amount. The doctrine that where a municipal corporation is wholly void *ab initio*

¹ "The Federal courts, which have with great unanimity sustained the validity of municipal bonds, should hesitate long before accepting the forced and narrow interpretation contended for by the defendant. These solemn obligations, issued to invite the investors of the world, should not be invalidated except for grave and serious infirmities. Even if the question were a doubtful one, a construction should be given to the statute which upholds the bonds, rather than one which turns them to ashes in the hands of the *bona fide* holder." *Cox, J.*, in *Rich v. Town of Ments*, 18 Fed. Rep. 52; 19 Fed. Rep. 725. To same effect, *Shelley v. St. Charles County*, 17 Fed. Rep. 909, per *McCrary, J. infra*, § 956.

² *Tulare Irrig. Dist. v. Shepard*, 185 U. S. 1, 14; *Franklin Ave. Sav. Inst. v. Roscoe Board of Education*, 75 Mo. 408; *Burnham v. Rogers*, 167 Mo. 17; *Black v. Early*, 208 Mo. 281.

being created without warrant of law it can create no debts and incur no responsibilities, does not apply to the case of an irregularly organized corporation which has obtained, by attempted compliance with a general law authorizing the formation of municipal corporations, an organization valid as against everybody except the State acting by direct proceedings.¹ Where it appears that the municipality issuing the bonds has a *de facto* existence under a valid law of the State, however irregularly it may have been organized, the rights and liabilities of the parties under bonds issued by it are, in relation thereon, to be determined in precisely the same manner as if the organization of the municipality were free from defect. If, subsequently to the issuing of the bonds, the territory embraced within the *de facto* organization be organized, in compliance with the law, into a municipal corporation *de jure*, the *de jure* corporation becomes in law the successor of the *de facto* organization, and is *subject to and bound by the liabilities of the de facto organization*.² The fact that the officer issuing the bonds or taking part in their execution is not entitled *de jure* to the office which he holds similarly does not affect the validity of the bonds. The *action of a de facto officer in signing or issuing* the bonds is as binding upon the municipality for which he assumes to act as that of an officer *de jure*. A *de facto* officer is one whose title is not good in law, but who is, in fact, in the unobstructed possession of an office, and discharging its duties in full view of the public in such manner and under such circumstances as not to present the appearance of being an intruder or usurper. When a person is found thus openly in the occupation of a public office and discharging its duties, third persons having occasion to deal with him in his capacity as such officer are not required to investigate his title, but may safely act upon the assumption that he is a rightful officer, and contracts and obligations made or issued by him for proper corporate purposes are not affected by the fact that he is only an officer *de facto*, and not *de jure*.³

¹ *Shapleigh v. San Angelo*, 167 U. S. 646; *Tulare Irrig. Dist. v. Shepard*, 185 U. S. 1; *Montpelier National Ins. Co. v. Huron Board of Education*, 62 Fed. Rep. 778; *Riley v. Garfield Township*, 58 Kan. 299; *St. Paul Light Co. v. Sandstone*, 73 Minn. 5; *Coler v. Dwight School Township*, 3 N. Dak. 249; *Bradford v. Westbrook* (Tex. Civ. App.), 88 W. Rep. 382. See also *Comanche County v. Lewis*, 133 U. S. 198. Organization of precinct held to be defective and unauthorized, and not to create a corporation either *de facto* or *de jure* which was entitled to exercise a statutory power to issue bonds. *Morton v. Carlin*, 51 Neb. 202.

² *Shapleigh v. San Angelo*, 167 U. S. 646; *Uvalde v. Spier*, 91 Fed. Rep. 594; *Riley v. Garfield Township*, 58 Kan. 299; *Bradford v. Westbrook* (Tex. Civ. App.), 88 S. W. Rep. 382.

³ *Waite v. Santa Cruz*, 184 U. S. 302, 322; *Flagg v. Barnes Co. School Dist.*, 4 N. Dak. 30, 55; *Vicksburg v. Lombard*, 51 Miss. 125; *Carli v. Rhener*

§ 888. **Statutory Requirements as to Execution, Authentication, and Delivery of Bonds.** — It is within the power of the legislature to prescribe the manner in which municipal bonds shall be executed and to declare that if not so executed they shall be of no validity. If not substantially thus executed, they create no legal liability.

(*re* acts of municipal judge), 27 Minn. 292; *Magneau v. Fremont* (*re* quorum of legal members of council in passing an ordinance), 30 Neb. 843; *Petersilea v. Stone* (constable *de facto*), 119 Mass. 465, — learned and interesting opinion by *Devens*, J.

In *Ralls County v. Douglass*, 105 U. S. 728, the action was brought to recover a judgment on interest coupons issued by the county. Mr. Chief Justice *Waite*, stating the opinion of the court, says the question presented in this case is (p. 729): "Whether, if county bonds are issued in Missouri by a *de facto* county court and are sealed with the seal of the court and signed by the *de facto* president, they can be impeached in the hands of an innocent holder by showing that the acting president was not *de jure* one of the justices of the court." The court held that they could not be thus impeached. On this point the court says (p. 730): "In no State is it more authoritatively settled than in Missouri that 'the acts of an officer *de facto* (although his title may be bad) are valid, so far as they concern the public or the rights of third persons who have an interest in the things done.' In *State v. Douglass* (50 Mo. 593, 596), the Supreme Court of that State said: 'Without this rule the business of a community could not be transacted. The public are necessarily compelled to do business with an officer who is exercising the duties and privileges of an office under color of right, and to say that his acts as to strangers should be void would be productive of irreparable mischief. It would cause a suspension of business till every officer's right *de jure* was established.' To the same effect is *Harbaugh v. Winsor*, 38 *id.* 327. This is conclusive. The question here is not whether Dimmick was *de jure* probate judge of Ralls County, but whether he was acting under color of right as a justice and president of the county court. That is averred in the petition and not denied in the answer. His right to the office is one thing; his action

while exercising the duties of the office, another."

In *Attorney-General v. Crocker*, 138 Mass. 214, the court held that a certain town clerk was a *de facto* officer, whether or not he had ever had any valid appointment. The court, in concluding its opinion, says (p. 222): "The public and parties, having rights depending upon official acts, are not so much concerned with the title to an office, as they are that the duties of the office shall be performed, and the rights depending upon their performance secured and protected; and when they find an *actual incumbent of an office performing its duties*, they have a right to rely upon his acts as done by virtue of the office." In *Galbraith v. McFarland*, 3 Coldwell (Tenn.), 267, the facts and decision are stated accurately in the head-note, as follows: "An act performed by a clerk of the circuit court, after the term for which he was elected has expired by its own limitation, is valid. He was an officer *de facto*, and his official acts, so far as they affected the rights of third persons and the public, are as effectual and valid as if performed by an officer *de jure*." 5 *American and English Encyclopedia of Law* (1st edition), p. 105: "One holding after his term of office has expired, may be a *de facto* officer" (citing numerous cases). The Supreme Court of Michigan, in *Jhons v. People*, 25 Mich. 499, said (p. 503): "Persons in the *actual and unobstructed exercise* of office must be held to be legal officers, except in proceedings where their official character is the issue to be tried as against themselves. As intimated in the latter case, *the title to office can never be tried collaterally*." In *Kansas*, see *State v. Buckland*, 23 Kan. 238; *Morton v. Lee*, 28 Kan. 286. Further as to corporations and officers *de facto*, *ante*, chapters on Corporate Meetings and Quo Warranto, and Index. *Officer and Officer*.

¹ *Anthony v. Jasper County*, 101 U. S. 693; 4 *Dillon C. C.* 136; *Young v. Clarendon Township*, 132 U. S. 340, 348. In such a case as that mentioned

When the statute specifies the officers by whom the bonds shall be signed, they must be executed by the persons who held the prescribed offices at the time when the *bonds were actually signed*¹ and probably also at the time of actual delivery. The signature of each of the officers specified in the statute is essential to the validity of the bonds and cannot be omitted even though he had no discretion to withhold his signature.² But in the absence of a mandatory statutory requirement as to the manner of signing the bonds, the bonds of a city may be signed by any of the officers of the city whom the city council, as the governing board of the city, may designate for that purpose.³ The application of the foregoing principles as to signing does not necessarily cease merely with the manual execution

in the text if the statute has not been complied with, the plea of *non est factum* is a good defence against even a *bona fide* holder. *Anthony v. Jasper County*, *supra*.

¹ *Coler v. Cleburne*, 131 U. S. 162; *Anthony v. Jasper County*, 101 U. S. 693; *Bissell v. Spring Valley Township*, 110 U. S. 162; *Wright v. East Riverside Irr. Dist.*, 138 Fed. Rep. 313. As bonds do not take effect until delivery, the bonds ought, perhaps on principle, to bear the signature of the officers in office at the time of such delivery unless they have, under a valid contract, been deposited in escrow to be delivered on payment or some specified subsequent event, or unless for some other sufficient reason the principle should not apply. If the statute requires the bonds to be signed by a designated officer, *e. g.*, the mayor of a city, the common council has no power to authorize the ex-mayor whose name had been engraved on the coupons or any person to sign them other than the person who was mayor at the time they were signed. *Coler v. Cleburne*, 131 U. S. 162, 172; *Amy v. Watertown*, 130 U. S. 301; to be distinguished from *Weyauwega v. Ayling*, 99 U. S. 112.

If signed by the person who was mayor at the time of signing, but who ceases to be such mayor before the bonds have been delivered, the safe if not necessary course, where there is a statute such as that mentioned in the text, is, as above stated, to have the bonds signed by the officer who is in office at the time of the actual delivery of the bonds. The case of such a change of officer before delivery not unfrequently occurs, and the author pur-

sues the course here recommended, viz., to require or advise that the bonds be signed by the officer who is in office at the date of delivery. Different principles would or might apply if there is no mandatory statute as to the signing or mode of execution of the bonds.

² *Bissell v. Spring Valley Township*, 110 U. S. 162. When the statute directs that railroad aid bonds of a township shall be issued under the hands and seals of the commissioners of the township, bonds sealed with the individual seal of the commissioners are validly executed. The seal of the township is not required. *Smythe v. New Providence*, 158 Fed. Rep. 213.

³ *German Ins. Co. v. Manning*, 78 Fed. Rep. 900; *Lynde v. Winnebago County*, 16 Wall. 6, holding valid bonds sealed by the county judge outside of his jurisdiction with a new seal procured for the purpose.

Parol evidence is admissible to prove the fact and the method of signing. *Onslow County v. Tollman*, 145 Fed. Rep. 753, 771. Bonds were required to be executed by the board of commissioners of a county. The board convened for the purpose of executing bonds, and in the board room they were signed by the chairman and clerk of the board and the county treasurer. The county treasurer alone signed the coupons. Who impressed the seal on the bonds and when it was done did not appear. The board was in session during the whole signing. Held that the signing was intended to be the act of the board, and that the bonds were sufficiently executed. *Onslow County v. Tollman*, 145 Fed. Rep. 753, 770.

of the bonds. Thus if the statute imposes other formalities in the nature of conditions to be performed before the delivery of the bonds as a prerequisite to their issue, these conditions must also substantially be complied with. If, for example, the statute requires that, *before* the bonds be issued or obtain validity or be negotiated, they shall be *first registered* with and certified by the treasurer or auditor of the State or other officer, the *registration* by such officer and his certificate *is essential to the complete execution* of the instruments so as to bind the municipality for their payment.¹ But the requirement

¹ *Anthony v. Jasper County*, 101 U. S. 693, aff'g 4 Dillon C. C. 136; *Coler v. Cleburne*, 131 U. S. 162; *Young v. Clarendon Township*, 132 U. S. 340; *Douglass v. Lincoln County*, 5 Fed. Rep. 775; *Frank v. Butler County*, 139 Fed. Rep. 119; *State v. Babcock*, 19 Neb. 223, 230; *State v. Roggen*, 22 Neb. 118.

In 1872, the legislature of *Missouri* passed an act which provided that "before any bond hereafter issued by any county shall obtain validity or be negotiated, it must be first registered by the State auditor who shall certify thereon that all conditions precedent required by law and by the contract under which the bonds were ordered to be issued have been complied with." In *Anthony v. Jasper County*, 101 U. S. 693, aff'g 4 Dillon C. C. 136, it appeared that bonds were signed, sealed, and issued *after* this statute went into effect and were antedated to a date *prior* to the passage of that enactment. In point of fact, the conditions on which the bonds had been voted had not been complied with, and hence they could not have been and were not certified by the auditor as registered bonds. The bonds found their way into the hands of an innocent purchaser for value who did not know that they bore a false date. The Circuit Court held that the county was not estopped to set up the defence and the case was taken to the Supreme Court of the United States, which affirmed the decision of the Circuit Court. In delivering its judgment the Circuit Court by *Dillon*, Circuit Judge, said: "If the bonds bore date after the act of March 30, 1872, and had not been registered, it is plain, we think, that they would have no '*validity*,' and hence could not support an action in the hands of any person. But they are antedated; and the question is,

whether they have validity in the hands of the innocent purchaser. Upon the best consideration we have been able to give, our conclusion is that the bonds cannot be enforced. The case comes within the doctrine, which is well settled, that where a statute declares absolutely and without exception that a contract or bond or note is void, it is void into whosoever hands it may come. This statute declares that no unregistered bond shall be valid or be negotiated. Bonds must *first* be registered. Without registration they '*obtain no validity*.' Such is the statute. A declaration that bonds shall have no validity is equivalent to declaring them to be void. Is the county estopped to set up this defence? We think not. The case is to be distinguished, we think, from those decided by the Supreme Court of the United States, in which it is held that the frauds of the officers cannot be visited upon the innocent bondholder, and falls within the principle of *Bayley v. Taber*, 5 Mass. 286. In that case it was held, where a statute enacted that promissory notes of a certain description, '*made or issued*' after a specified day, should be '*utterly void, and no action should be sustained thereon*,' that it was competent to the makers of such notes, when sued upon notes bearing date *before* the day fixed by the statute, to prove that they were, in fact, made and issued *after* such day. The principle of that case is the same as in the case at the bar, and if that is a sound principle when applied to the individual maker of prohibited paper, it should apply with at least equal force in favor of public bodies, where one or two officers, without the consent of the others, may, as in this case, combine to evade the law, the other officers being innocent of wrongful participation. The principle involved is one of

that the bond shall be signed by a designated officer does not render it necessary that the officer signing the bond should be *de jure* en-

great consequence. For illustration: Loose and general powers have been heretofore given in this State to municipalities and counties to issue such bonds. This power has been taken away by the new Constitution. Can the protective provisions of that instrument be evaded and rendered useless by the mere fraudulent act of the officers of the county in antedating the bonds? If so, the power to defraud is endowed with a fearful vitality, which survives the prohibitions of the Constitution, and threatens to become immortal."

In delivering the opinion of the Supreme Court, *Waite*, C. J., said: "There can be no doubt that it is within the power of a State to prescribe the form in which municipal bonds shall be executed in order to bind the public for their payment. If not so executed, they create no legal liability. Other circumstances may exist which will give the holder of them an equitable right to recover from the municipality the money which they represent, but he cannot enforce the payment, or put them on the market as commercial paper. The act now in question is, we think, of this character. It in effect provides that no bond issued by counties, cities, or incorporated towns shall be valid, that is to say, completely executed, until it has been countersigned or certified in a particular way by the State auditor. For this purpose, after being executed by the corporate authorities, it must be presented to that officer, and he must inquire and determine whether all the requirements of the law authorizing its issue have been observed, and whether all the conditions of the contract in consideration of which it was to be put out have been complied with. To enable him to do this, evidence must be submitted, which he is required to file and preserve. If he is satisfied, the registry is made, and the requisite certificate indorsed on the bonds. This being done, the execution of the bond is complete, and, under the law, it may then be negotiated, that is to say, put on the market as valid commercial paper. . . . When the bonds now in question were put out, the law required that to be valid they must be certified to by

the auditor of State. In other words, that officer was to certify them before their execution was complete, so as to bind the public for their payment. . . . The object to be accomplished is the complete execution of a valid instrument, such as the law authorizes public officers to put out and bind for the payment of money the public organization they represent. For this purpose the law has provided that the instrument must not only be signed and sealed on behalf of the county court of the county, but it must be certified to or countersigned by the auditor of state. . . . In order to recover in this case it became necessary for the plaintiff to prove that the bonds from which the coupons sued on were cut had been executed according to law. He did prove that they were signed by the presiding justice and clerk of the court, and were sealed with the seal of the court. This, before the act of March 30, 1872, would have been enough, but after that more was necessary. The public can act only through its authorized agents, and it is not bound until all who are to participate in what is to be done have performed their respective duties." This decision was adhered to in *Hoff v. Jasper County*, 110 U. S. 53, where it was also held that innocent holders for value are charged with the duty of knowing the laws concerning the registration and certification of bonds, and of inquiring whether they have been complied with.

In *Young v. Clarendon Township*, 132 U. S. 340, a statute empowered municipalities to aid railroad companies by loan or donation, but provided that the bonds when "issued" should be delivered by the person having charge of the same to the treasurer of the State; that the treasurer should hold the same as trustee for the municipality and for the railroad company; that whenever the railroad company should present to the treasurer a certificate from the governor of the State that the company had in all respects complied with the provisions of the statute, such of the bonds as the company should be entitled to receive should be delivered to it; that the treasurer should indorse upon each bond so delivered the date of delivery and to whom it was delivered, and that

titled to the office. It is sufficient that the officer *de facto* occupies the office under the principle that the acts of a *de facto* officer are valid as to the public and third persons.¹

in case the bonds were not demanded in compliance with the terms of the act within three years from the date of delivery to the treasurer, the treasurer should cancel them and return them to the proper officers of the municipality. A township acting under this statute delivered to the State treasurer its bonds for the benefit of a railroad company. The company completed its railroad within the prescribed period of three years and became entitled to the governor's certificate under the statute, but, in the meantime the Supreme Court of the State had held the statute to be unconstitutional and the governor thereupon refused to give the certificate. In a later case the Supreme Court of the United States held the statute to be constitutional. Before the expiration of the three years the treasurer returned the bonds to the township. A creditor of the railroad company having recovered judgment against the company sought to enforce payment of the bonds on the ground that the company was equitably entitled to their delivery and that the township was therefore indebted to the company in the amount of the bonds. The court held that the bonds were never completely executed and delivered instruments and that neither the railroad company nor the plaintiff suing in its rights as a judgment creditor, could enforce their payment. Mr. Justice Lamar said: "Here the condition prescribed by the statute as that upon which the delivery was to be made to the railroad company and upon which the bonds were to be perfected instruments in its hands, was never performed. On this point, the statute seems to be very simple and clear. Indeed, it would be difficult to make it more clear. By its very terms, the bonds received by him in their uncompleted condition were to be by the State treasurer 'safely kept'; and for three years after their reception could only be parted with by him in one way, — that is, to the railroad company interested on its production of the governor's certificate. On this condition could they be delivered and not on any other. The certificate was

not a mere formal act on the part of the governor, but it was a condition precedent to the power of the treasurer to deliver. . . . The company's compliance with the provisions of the act gave it the right to receive the governor's certificate; but it did not confer the right to receive the bonds. That was given by the governor's certificate alone. Had the treasurer made delivery without the certificate, he would have acted without authority of law, and the bonds would have been voidable in the hands of the company. . . . It does not matter so far as the question of statutory power of the treasurer is concerned that the failure of the company to produce the certificate might not be because of any fault of the company. Failure might be due to the governor's mistaken view of the law or to his misconception of the facts, or even to his wilful refusal to discharge his official duty. — all is immaterial to this aspect of the statutory scheme. A miscarriage in this particular was one of the risks taken by the company. The company knew the statute. — was held by the law to know it and understand it. It contracted with the township through the statute and could so contract with it in no other way. Availing itself of the statute, it must take it *cum onere*. If the governor failed to give the certificate when he should and could not be reached by mandamus, these were but features of the company's risk."

¹ *Waite v. Santa Cruz*, 184 U. S. 302, 322, aff'g 89 Fed. Rep. 619, 626; *supra*, § 204; *Greene v. Rienzi*, 87 Miss. 463. Index. *Acts; Office and Officer; Quo Warranto*. It is essential that there should, however, be an office *de jure* which may be filled by the persons signing the bonds. There can be no officer either *de jure* or *de facto* if there be no office to fill. Hence, if the statute creating the office be unconstitutional and invalid, bonds signed by a person claiming the office attempted to be created by the invalid statute are without authority of law and void. *Norton v. Shelby County*, 118 U. S. 425, 441. See on this subject, *State v. Carroll*, 38 Conn. 449, referred to in the chapter on *Quo Warranto*.

§ 889. **Compliance with Statutory Requirements Essential.** — The legislature in granting to a municipality power to issue its bonds *may impose such conditions* as it may choose, and legislative authority to issue bonds does not carry with it authority to execute bonds except such as substantially comply with the restrictions and conditions of the enabling act.¹ Accordingly if the legislature limits the *term* within which bonds shall be payable, such limitation is in the nature of a restriction on the power to issue bonds, and if bonds issued by the municipality pursuant to this authority extend beyond — we should say materially beyond — the prescribed term of years from the date of issue, they are invalid.² The word “bond”

¹ *Sheboygan County v. Parker*, 3 Wall. (U.S.) 93, 96; *Wells v. Pontotoc County*, 102 U. S. 625; *Claiborne County v. Brooks*, 111 U. S. 400; *Young v. Clarendon Township*, 132 U. S. 340; *Provident Life & Trust Co. v. Mercer County*, 170 U. S. 593, 599. The fact that the municipality issuing the bonds is described as a village, when it is properly a city under the statutes of the State, does not affect the validity of the bonds when it has been recognized by statute as a village and has levied and collected taxes, passed ordinances, and otherwise acted as a village. *Cornell University v. Maumee*, 68 Fed. Rep. 118. See also *State v. Perrysburg*, 14 Ohio St. 472.

² *Barnum v. Okolona*, 148 U. S. 393; *Woodruff v. Okolona*, 57 Miss. 806. Railroad aid bonds maturing from eleven to seventeen years after their date were held to be invalid when issued under a statute which only authorized an issue of bonds “not to extend beyond ten years from the date of issuance.” *Barnum v. Okolona*, 148 U. S. 393. A statute authorizing the issuance of bonds provided that they should be payable in not less than five nor more than thirty years from date. Bonds were issued dated September 10, 1872, and made payable thirty years from October 15, 1872, with interest thereon from October 15, 1872. When actually delivered did not appear. It was held that, as they were payable thirty years from the date they began to bear interest, they were practically thirty year bonds. *Rock Creek Township v. Strong*, 96 U. S. 271. The court said, “The legal effect is precisely what it would have been had the date asserted been October 15 instead of

September 10, 1872; substantially the legislative direction was followed.” To the same effect, *Dows v. Elmwood*, 34 Fed. Rep. 114; *South St. Paul v. Lamprecht Bros. Co.*, 88 Fed. Rep. 449.

Bonds issued payable in eleven days less than ten years from their date, under a statute authorizing the issue of bonds payable in not less than ten years from date, held void even in the hands of a *bona fide* purchaser. *People's Bank v. School Dist. No. 52*, 3 N. Dak. 496. Having in view the object of the ten year limit, and the fact that municipal taxes are levied and collected annually and not oftener, might not the court have well decided that the eleven days was no material or substantial departure from the statute?

Where an act provided that bonds should be payable twenty years from date and gave the township the option to call in and pay them after the lapse of ten years, the fact that the bonds were made payable two and one-half months before the expiry of twenty years from their issue did not invalidate the bonds. The court held that the provision relative to the time of payment was directory in its character and did not go to the essence of the power to issue, except as imposing a limitation beyond which the bonds should not be made to run. *Kearny County v. Vandriess*, 115 Fed. Rep. 866. Where there is no express declaration limiting the term, a statutory requirement of the levy of a five per cent tax, which would create a fund sufficient to pay off the bonds issued at the end of twenty years, has not the effect of fixing the period within which the bonds must mature, and bonds will not be held invalid because they mature at

imports a seal, and the word, when used in a statute authorizing the issue by a municipal corporation of written obligations negotiable in character, means specialties or writings under seal.¹ But the absence of a seal will not affect the validity of the instruments if they were intended by the officers to be bonds and the statute so denominates the securities to be issued.² In every issue of municipal bonds it is necessary that *precedent steps* should be taken to determine certain essential features of the issue. A city can only act through its designated functionaries or agents, and these must determine within the statutory authority not only the expediency or necessity of the issue, but also such matters as the amount; the rate of interest which they shall bear; the time when they shall

yearly intervals beginning at the expiry of twenty years from the date of their issue, and continuing for eleven years thereafter. *Keith County v. Citizens Sav. & Loan Assoc.*, 116 Fed. Rep. 13. The provision of the *Georgia* Constitution that any municipal corporation which may incur any bonded debt shall provide for the assessment and collection of an annual tax sufficient in amount to pay the principal and interest of said debt within thirty years from the date of incurring the same, is held to give a discretion to the municipal corporation to fix the maturity of the principal and interest of the bonds at any time within the period of thirty years. *Wilkens v. Waynesboro*, 116 Ga. 359. In *People's Nat. Bank v. Ayer*, 24 Ind. App. 212, it was held that a statutory provision that assessments "may" be made to run for twenty years and that bonds issued to anticipate them "may" also be issued payable during a period of twenty years, was directory and not mandatory, and that the assessments and the bonds might run for a period of less than twenty years.

Under a statute providing that bonds may be issued making part of them mature annually and running through a series of not more than twenty years from the dates of their issuance, bonds of a \$35,000 issue are not invalid because they are made to mature \$100 in each year for nineteen years from issuance and the balance of \$33,100 at the end of twenty years. *Kemp v. Hazlehurst*, 80 Miss. 443. Where the statute provided that bonds were to run not more than thirty years and to be redeemed within that time at

the pleasure of the county court, it was held that the proper course was for the court, before the issue of the bonds, to fix the time for their redemption and that its action in fixing the time as at the expiration of six years and within twenty years from the date of their execution, some of them falling due at six years and others falling due each successive year thereafter until the expiry of twenty years, was correct. The court said that by the use of the words "the pleasure of the court" the statute did not contemplate that the time of redemption was to be left uncertain, but that the pleasure was to be exercised and the time fixed before the bonds were issued. *Turpin v. Madison County Fiscal Court*, 105 Ky. 226. Where the question submitted to the electors was whether the city should issue bonds maturing in not less than fifteen years nor more than thirty years, the principal to be payable in equal annual instalments, it was held that an ordinance providing for bonds payable at the option of the city fifteen years after date and absolutely due and payable twenty-five years after date was not responsive to the question submitted. *Denver v. Hallett*, 34 Colo. 393.

¹ *Koshkonong v. Burton*, 104 U. S. 668, 673; *Rondot v. Rogers Township*, 99 Fed. Rep. 202, 209.

² *Draper v. Springport*, 104 U. S. 501; *Bernards Township v. Stebbins*, 109 U. S. 341; *Rondot v. Rogers Township*, 99 Fed. Rep. 202, 209; *D'Esterre v. New York*, 104 Fed. Rep. 605, 609; *Solon v. Williamsburgh Sav. Bank*, 114 N. Y. 122; *Thornburgh v. Tyler*, 16 Tex. Civ. App. 446.

become payable; the time when redeemable; and the purposes for which the money is to be used. When the statute requires the proceedings for the issuance of the bonds to fix these matters, substantial compliance with material requirements is essential to the validity of the issue in the absence of estoppel.¹ A statute pro-

¹ *Schultze v. Manchester*, 61 N. J. L. 513.

Adoption of resolution or ordinance. The adoption of a proper resolution providing for the issue, and the vote of the electors on the question, held essential to the regularity and validity of the issue. *Elyria Gas & W. Co. v. Elyria*, 57 Ohio St. 374. Under a charter requirement that funding bonds of a city shall be issued only after an ordinance therefor shall be duly passed, such bonds issued without any ordinance or resolution of the mayor and council are void, although signed by the mayor and attested by the clerk under the city seal. *Swan v. Arkansas City*, 61 Fed. Rep. 478. When, by statute, the power to issue funding bonds can only be exercised through the medium of an ordinance, resolutions purporting to confer authority upon the mayor and clerk to issue the bonds are invalid, and bonds attempted to be issued thereunder are void. The purchaser of the bonds is bound to take notice of the defect which cannot be cured by any recital contained in the bond. *Edminson v. Abilene*, 7 Kan. App. 305; Index, *Ordinances*. An ordinance directing an issue of bonds which declares that they are to be issued and the proceeds used for "corporate purposes" is sufficiently definite as to the purposes of the issue. *Lussem v. Chicago Sanitary Dist.*, 192 Ill. 404. See also *Wilson v. Chicago Board of Trustees*, 133 Ill. 443. A statutory requirement that an ordinance for a local improvement to be paid for with bonds shall prescribe the form of bonds, is complied with if there is a general ordinance prescribing the form of improvement bonds to be issued by the city although the special ordinance for the improvement does not contain any provision as to the form. *Jones v. Seattle*, 19 Wash. 669. Delay of two years after passage of ordinance and before date of sale does not affect validity of bonds. *Moller v. Galveston*, 23 Tex. Civ. App. 693. If the clerk of the municipality fails to keep a record of the proceedings

authorizing the issue, parol evidence is admissible to supply the omission. *Rondot v. Rogers Township*, 99 Fed. Rep. 202, 210; *School Dist. No. 2 v. Clark*, 90 Mich. 435. See also *ante*, § 557; Index, *Records and Documents*.

Denomination. A statute provided that bonds issued under it should be of three several denominations, "the number of bonds of such denominations to be fixed by the county board." Held that no bond could be issued of any other denomination, but that all three denominations need not be issued. *Bingham v. Milwaukee County*, 127 Wis. 344.

Rate of interest. When the statute requires the resolution authorizing the issuance of bonds to specify the rate of interest thereon, a resolution which does not determine the rate of interest which the bonds shall bear is fatally defective. *Hillsborough County v. Henderson*, 45 Fla. 356; 33 So. Rep. 997. Omission of rate of interest from notice of election held fatal to proceedings. *State v. Cascade County School District*, 15 Mont. 133. A statutory requirement that the resolution authorizing the issue of bonds shall determine the rate of interest on the bonds is not complied with by a resolution which states that the bonds shall bear interest at not more than four per cent per annum. *Hillsborough County v. Henderson*, 45 Fla. 356; 33 So. Rep. 997. See also *State v. Saline County Court*, 45 Mo. 242; *Mercer County v. Pittsburgh & E. R. Co.*, 27 Pa. St. 389. Although an issue of bonds bearing interest at six per cent per annum has been authorized by a vote, the municipality may issue bonds thereunder bearing any less rate which it deems advantageous. *Cleveland v. Spartanburg*, 54 S. Car. 83. When the rate of interest fixed is within the statutory limit, the time at which it is to be paid, whether annually or semi-annually, is within the discretion of the municipal authorities in the absence of express provision to the contrary. *Derby v. Modesto*, 104 Cal. 515, 523. If under authority to issue bonds with

vided that railroad aid bonds should be made payable to "the railroad company and assignees." The bonds were made payable to the railroad company "or bearer." The provision was held to be one of form which had been substantially complied with.¹ If a provision or stipulation be inserted in a bond which is void because it is contrary to the express terms of the enabling act, the bonds, if otherwise valid, are not affected thereby, but will be read as if they did not contain the invalid provision.²

eight per cent interest, bonds be issued drawing twelve per cent, they are valid and bear interest at the statutory rate. *Quincy v. Warfield*, 25 Ill. 317.

Usury. That usury can be predicated of a sale or issue by a corporation of its securities, see *Danville v. Sutherland*, 20 Gratt. (Va.) 555; *Lynchburg v. Norvell*, 20 Gratt. (Va.) 201; *Clark v. Des Moines*, 19 Iowa, 199.

Place of payment. Bonds may be made payable outside the State, in the absence of any statutory direction to the contrary. *Meyer v. Muscatine*, 1 Wall. (U. S.) 384; *Maddox v. Graham*, 2 Met. (Ky.) 56. But in *Illinois* it has been held that, in the absence of express power to otherwise provide, they must be made payable at the municipal treasury. But if bonds are made payable elsewhere, they are not void; but this provision is of no effect. *Johnson v. Stark County*, 24 Ill. 75; *Sherlock v. Winnetka*, 68 Ill. 530; *Enfield v. Jordan*, 119 U. S. 680. Under the provisions of the *California* Constitution that all moneys belonging to or collected for any municipality shall be immediately deposited with the treasurer to the credit of the city for the benefit of the funds to which they respectively belong, the legislature cannot by statute authorize bonds to be made payable at a place other than the city treasury. *Los Angeles v. Teed*, 112 Cal. 319. See also *Yarnell v. Los Angeles*, 87 Cal. 603. As to place of payment of bonds the Constitution of *California* has recently been amended.

Time when payable. Omission of time when payable from notice of election held fatal to proceedings. *State v. Cascade Co. School District*, 15 Mont. 133.

Time when redeemable. Omission of time when redeemable from notice of election held fatal to proceedings. *State v. Cascade Co. School District*, 15 Mont. 133.

Date. A statute directed that

refunding bonds should bear date May 1, 1884. Bonds issued pursuant thereto were not delivered until November 7, 1884, and the municipal officers inserted the true date. It was held that their validity was not affected thereby. *Lexington v. Union Nat. Bank*, 75 Miss. 1. Bonds may, by ordinance, be directed to be antedated, especially when the enabling act recognizes the fact that they do not bear the date of their sale by requiring that they shall not be sold for less than par and accrued interest. *Moller v. Galveston*, 23 Tex. Civ. App. 693. See also *Yesler v. Seattle*, 1 Wash. 308.

¹ *Supervisors v. Galbraith*, 99 U. S. 214. Where a statute provided that bonds should state on their face "to whom issued" but also provided that bonds signed by the proper officers and registered by the county clerk would be negotiable and transferable by delivery, it was held that making bonds payable "to — or bearer" was a sufficient compliance with the terms of the State. *Finney Co. School Dist. v. Cushing*, 8 Kan. App. 728. A statutory provision directing that refunding bonds shall be issued "to the holder of such indebtedness" is complied with by issuing bonds to the holder of the indebtedness which are payable to bearer. It is not necessary that the bonds be made payable to the holder of the indebtedness. *West Plains v. Sage*, 69 Fed. Rep. 943. When a statute requires railroad aid bonds to be "executed to" the railroad company and "delivered to the president or treasurer" of the railroad company, the validity of the bonds is not affected by the fact that they are made payable to bearer. *Lexington v. Union Nat. Bank*, 75 Miss. 1.

² *Pontotoc v. Fulton*, 79 Miss. 511. See also *Howard v. Western R.R. Co.*, 94 U. S. 463. *Quincy v. Warfield*, 25 Ill. 317 (bonds issued for interest in excess of statutory rate held valid and to bear interest at the authorized or

§ 890. **Statutory Requirements; Statement of Purpose of Issue.** — A statutory requirement that bonds issued by a municipal corporation *shall express upon their face the purpose* for which they are issued is reasonable, and is one of which the purchaser is bound to take notice. If it appears on their face that the bonds are issued for an illegal purpose, they are void; if, notwithstanding such requirement, they are issued without any purpose appearing upon their face, the purchaser takes the risk of their being issued for an illegal purpose; and if that proves to be the case, they are as void as if he had received them with express notice of their illegality. Ordinarily the recital of the fact that the bonds were issued in pursuance of a certain ordinance is notice that they were issued for a purpose provided in such ordinance, and the city is estopped to show against a *bona fide* holder for value the fact to be otherwise; but where the statute requires such purpose to be stated upon the face of the bonds and this is not done, it is no answer to say that the ordinance authorized them for a legal purpose, if in fact they were issued without consideration and for a different purpose.¹ Hence, when the statute requires the purpose to be stated, it is an essential element, affecting the negotiability of the bonds and their freedom from equitable defences in the hands of *bona fide* purchasers, that the purpose be adequately stated in such terms as to comply with the requirements of the legislature.²

legal rate). Wrong place of payment does not invalidate bonds otherwise legal. *Sherlock v. Winnetka*, 68 Ill. 30; *Enfield v. Jordan*, 119 U. S. 680; *Coland County v. Hill*, 132 U. S. 107.

¹ *Barnett v. Denison*, 145 U. S. 135.

² Under a statute requiring that bonds shall express upon their face the purpose for which they were issued and under what ordinance, a statement that they were issued to take up former bonds of a certain date "as provided in the ordinance of said village," is not compliance with the statute; and when there is no valid or sufficient ordinance authorizing the issuance of the bonds, the refunding bonds are invalid in the hands of a purchaser. *S. Trust Co. v. Mineral Ridge*, 104 Fed. Rep. 851. *Quere?* Where a statute declares that bonds to be issued under its provisions "shall on their face stipulate that the holders of any of them or any coupons thereof shall be entitled to the remedies for the collection of the same" provided by the statute, a compliance with the conditions of the statute is essential, to

entitle a holder of bonds issued under the act which do not contain such stipulation on their face to the benefit of extraordinary remedies provided by the statute. *Hubbert v. Campbellville Lumber Co.*, 191 U. S. 70, aff'g 112 Fed. Rep. 718. A statutory provision that bonds issued under the authority of the act "shall express upon their face the purpose for which they were issued and under what ordinance" is complied with when the bonds are designated "*refunding bonds*," specifying the date of the ordinance under which they are issued and reciting that they are issued to procure the means to refund and extend the time of payment of certain outstanding general fund bonds of a village, which, from its limits of taxation, the village is unable to pay at maturity. It is not necessary in issuing such refunding bonds to go beyond the immediate purposes and recite the character of the original indebtedness for which the refunding bonds were issued. *Kent v. Dana*, 100 Fed. Rep. 56. See also *Cadillac v. Woonsocket*

§ 891. **Statutory Requirement of Popular Vote.** — Provision requiring in certain cases popular sanction before incurring indebtedness is remedial and protective in its nature and objects. It insures publicity and discussion, and thus prevents hasty, inconsiderate, or secret action on the part of the officials of the municipality and operates as a check, more or less effective, upon the creation of improvident and extravagant indebtedness. It is moreover in accordance with the principles of home-rule and of local self-government, and it is but just that the electorate of the locality specially affected should have the right to determine the question whether it is expedient to incur the proposed indebtedness for the proposed object. The general value of requiring a popular sanction is undeniable, but experience has shown that it is not a *panacea*.¹

We have already seen that the constitutions of many States require the sanction of a popular vote before the incurring of debt² and have stated the result of the decisions founded upon these constitutional provisions. When the sanction of a popular vote to the incurring of debt, or an issue of bonds, is prescribed by statute, the validity of the obligation is governed by similar principles as are applied in the case of the constitutional requirements. A *statutory provision* that the incurring of debt, or the borrowing of money or an issue of bonds *be submitted to a popular vote, must be substantially complied with*, and the election held and the vote given substantially in the form prescribed by the statute. If substantial compliance in material respects with the statute has not been made, bonds issued in evidence of the debt are invalid in the absence of estoppel.³

Inst. for Savings, 58 Fed. Rep. 935. Under such statute, also, a reference to the ordinance authorizing the issue by date and general purport, and a statement that the bonds are issued to pay certain indebtedness of the village incurred in the improvement thereof, is sufficient. *Clapp v. Marice City*, 111 Fed. Rep. 103. A statutory requirement that bonds shall state the purpose for which they are issued is sufficiently complied with if they show upon their face that they are *canal bonds* issued in aid of the construction of a canal. *Keith County v. Citizen's Sav. & Loan Assoc.*, 116 Fed. Rep. 13. A bond which recites that it is a *consolidated debt bond for outstanding indebtedness* and cites the acts of the legislature and the ordinance of the city authorizing its issue, states with sufficient clearness the purpose for which it is issued. *Jefferson v. Marshall National Bank*, 17 Tex. Civ. App. 539.

¹ See *ante*, chap. i. Index, *Elections: Majority; Voter and Voting*.

² *Ante*, chapter on Constitutional Limitations of Indebtedness, § 213.

³ *Manhattan Co. v. Ironwood*, 74 Fed. Rep. 535; *Brown v. Ingalls Tp.*, 86 Fed. Rep. 261, rev'g 81 Fed. Rep. 485; *Law v. San Francisco*, 144 Cal. 384; *Murphy v. San Luis Obispo*, 119 Cal. 624; *Epping v. Columbus*, 117 Ga. 263; *Coffin v. Richards*, 6 Idaho, 741; *Lewis v. Bourbon County*, 12 Kan. 186; *Leavenworth v. Wilson*, 69 Kan. 74; *Ashland v. Culbertson*, 103 Ky. 161; 44 S. W. Rep. 441; *Le Tourneau v. Duluth*, 85 Minn. 219; *Greene v. Rienzi*, 87 Miss. 463; *Thornburg v. School Dist. No. 3*, 175 Mo. 12.

Even when there is no direction as to the form in which the question shall be submitted to the voters, it is essential that it be submitted in *such manner as to enable the voters intelligently to express their opinion upon it*, and for that purpose the proposition should be submitted to them separate and distinct from any other proposal

littag v. Park Ridge, 61 N. J. Law 151; *schultze v. Manchester Tp.*, 61 N. J. L. 13; *Canandaigua v. Hayes*, 90 N. Y. App. Div. 336; *Wadsworth v. Concord*, 33 N. Car. 587; *Robinson v. Goldsboro*, 135 N. Car. 382; *Asheville v. Webb*, 134 N. Car. 72; *Wilson v. Florence*, 39 S. Car. 397; and see also *Vilson v. Florence*, 40 S. Car. 290; *Appleton Waterworks Co. v. Appleton*, 16 Wis. 363.

The Constitution of California forbids a city to become indebted beyond a certain extent without the assent of two-thirds of its qualified electors. An act providing for the refunding of bonds did not provide for the submission of the question to voters, and it was conceded that the act was therefore unconstitutional. The court held that while by the Constitution a submission must be had, it did not necessarily follow that an act of the legislature on the subject must contain that requirement. It was sufficient that, by any legislation, authority was given to the municipal government to call such an election and that the election was actually called and held. The court said that it was probable that the constitutional provision requiring such election was of itself sufficient authority to the municipality for holding it. *Los Angeles v. Teed*, 112 Cal. 319. Where the statute prescribes the nature of the notice to be given and the board merely orders notice to be posted, without fixing a date for the election, the clerk of the board has no authority to supply the omission. *Thornburg v. School Dist. No. 3*, 175 Mo. 12. When the statute prescribes the place where the election is to be held, the voters are chargeable with notice thereof, and a provision for a special notice thereof is directory only. A failure to specify the place in the notice does not invalidate the election. *Wilson v. Pike County*, 144 Ala. 397; 39 So. Rep. 370. Where the statute authorizes cities to establish the method of holding the elections by ordinance, a direction in an ordinance specifying the manner of marking the

ballots is mandatory, and if not complied with, the election is invalid. *Murphy v. San Luis Obispo*, 119 Cal. 624.

Purpose. Where the statute does not require it, it is not necessary that the proposition should specify the purposes for which the bonds are to be issued. *Conklin v. El Paso* (Tex. Civ. App.), 44 S. W. Rep. 879. On the other hand a submission is not invalidated because the purpose to which the proceeds of the bonds are to be applied is stated in the submission. *Louisville v. Board of Park Com'rs*, 112 Ky. 409; 65 S. W. Rep. 860.

Denomination. Where the statute provides that bonds shall be issued in certain denominations, and specifies the rate of interest and their duration, a petition and proclamation for an election are not void which fail to state the denomination, rate of interest, or when the bonds are to fall due, but which specifically mention the statute. *State v. Topeka*, 68 Kan. 172. A notice of election for the issuing of either coupon or registered bonds does not invalidate the election, although the statute only authorizes an issue of coupon bonds. *Blakey v. Montgomery*, 144 Ala. 481.

Record of election. An election is not rendered invalid because the requirement of the statute that the result must be spread upon the order book is not complied with, since the provision is merely directory. *Turpin v. Madison County Fiscal Court*, 105 Ky. 226.

Issue of bond construed. A statute requiring the submission of the question of future issues to the vote of the qualified taxpayers does not affect the validity of bonds which have been executed, certified by the Attorney-General and registered by the comptroller, although they have not been sold at the time the act takes effect, as they have been already "issued" within the contemplation of the statute. *Moller v. Galveston*, 23 Tex. Civ. App. 693.

Propositions or questions how submitted, etc. Where several propositions have been separately submitted, the

which is not germane to the question upon which a vote is desired.¹ Where the statute requires the proposition to "specify" or to "desig-

failure of one to carry does not affect the validity of the others, which have received the requisite number of votes. *Law v. San Francisco*, 144 Cal. 384. The question submitted was, whether the city should issue bonds "maturing in not less than fifteen years nor more than thirty years," the principal to be payable in instalments commencing the year following the issuance of the bonds. The Constitution required that a sinking fund should be created sufficient to extinguish the principal of the debt within fifteen years but not less than ten years. Held that an affirmative vote did not authorize the issue of bonds payable at the option of the city fifteen years after date, and absolutely in twenty-five years; that the fact that the ordinance provided for a sinking fund did not provide for annual payments as required by the vote, but that bonds payable in annual instalments in fifteen years complied with the requirements of both the vote and the Constitution. *Denver v. Hallett*, 34 Colo. 393.

¹ *Farmers Loan & Trust Co. v. Sioux Falls*, 131 Fed. Rep. 890, reversed in *Sioux Falls v. Farmers Loan and Trust Co.*, 136 Fed. Rep. 721; *Leavenworth v. Wilson*, 69 Kan. 74; *State v. Allen*, 186 Mo. 673; *Elyria Gas & Water Co. v. Elyria*, 57 Ohio St. 374; *In re Bloomsburg Town Election*, 4 Pa. Dist. 671; *McBryde v. Montesano*, 7 Wash. 69. See also *Petros v. Vancouver*, 13 Wash. 423. An election for the double purpose of "sewerage and other public improvements" which have been passed upon adversely does not prevent the submission to a subsequent election for the single purpose of "a system of sewerage." *Robinson v. Goldsboro*, 122 N. Car. 211.

In *Elyria Gas & Water Co. v. Elyria*, 57 Ohio St. 374, it was held that under a statute authorizing the submission of the question of issuing bonds for the "erection or purchase of water works," a proposition for "the purchase and erection of water works" was unauthorized, since the purchase of water works necessarily implies that they have already been erected and are a present existing property, the subject of sale and purchase, while the erection of water works can only have reference to their future construction, and thus

the two purposes are entirely distinct. Followed in *Leavenworth v. Wilson*, 69 Kan. 74. But in *State v. Allen*, 178 Mo. 555, a proposition to increase the debt by issuing bonds for the purpose of constructing, maintaining, and operating, or purchasing, an electric light plant, was held to be single and the contention that it constituted two propositions, which being submitted together made it impossible for any voter by his vote to say which of the two propositions he favored or opposed, was held to be without merit. Submission by ordinance of the question of purchasing an existing water works and light plant and providing for their extension is the submission of a single question to the voters. *State v. Allen*, 183 Mo. 283. Erection of a county building on a specified site and the issuing of bonds therefor do not constitute more than one subject or thing, and may be submitted jointly. Site, construction, cost, and credit are parts of one proposition. *Hubbard v. Woodsum*, 87 Me. 88. To the same effect. *Linn v. Omaha*, 76 Neb. 552; 107 N. W. Rep. 983. The question of authorizing an issue of bonds for "a water works and electric light plant" held to contain only one proposition, because relating to one plant only; but opinion expressed that the better course would be to submit the question of providing "a combined water works and electric light plant." *State v. Wilder*, 200 Mo. 97. See also to the same effect *Kemp v. Hazelhurst*, 80 Miss. 443. The construction of a city hall and the improvement of the water works and light plant are distinct propositions and must be separately submitted. *State v. Allen*, 186 Mo. 673.

In *Truelsen v. Duluth*, 61 Minn. 48, the statute authorized the city to issue bonds for the purpose of erecting and maintaining suitable water and light plants, or for purchasing any water or light plant in operation in the city. The court held that the proposition to erect or purchase both plants might and could go hand in hand, be acted on together in the council and at the polls, and be treated throughout as if the erection or purchase of one actually involved and made necessary the erection or purchase of the other. This

nate" the amount of the issue, this must be definitely stated, and a proposition for an issue to an amount not exceeding a certain sum is not sufficient. The same rule applies to the petition for an issue and to the notice of an election. Where, however, the statute is silent on the subject, or merely authorizes a proposition for an issue "to the amount" or "to the extent of" or "not exceeding" a certain sum, the rule is otherwise.¹

case was followed in *Janeway v. Duluth*, 65 Minn. 292. And in *Baumann v. Duluth*, 67 Minn. 283, a ballot under the same statute, containing three propositions, (1) for the purpose of erecting or purchasing a water and light plant; (2) for the purpose of purchasing a water and light plant; (3) for the purpose of erecting a water and light plant, was sustained, the court merely holding that the second and third propositions were competing propositions, and that an elector could vote against both, but not in favor of both. The question whether or not the first proposition was independent and operative to authorize the issue of bonds for the purpose of either erecting or purchasing a water and light plant as the common council might elect, was not involved in the appeal, and the court expressed no opinion upon it. Submission of question of issuing bonds for construction of "two public wagon roads in said county" held to be sufficiently specific under statute requiring order of supervisors to "specify the particular purposes" for which the indebtedness is to be created and to submit proposal to a vote. *People v. Counts*, 89 Cal. 15; 26 Pac. Rep. 612. An act provided that it should be unlawful to submit more than one proposition for decision at any one election, and that any tax, &c., voted at an election where more than one question was voted upon should be void. At that time counties and cities were permitted by statute to become indebted by vote for many things, including aid to railroads to an almost unlimited extent. The Constitution subsequently prohibited counties or municipalities rendering aid to any corporation or private enterprise. In consequence of this prohibition the legislature by general laws provided for what purpose, and how bonded indebtedness might be incurred by cities which excluded every other method formerly allowed. It was held, therefore, that the act

prohibiting more than one subject to be submitted at an election was impliedly repealed by the Constitution and subsequent legislation, and that bonds issued by a city pursuant to three separate ordinances voted upon at one election for street improvements, the erection of a city hospital and a market house, were valid. *Woolfolk v. Paducah* (Ky.), 80 S. W. Rep. 186. Under a statute requiring the submission to vote of the question of issuing bonds not exceeding a specified sum and were not defective for failure to state the number of bonds, the term, or the rate of interest. *Arbuckle v. McKinney* (Ky.), 97 S. W. Rep. 408.

¹ *Canandaigua v. Hayes*, 90 N. Y. App. Div. 336. In *State v. Saline County Court*, 45 Mo. 242, authority was given by the statute for an issue of bonds "not exceeding \$70,000," the vote of the necessary majority of taxpayers to specify the amount. The order of the county court submitting the question called upon the taxpayers to decide, not whether there should be a subscription of \$70,000 or any other specific sum, but for or against an issue to "an amount not exceeding \$70,000," leaving the precise amount undetermined. It was held that bonds issued in pursuance of the vote were invalid. A statute authorizing the grand jury of a county to designate the amount of a proposed subscription to stock was held not to be complied with by a presentment of the grand jury recommending the county commissioners to subscribe to stock "to an amount not exceeding \$150,000." *Mercer County v. Pittsburgh E. R. Co.*, 27 Pa. 389, distinguished in *Mercer County v. Hackett*, 1 Wall. (U. S.) 83. To the same effect is *Schultze v. Manchester*, 61 N. J. L. 513. Under an act requiring the

Requisite majority, what? A requirement that the issue of bonds shall be approved by a majority of the voters "voting at an election" is usually held to be complied with if the specified majority of the votes cast at the election be cast in its favor. It is not required that the proposal receive the assent of the specified majority of the entire number of the voters within the municipality.¹ It has also usually been held that "a majority of the voters voting" at the election means a majority of voters voting on the proposition in question, and not a majority of those voting on that and other propositions.² In other cases where the requirement

amount to be appropriated to be specified in the petition asking for an issuance of bonds and in the notice of the election, a petition asking for the issuance of a specified *per centum* of taxable property and a notice of election in the same terms were held defective and invalid. *Cincinnati W. & M. R. Co. v. Wells*, 39 Ind. 539; *Detroit E. R. & I. R. Co. v. Bearss*, 39 Ind. 598. And a petition under an act requiring the petition to specify the amount of bonds to be issued which requested an issue of bonds not exceeding \$5000, was held insufficient in *Schultze v. Manchester Township*, 61 N. J. L. 513. Notice of election as to the issue of \$25,000 of bonds, "not more than" \$20,000 to be issued for erecting a school-house and "not more than" \$5000 for water and lighting purposes, "and the surplus, if any, to be used by the mayor and council in such manner as they may see fit" does not comply with a statutory requirement that the notice shall "specify what amount of bonds is to be issued and for what purposes." *Smith v. Dublin*, 113 Ga. 833.

Where the statute authorized an issue "to the amount" specified, it was held that the words "to the amount" meant *any amount not exceeding* the sum limited, and that an issue might be made for a less amount than the vote authorized. *Bauer v. School Dist.*, 78 Mo. App. 442. Where the statute does not require the amount of the issue to be fixed, it has been held that the proposition is sufficiently definite if it fixes the maximum amount to be issued. *Chicago, B. & Q. R. Co. v. Wilber*, 63 Neb. 624. In *Knight v. West Union*, 45 W. Va. 194, an ordinance authorizing the issue to *an extent not exceeding* \$6000 was held to be equivalent to one fixing it at that

sum. The court considered that it carried authority to issue bonds to that amount if necessary. In *Wells v. Sioux Falls*, 16 S. Dak. 547, where no statutory provision is mentioned, a proposition authorizing the issue of bonds "to the extent of \$210,000" was held to confer authority to issue bonds to the extent of \$50,000, especially as it appeared that the municipality intended to issue the remainder of the amount authorized as might be required.

A statutory provision as to *amount* of the issue is mandatory, but it seems to be otherwise as to the *denomination* of the bonds. Under a statute requiring the ordinance to state the "number and character" of the bonds, an ordinance submitting to an election the question of issuing fifty bonds of the denomination of \$500 each, and a vote in favor thereof, a subsequent change of the number of bonds to forty bonds of \$500 each, and twenty bonds of \$250 each, does not affect the essence of the thing to be done, and bonds so issued are valid and binding obligations. *Derby & Co. v. Modesto*, 104 Cal. 515, 523.

¹ *Law v. San Francisco*, 144 Cal. 384; *Ashland v. Culbertson*, 103 Ky. 161; 44 S. W. Rep. 441; *State v. Ruhe*, 24 Nev. 251; *McLean v. Valley County*, 74 Fed. Rep. 389; *Murphy v. Long Branch (N. J.)*, 61 Atl. Rep. 593; *Rome v. Whitestown Water Works Co.*, 113 N. Y. App. Div. 547, aff'd 187 N. Y. 542. See further as to what constitutes a majority of the voters, *ante*, § 383, where the authorities are collated and fully examined.

² *Murphy v. Long Branch (N. J.)*, 61 Atl. Rep. 593; *Fox v. Seattle*, 43 Wash. 74. See also *Armour Br. Banking Co. v. Finney County*, 41 Fed.

s that the issue be approved by a prescribed majority of the *qualified voters* of the municipality, or other language of similar import, the decisions usually hold that a vote of the majority of all the qualified voters of the municipality is not required, but only the requisite majority of the qualified voters voting at the election.¹ When the statute specifies the nature of the election at which the question shall be submitted, *e. g.*, a general election or a special election, for the purpose, it can only be submitted at an election of the kind specified in the statute and held in conformity with the statutory requirements.² When the nature of the election is not specified by

Rep. 321. *Contra*, holding that the requisite majority of all the votes cast at the election is required. *Law v. San Francisco*, 144 Cal. 384; *Bryan v. Lincoln*, 50 Neb. 620; *State v. Benton*, 29 Neb. 460.

In *Potter v. Lainhart*, 44 Fla. 647, the words "majority of the registered voters" occurring in an act dealing with the powers and duties of county commissioners to issue bonds, taken in connection with another section authorizing the county commissioners to issue bonds with the sanction of a "majority of the votes cast upon the subject," were held to mean a majority of the votes cast upon the subject. The court said: "The general common-law rule is that where the electoral body is indefinite the majority is estimated upon the basis of the total number of votes cast, and not upon the basis of the number of votes which might lawfully have been cast if the persons entitled to vote had chosen to cast their votes, and under this rule the majority of votes cast should determine the question." See also *Pickett v. Russell*, 42 Fla. 116, 634. Where an act providing for the submission of an issue of bonds required the approval of "a majority of the voters voting at such election" and the general election law provided that where the approval of a majority of the legal voters of the State was required, the meaning of the words "legal voters" was "persons entitled to vote and who do vote at the time and in the manner prescribed in and by such statute upon the question or propositions submitted," the court held that while, if the charter provision for submission stood alone, it might not be free from doubt whether persons who did not vote upon the proposition submitted at the election, though voting upon other questions, could be

counted upon the question whether the recommendation to issue bonds had been approved or not, still in view of the fact that the language used in that section must have been deemed to have been used with the election law in the legislative mind, the words, "a majority of the voters voting at the election," as used in the section of the charter, meant a majority of such voters as voted upon such proposition. *Murphy v. Long Branch (N. J.)*, 61 Atl. Rep. 593.

¹ *St. Joseph Township v. Rogers*, 16 Wall. (U. S.) 644; *Cass County v. Johnston*, 95 U. S. 360; *Carroll County v. Smith*, 111 U. S. 556; *Cronly v. Tucson*, 6 Ariz. 235. *Contra*, *Hawkins v. Carroll County*, 50 Miss. 735.

It is no ground of objection that several unqualified voters were allowed to vote if without their votes the requisite number of the registered voters remain. *Epping v. Columbus*, 117 Ga. 263. Registration list *prima facie* evidence of who constitute qualified electors. *Claybrook v. Rockingham County*, 117 N. Car. 456. A provision in a village charter *prescribing other qualifications for voters* at an election upon a proposition to raise money for village purposes than those prescribed by the Constitution for the right to exercise the franchise of voting at general elections, is constitutional. *Spitzer v. Fulton*, 33 N. Y. Misc. 257. In *Mississippi*, registration of the voter was held to be, by statute, an essential prerequisite of the right to vote, or qualification of the elector. *Greene v. Rienzi*, 87 Miss. 463. See also *Bew v. State*, 71 Miss. 1.

² *Manhattan Co. v. Ironwood*, 74 Fed. Rep. 535; *Canandaigua v. Hayes*, 90 N. Y. App. Div. 336. Where an act conferred the power to initiate proceedings for the issue of bonds on

the statute, the general election laws may be resorted to to supply the omission.¹ When there has been a substantial compliance with the requirements of the law, regulating the manner in which elections to pass upon an issue of bonds shall be held, and it appears that there has been a fair election thereunder, the election will not be affected by technical irregularities, and this rule has been held to apply to the time and manner of the publication of the notice.²

§ 892. **Form; Medium of Payment.** — Express power to issue negotiable bonds, in the absence of legislative restriction, leaves something to the discretion of the borrowing municipality. The bonds are to be offered and disposed of in a market in which there is current *more than one circulating medium*, of which one is regarded as more stable and less subject to fluctuation than any other. In which medium the bonds shall be payable, if there is no legislative restraint, is purely a matter of contract, which is entrusted to the discretion of the borrower, who can adopt advantageous terms. Hence, under such an authority, the municipality may issue bonds payable in *gold coin of the United States* of the then present standard of weight and fineness; or if it chooses payable in the lawful money of the United States.³

officials to be chosen at an election to be held on a certain date and directed these officials to submit the question to a vote, bonds, which recited that they were issued pursuant to a vote of the qualified electors held on the date prescribed for the election of the officials, show on their face that they were not legally authorized and are invalid. *Manhattan Co. v. Ironwood*, 74 Fed. Rep. 535.

¹ *Union Bank v. Oxford*, 116 N. Car. 339.

² *Knox County v. Aspinwall*, 21 How. (U. S.) 539; *Brown v. Ingalls Tp.*, 86 Fed. Rep. 261; *Blakey v. Montgomery*, 144 Ala. 481; 39 So. Rep. 745; *Epping v. Columbus*, 117 Ga. 263; *Janeway v. Duluth*, 65 Minn. 292; *State v. Allen*, 178 Mo. 558; *Bauer v. School Dist. No. 127*, 78 Mo. App. 442; *Fletcher v. Collingswood (N. J.)*, 59 Atl. Rep. 90; *Knight v. West Union*, 45 W. Va. 194. *As to sufficiency of notice*, see *Brown v. Ingalls Tp.*, 81 Fed. Rep. 485; *Woodall v. Adel*, 122 Ga. 301; *Kline v. Streator*, 78 Ill. App. 42; *Fletcher v. Collingswood (N. J.)*, 59 Atl. Rep. 90; *State v. Allen*, 178 Mo. 558. Where law is silent as to notice, the common council held

authorized to prescribe the method. *Highland Park v. McAlpine*, 117 Mich. 666. *As to sufficiency of publication of notice*, see *Cleveland v. Spartanburg*, 53 S. Car. 83; *Highland Park v. McAlpine*, 117 Mich. 666. *As to bond elections, notice, majority required, &c.*, see *ante*, § 383. Index, *Elections; Majority; Voter and Voting*.

³ *Woodruff v. Mississippi*, 162 U. S. 291, rev'g 66 Miss. 298; *Pollard v. Pleasant Hill*, 3 Dillon, 195; *Young v. Montgomery & E. R. Co.*, 2 Woods, 606; *Moore v. Walla Walla*, 60 Fed. Rep. 961; *Judson v. Bessemer*, 87 Ala. 240; *Skinner v. Santa Rosa*, 107 Cal. 464; *Murphy v. San Luis Obispo*, 119 Cal. 624; *Hillsborough County v. Henderson*, 45 Fla. 356; 33 So. Rep. 997; *Heilbron v. Cuthbert*, 96 Ga. 312; *Farson, Leach & Co. v. Com'rs of Sinking Fund*, 97 Ky. 119; *Winston v. Fort Worth (Tex. Civ. App.)*, 47 S. W. Rep. 740; *Packwood v. Kittitas County*, 15 Wash. 88; *Kenyon v. Spokane*, 17 Wash. 57. *Contra*, *Cincinnati v. Anderson*, 6 Ohio C. D. 594; *Burnett v. Maloney*, 97 Tenn. 697.

In *Woodruff v. Mississippi*, 162 U. S. 291, rev'g 66 Miss. 298, the State levee board, under statutory author-

§ 893. **Improvement Bonds payable from Assessment only.**— Contracts by municipalities for the construction of improvements which by their terms are to be paid only from the proceeds of a special assessment have long been known and recognized. The rights and liabilities of the municipality thereunder are discussed elsewhere.¹ The magnitude of the burden frequently imposed upon property benefited by the improvement led to the adoption of the practice of making the assessment payable in instalments over a term of years, the object being to lighten the immediate obligation upon the property owner. This practice resulted in postponing the payment of the contractor, and for his benefit, *certificates or warrants* of the municipality were at first issued for the amount payable to him, which specified upon their face that they were to be payable only from the fund created by the assessment. These certificates or warrants the contractor would dispose of to persons who had given him credit or to purchasers, and to facilitate their disposition, the practice arose of issuing instruments in the form of *bonds*, which purported to be the promise of the municipality to pay to the contractor or his order or to bearer a specified sum from the fund arising from the assessment for the improvement and not otherwise. Similar

ly, issued negotiable bonds which acknowledged that the board was indebted to bearer, in the sum of \$1000 in gold coin of the United States of America, which said sum "the board bound itself to pay. The coupons were made payable "in currency." The Supreme Court of Mississippi construed the bonds as obligations payable in gold coin, and held that the statutory power to borrow, which contained no provision or restriction as to the medium of payment, did not authorize the board to borrow gold coin. The issue of bonds acknowledging the receipt thereof and agreeing to pay in the same medium, and that the bonds were void for want of power in that particular. The Supreme Court of the United States held, in an opinion by Fuller, C. J., that the bonds were legally solvable in the money of the United States, whatever its description, and not in any particular kind of medium, and that it was impossible to hold that they were void because of want of power to issue them. *Id.*, J., concurred in an opinion, in which he said: "In my judgment no transaction of commerce or business, obligation for the payment of money it is not immoral in its character and

which is not, in its manifest purpose, detrimental to the peace, good order, and general interest of society, can be declared or held to be invalid because enforced or made payable in gold coin or currency, when that is established or recognized by the government. And any acts by State authority impairing or lessening the validity or negotiability of obligations thus made payable in gold coin are violative of the laws and Constitution of the United States." Interest-bearing warrants issued for money borrowed for the construction of water works and payable from the revenues of the system may also be made payable in gold coin, although the revenues are not payable in that medium. *Kenyon v. Spokane*, 17 Wash. 57. A statutory provision that bonds "shall be payable in gold coin or lawful money of the United States," confers power on the municipality to make them payable in gold coin only. It does not require that the bonds should express the alternative method of payment. *Murphy v. San Luis Obispo*, 119 Cal. 624.

¹ Chapter on Contracts, *ante*, § 827. As to warrants payable only from a particular fund, see *ante*, § 860.

instruments have also been issued in some cases where the municipality has desired to acquire a public utility, *e. g.*, water works, but has been unable to raise the money by borrowing directly on its own account and credit without violating the constitutional debt-limit provision. In view of its great practical importance we shall endeavor to present the subject in the light of existing adjudications, with requisite fulness and care. There can be no serious question as to the power of the legislature to authorize the issue of bonds of this nature. Such *constitutional objections* to the validity of the bonds as have been advanced have been overruled.¹ Indeed, it would seem that from the nature of the transaction, which is in effect an extension of time for the payment of a valid special assessment, the property holder, who is subject to the tax, cannot have any constitutional right which is violated by a statute deferring payment and permitting the issue of bonds payable from the assessment, for, as has been well said, the property owner has no fundamental or constitutional right to have the payment of benefits conferred upon his property by the improvement deferred until a future period, and it is entirely for the determination of the legislature whether such privilege should be secured to him.² Although such obligations do not constitute debt of the municipality in the constitutional sense of the word,³ or an obligation which is payable from its general funds, yet bonds which are issued in the name of the municipality, to be paid only from a special fund created by the enabling act and so limited on the face of the obligation, are the bonds of the municipality. The municipality is the obligor in the bond, must fulfil the obligations imposed upon it, and is subject

¹ A statute permitting property owners whose assessment is \$25 or more to make payment in instalments is not unconstitutional and void for want of uniformity on the ground that it denies to the property owner whose assessment is less than \$25 the same privilege. The legislature may divide the property owners into classes according to the amount of their respective assessments and provide a method of payment equal and uniform among the several classes. *Ladd v. Gambell*, 35 Oreg. 393. See also *Hellman v. Shoulters*, 114 Cal. 136. The legislature has the right to fix the rate of interest which the deferred instalments of assessments and bonds when issued shall bear, and the fact that the statute prescribes the rate of interest therefor does not violate any constitutional right as depriving prop-

erty owners of property without due process of law by precluding the city from negotiating for a lower rate of interest. *Hulbert v. Chicago*, 213 Ill. 452. See also *Gage v. Chicago*, 216 Ill. 107.

² *Gage v. Chicago*, 216 Ill. 107.

³ That such obligations do not constitute "debt" within the constitutional limitation of indebtedness of cities and municipalities is shown, *ante*, § 198. Bonds payable only from the revenues of the water works system of a city are not "municipal bonds" within the meaning of a constitutional provision authorizing the investment of the permanent school fund in municipal bonds. The Constitution contemplates bonds secured by a pledge of the credit of the city. *State v. Clausen*, 40 Wash. 95.

to appropriate actions in respect thereof, notwithstanding the fact that it is not under any general liability, or, so to speak, liability *in personam*, for the debt.¹ If, however, the bonds do not purport to

¹ *Hellman v. Shoulters*, 114 Cal. 136; *Meyer v. San Francisco*, 150 Cal. 131. In *Jordan v. Cass County*, 3 Dillon C. C. 185, Fed. Cas. No. 7517, bonds had been issued by the county court in the name of the county but on behalf of a township. The question was whether the bondholder could for any purpose maintain an action on the bonds against the county in whose name they were made, although it was not contended that the bonds were the proper debt or obligation of the county or that payment could be enforced against the property of the county or against the taxpayers in the county at large. The statute directed that the bonds should be issued in the name of the county. The court held that the action lay against the county, saying, per *Dillon*, Circuit Judge: "It seems to us that the provision that the bonds shall be issued in the name of the county implies a liability on the part of the county to be sued, so far as is necessary to give effect to the rights of the holders of the bonds consistently with the provisions of the constitution." Nature of judgment in Federal court and mode of enforcement in such cases, see chapter on *Mandamus*. In *Cass County v. Johnston*, 95 U. S. 360, 369, bonds were issued under the same act as in the case last cited, and it was held that the obligor therein was the county and not the township; and that the action was properly brought against the former whatever might be the nature of the remedy granted in the action. Approving *Jordan v. Cass County*, *supra*. In *Davenport v. Dodge County*, 105 U. S. 237, the statute authorized any precinct in an organized county to aid works of internal improvement, and the county commissioners were directed to issue special bonds for such precinct, the tax to pay the same to be levied on the property within the precinct. It was held that to enforce payment in the Federal courts the holder of the bonds must sue the county in whose name the bonds were issued, and judgment, if rendered in his favor, would be in form against it, establishing the validity and amount of the debt, but to be collected by a

tax upon the taxable property of the precinct.

In *Mather v. San Francisco*, 115 Fed. Rep. 37, a statute provided that, in case a street should be widened, all damages, &c., should be paid by "bonds of the city and county of San Francisco," and that for the payment of the interest and principal of the bonds a tax should be levied upon the lands benefited by the improvement. It was further provided that the city and county should not be liable for the debt in any event. The Circuit Court of Appeals (*Gilbert, Ross, and Hawley, JJ.*) held that, as the bonds were the bonds of the city and county, to be paid from a special fund to be provided by the city and county, the city and county could be sued upon the obligations therein in the Federal court, and a judgment recovered payable from the special fund and to be enforced by appropriate proceedings to compel it to provide the fund. *Gilbert, C. J.*, after referring to the cases above cited and others, said: "The ground upon which the right to bring a suit against a county in the decisions we have referred to was maintained, was not that the county was under obligation to pay the bonds or was in any way liable for the debt which they represented, but upon the ground that the bonds were in form the bonds of the county and a duty had been imposed upon the county with reference to the payment thereof. Although the debt was in each case primarily the debt of the township, the county stood in such relation to the township and to the bonds as to require the exercise of its official authority in the matter of levying, assessing, and collecting taxes wherewith to pay the bonds. We think the present case comes clearly within the principle of those decisions. The provision in the act of the legislature that the city and county of San Francisco shall not be liable for the debt created by the bonds does not absolve it from liability to provide the means for the payment of the bonds in the manner prescribed by the act." This decision appears to overrule the case of *Shapter v. San Francisco*, 110 Fed. Rep. 615,

be the promise of the municipality, but are issued by certain persons or officers or commissioners designated by statute to make the improvement, and are expressly stated to be issued pursuant to the statute for the purpose of the improvement, payable only from the assessment therefor, without liability on the part of the municipality, such bonds, not being in form the obligation of the municipality, were regarded as simply the *statutory promise or obligation of the commissioners or agents* selected by the State to make the particular improvement, and no action in such case was held to lie against the *municipality* in respect of the bonds, even if it be only to enforce the creation of the fund.¹ If the bonds express upon their face that they are issued pursuant to statute and are payable by virtue thereof only from the proceeds of the special fund created by an assessment or otherwise, there is no liability upon the city to pay the bonds out of its general funds or by virtue of its general power of taxation.² But if the enabling act does not in express terms limit the power of the municipality to an issue of bonds which are payable only from the special assessment or other designated fund, or if the municipality, besides having power to issue bonds under a statute so limiting its liability, has also power to issue its general obligations, a bond which by its terms is the direct and absolute promise of the municipality to pay a definite sum of money with interest, and is not declared to be payable only from the fund, is the general obligation of the city payable from its general funds or general power of taxation, although the bond also recites that it is issued to provide for the payment of the cost of an improvement, which cost is chargeable against the property benefited and is made a lien thereon. In effect, this is only a recital of the power possessed by the city for levying and enforcing a special assessment as a means towards providing funds for the payment of the debt created by the issue and sale of the bonds; and if there is no declaration in the bonds to the effect that they are payable only out of the particular fund, the general liability of the city is not limited thereby.³ Under special improvement

which was an action brought upon the same bonds and in which the opposite conclusion was reached. See also *Eddy v. San Francisco*, 148 Fed. Rep. 272. Fed. Rep. 437; *White River Sav. Bank v. Superior*, 148 Fed. Rep. 1; *Easterbrook v. San Francisco (Cal.)*, 44 Pac. Rep. 800.

¹ *Liebman v. San Francisco*, 24 Fed. Rep. 705. See also *Neath v. Phillips County*, 108 U. S. 553. These cases are examined and distinguished in *Mather v. San Francisco*, 115 Fed. Rep. 37, 42, *supra*.

² *Shapter v. San Francisco*, 110 Fed. Rep. 615; *Vickrey v. Sioux City*, 115 Fed. Rep. 437; *United States v. Ft. Scott*, 99 U. S. 152; *Burlington Sav. Bank v. Clinton*, 111 Fed. Rep. 439; *Fort Madison v. Fort Madison Water Co.*, 114 Fed. Rep. 292, aff'g 110 Fed. Rep. 901; *Vickrey v. Sioux City*, 115 Fed. Rep. 437; *King v. Superior*, 117 Fed. Rep. 113; *Superior v. Marble Sav. Bank*, 148 Fed. Rep. 7; *Olmsted v.*

bonds the municipality was held to be a statutory trustee for collection, bound to the exercise of due diligence to collect according to law, enforcing the same through municipal machinery as an agent of the owners of the bond and answerable for failure to perform this duty, or not paying over, or failing to pay the money collected.¹ It is not a guarantor of collection, and unless there

Superior, 155 Fed. Rep. 172, 178; *Allen v. Davenport*, 107 Iowa, 90; *Wyandotte v. Zeitz*, 21 Kan. 649; *Morrison v. Bernards*, 36 N. J. Law, 219; *State v. Fayette County*, 37 Ohio St. 527; *Commonwealth v. Pittsburgh*, 88 Pa. 66; *Austin v. Seattle*, 2 Wash. 667; *Fowler v. Superior*, 85 Wis. 411. The cases are conflicting and cannot all be reconciled. In each case the question is one of legislative and municipal power and intention to be deduced from all the applicable legislative provisions and the terms of the bonds, and the text of this section is intended only to express the general conclusions of the courts in the particular cases before them.

In *Indiana*, gravel road bonds issued by boards of county commissioners for the purpose of raising money for the construction of a free gravel road, although by statute declared to be "the bonds of the county," and although the statute does not contain any provision that the county shall not be liable therefor, have been construed to be payable only from the special fund created under the enabling act to be raised by the collection of the assessments, which fund is by statute to be applied "to no other purpose than the payment of said bonds and interest." *Strieb v. Cox*, 111 Ind. 299; *Montgomery County v. Fullen*, 111 Ind. 410, 412; s. c., 118 Ind. 158; *Ripley County v. Hill*, 115 Ind. 316, 330; *Spidell v. Johnson*, 128 Ind. 235, 238; *Kirsch v. Braun*, 153 Ind. 247, 256; *Little v. Hamilton County*, 7 Ind. App. 118. In *Walker v. Monroe County*, 11 Ind. App. 285, the action was brought against the county upon a gravel road bond, and the plaintiff's contention was that it created a general liability against the county because it was not upon its face contingent or secondary. The court said: "While it may be regarded as a somewhat anomalous and illogical holding to declare that although the statute authorizes the issuance of a county bond, yet no general responsibility of the county

arises therefrom, the repeated decisions of our State courts forbid any other conclusion." In *Braun v. Benton County*, 70 Fed. Rep. 369, aff'g 66 Fed. Rep. 476, the Federal court held, following the decisions of the Indiana Supreme Court, that gravel road bonds are not obligations payable by the county from its funds or otherwise than from the assessment. It deemed itself bound by the decisions of the State courts on this point, so far at least as concerned bonds issued after the construction was adopted.

Street Improvement bonds issued under the *Indiana* law of 1889, known as the "Barrett Law," are also held to create no indebtedness on the part of the city, following in that respect the decisions of the court in regard to Gravel Road Bonds. *Quill v. Indianapolis*, 124 Ind. 292; *Porter v. Tipton*, 141 Ind. 347.

Where a city charter provided that a street improvement should be charged to abutting property in proportion to benefits and the amount collected by special assessment; that the city might issue improvement bonds to cover unpaid assessments; that the bonds should "contain such recitals as may be necessary to show that they are chargeable to a particular property, specifying the same"; and limited the general power of the city to issue its bonds to certain specified purposes only which did not include street improvements, it was held that a bond which was, in form, the general bond of the city, was unauthorized, and that the holder could not recover a judgment against the city payable from its general funds. *Uncas National Bank v. Superior*, 115 Wis. 340, limiting and distinguishing *Fowler v. Superior*, 85 Wis. 411. See further *Olmsted v. Superior*, 155 Fed. Rep. 172; *White River Sav. Bank v. Superior*, 148 Fed. Rep. 1.

¹ *New Orleans v. Warner*, 175 U. S. 120; *Jewell v. Superior*, 135 Fed. Rep. 19, 22; *Olmsted v. Superior*, 155 Fed. Rep. 172, 178. Right to enforce the

be a failure in duty there is no liability for non-collection.¹ None of the bondholders has any right of priority in the fund derived from the assessments. This is a trust fund pledged to the payment of all of the bonds, and the right of the holder of a part of the bonds is only to such portion of the fund realized as the sum of his bonds bears to the entire amount of the issue of bonds.²

Respecting the question of *the negotiability of these instruments* it has been held that because the bonds are not payable unconditionally and at all events, but only out of a special fund created for and pledged to the payment, which may or may not prove adequate

duty of the city to levy and collect an assessment to pay bonds charged thereon held to be lost by laches. *Eddy v. San Francisco*, 148 Fed. Rep. 272.

¹ *Jewell v. Superior*, 135 Fed. Rep. 19, 22; *Roter v. Superior*, 115 Wis. 243. A municipality does not become liable to the holder of the bond simply because of the return of a tax as delinquent. The liability arises on the receipt of the moneys by the municipality or officers. *Jewell v. Superior*, 135 Fed. Rep. 19, 23. In *Wisconsin* it has been held that if special taxes become delinquent and the county treasurer, after receiving the delinquent tax-roll collects the amount of the lien, he becomes trustee of the money for the owner or holder of the lien, and *mandamus* will lie in the favor of the holder to compel payment. *State v. Hobe*, 106 Wis. 411. But this is so only when the statute, either expressly or by implication, makes the county treasurer a trustee by directing him to pay over to the bondholders. *Olmsted v. Superior*, 155 Fed. Rep. 172, 177.

² *Jewell v. Superior*, 135 Fed. Rep. 19. The respective instalments of bonds payable in annual instalments held to be payable from the corresponding annual instalment of the assessment, and that moneys arising from an assessment to pay an instalment coming due could not be applied to the payment of instalments of bonds which had matured prior thereto, and which remain partly unpaid by reason of failure to fully collect the assessments levied to meet them. *Baker v. Meacham*, 18 Wash. 319.

In *Wilmette v. People*, 214 Ill. 107, it is held that it is the duty of a special assessment bondholder to ascertain when sufficient money has been col-

lected to pay principal and interest and to demand payment; that the municipality is not obliged to notify the holder of that fact; and that interest upon a voucher issued against a deferred instalment of a special assessment ceases when money legally applicable to the payment of the voucher has reached the municipal treasury. When the bonds are issued for a term of years, *e. g.*, twenty years, and have interest coupons attached, they do not bear interest after maturity, if the scheme or plan provided by law to create the fund does not include such interest. *Meyer v. San Francisco*, 150 Cal. 131. Nor do the interest coupons on such bond bear interest after maturity. *Bates v. Gerber*, 82 Cal. 550; *Davis v. Sacramento*, 82 Cal. 562. It is otherwise as to interest on the principal, at least if the statute contemplates that it may not be paid at maturity, and makes provision for the continued collection of moneys for the account of the fund. *Kendall v. Porter*, 120 Cal. 106.

In *California*, a demand upon a city treasurer when he had funds applicable for the purpose of paying improvement bonds gives the parties demanding upon refusal of their demand, the right to a mandate against him. *Meyer v. Porter*, 65 Cal. 67; *Meyer v. Widber*, 126 Cal. 252. The fact that there are other creditors interested in the fund who have demanded payment, is no answer to the petition of a creditor who makes application for a mandate to compel payment. *Meyer v. Porter*, 65 Cal. 67. If prior demandants have not brought any action to enforce their claim to the fund, the right of later demandants to *mandamus* to compel payment is not affected by the prior demand. *Meyer v. Widber*, 126 Cal. 252.

to meet the obligations in full, they do not have that certainty of payment which is essential to negotiability, and that they are not negotiable instruments within the law merchant.¹ Being deprived, according to these decisions, of the characteristics of negotiability by the uncertainty of payment, improvement bonds of this nature have been held to be mere choses in action, and, in the hands of a purchaser for value without notice, subject to all the defences to which they are subject in the hands of the contractor or person to whom they were originally issued.²

¹ *Washington County v. Williams*, 111 Fed. Rep. 801, 806; *National Bank of La Crosse v. Petterson*, 200 Ill. 215; *Northern Trust Co. v. Wilmette*, 220 Ill. 417, 426; *Kirsch v. Braun*, 153 Ind. 247, 257. See also *Morrison v. Austin State Bank*, 213 Ill. 472; *Cleveland, C. C. & St. L. R. Co. v. Jones Co.*, 20 Ind. App. 87. In *Nebraska*, bonds of a municipality the principal and interest of which by their terms are to be raised and paid by an annual levy of a tax which is to be applied first to the payment of interest and next to payment of the principal sum until the whole of the principal and interest shall have been paid and extinguished, the fund being applied *pro rata* on the total amount of the bonds, are not negotiable instruments within the law merchant because there is no certainty as to the time of their payment. *Washington County v. Williams*, 111 Fed. Rep. 801, 806. *Thayer, C. J.*, giving the opinion of the Circuit Court of Appeals, said: "If by the terms of the contract the sum promised to be paid, or a portion thereof, may never become payable, as where the sum promised is not to be paid unconditionally and at all events, but only out of a special fund derived from certain sources, which may not prove adequate to meet the demand in full, the instrument, according to the great weight of authority, cannot be deemed negotiable, and entitled in the hands of a third party to the immunities which belong to that class of instruments." Citing *Husband v. Epling*, 81 Ill. 172, 174; *Blackman v. Lehman*, 63 Ala. 547, 550; *Cota v. Buch*, 7 Metc. (Mass.) 588; *Harriman v. Sanborn*, 43 N. H. 128, 130; *Citizens' Nat. Bank v. Piolet*, 126 Pa. 194, 198; *Chicago Ry. Equipment Co. v. Merchants' Bank*, 136 U. S. 268, 279; *Daniel Neg. Inst.*, §§ 41-43.

² *National Bank of La Crosse v. Petterson*, 200 Ill. 215; *Northern Trust Co. v. Wilmette*, 220 Ill. 417, 426; *Kirsch v. Braun*, 153 Ind. 247, 257. See also *Cleveland, C. C. & St. L. R. Co. v. Jones Co.*, 20 Ind. App. 87. Where such "bonds" have been expressly authorized with a view to their sale to the public, the question of their negotiability has never been finally determined by the Supreme Court of the United States. In *Indiana v. Glover*, 155 U. S. 513, 517, the Supreme Court of the United States held that certificates made and payable in *Indiana* out of a particular fund and purporting to be the obligations of a quasi corporation existing under public laws and endowed only with restricted powers granted for special and purely local purposes of a non-commercial character, *e. g.*, school districts, are not governed by the law merchant, and in the hands of subsequent holders are open to the same defences as existed against the original payee. Citing *Stanton v. Shipley*, 27 Fed. Rep. 498; *State v. Hawes*, 112 Ind. 323; *Merrill v. Monticello*, 138 U. S. 673. This decision would seem to indicate a tendency on the part of the court to hold that these instruments are not negotiable, but an examination of the opinion and of the cases cited and examined therein shows that the principal reason of the court for denying to these instruments the characteristics and qualities of negotiable paper is to be found in the fact that the school district by which they were issued had no power or authority to issue negotiable paper, thus bringing the case within the general rule that in the absence of statutory authority a municipal corporation cannot make and deliver a negotiable instrument. It remains to be seen whether the Supreme Court, whose de-

The usual remedy to enforce the duty of the municipality to provide the special fund for the payment of the bonds is doubtless to be found in *mandamus*.¹ But in the Federal courts, *mandamus* will not issue as an original independent proceeding, but only in the exercise of a jurisdiction already acquired;² and notwithstanding the existence of a direct remedy in the State courts by *mandamus* to enforce the duty of the municipality or its officers, and notwith-

cisions of necessity are practically controlling upon the validity and effect of municipal securities, will deny to such bonds, when expressly authorized to raise money, the characteristics of negotiability for the reasons stated. Other considerations than the question of the certainty or uncertainty of payment seem to indicate that these instruments when issued for sale as a means of raising money are intended to be negotiable. They are described in the statutes as "bonds," and being so described they may finally be held to come within the principle that express power to issue "bonds" contemplates, and by fair implication authorizes the issue of negotiable instruments; that as a non-negotiable bond is no more serviceable to the holder than the ordinary warrant, the usual voucher issued by the municipality, a power to issue "bonds" necessarily or reasonably implies that it should have the attributes of negotiability. See *ante*, § 882. Inasmuch as ordinary municipal bonds, when expressly authorized, are issued to raise money by their sale, and as this object would be embarrassed or defeated if they were held non-negotiable, the courts, notwithstanding the law merchant held them to be negotiable though *under seal*. See *ante*, § 871. It may be urged with force that the legislature in authorizing an issue of improvement "bonds" intended that such bonds should have the characteristics and attributes of commercial paper. On the other hand it may be urged with equal if not greater force that if the legislature intended such bonds to be negotiable it would be easy and natural to say so. Under the practice of postponed payments of special assessments, the improvement bonds are issued as a means of raising money for the purpose of the local improvement, and the intention and desire of the municipality, although it may act only for the benefit of the property owners, is

that these bonds should represent a debt payable at par and should be an attractive investment. This intention and desire to make improvement bonds an attractive investment is strongly manifested in legislation which has been enacted to relieve these instruments from collateral attack by property owners. Thus, in some cases, statutes are to be found that if an assessment for a public improvement exceeds a stated sum, the owner of the land against which the assessment is made shall have the benefit of paying the assessment in annual instalments as provided by the statute, if he promises and agrees in writing, in consideration of the right to pay his assessment in instalments, that he will not make any objection to the legality or regularity of the assessment, and will pay the same with interest thereon. This is the method adopted by the "*Barrett Law*" of Indiana. See *Scott v. Hayes*, 162 Ind. 548. In other cases statutes declare that no action shall be brought questioning the legality of improvement certificates or bonds after a short period, *e. g.*, three months, from the time of the issuance of such certificates or bonds. This is the provision of § 989 of the Iowa Code. This provision is not retroactive, and only applies to assessments made and bonds issued after its adoption in 1897. *Waples v. Dubuque*, 116 Iowa, 167; *Citizens' State Bank v. Jeas*, 127 Iowa, 450.

¹ The right to the remedy by *mandamus* or action on the bonds and the circumstances under which these remedies are respectively available to the creditor, is discussed in the chapter on Contracts § 827.

² *Bath County v. Amy*, 13 Wall. (U. S.) 244; *Queensbury v. Culver*, 19 Wall. 83; *Heine v. Levee Commissioners*, 19 Wall. (U. S.) 655; *Green County v. Daniel*, 102 U. S. 187; *Davenport v. Dodge County*, 105 U. S. 237; *Waite v. Santa Cruz*, 89 Fed. Rep. 619. More fully see chapter on *Mandamus*.

standing the fact that the municipality is not generally liable under the obligation, an action will lie against the municipality in the Federal courts to establish the validity and amount of the plaintiff's debt in which a judgment may be rendered establishing the right of the plaintiff to recover and his right to a *mandamus* or to enforce the special remedies provided.¹ If a municipality collects the special assessment or fund out of which the bonds are payable, it holds such fund for the benefit of the creditors entitled to enforce the obligations of the bonds, and when it has the money in its treasury, it cannot refuse to pay the obligations on the ground that the assessments are invalid or because the bonds are illegal upon grounds which enure to the benefit of the persons subject to assessment only.² Among the remedies to which holders of improvement bonds are entitled is a suit in equity against the municipality and its officers for an accounting of the money which has been received from assessments and which has gone into the general funds of the municipality, and in such action the bondholders may have a decree compelling the officers charged with the duty of collecting the assessments to perform their duty in that regard on the principle that where a court of chancery takes jurisdiction of the cause for any purpose it retains it for all purposes and administers complete relief as the justice of the case may require.³ In addition to the remedy against the municipality by *mandamus*, the holder of improvement bonds has a remedy by action against the city for the amount owing on the bonds or for damages in the event that the city has clearly neglected its duty in not taking steps to perfect the assessment, in consequence whereof the assessment cannot be enforced.⁴

¹ *Shepard v. Tulare Irrig. Dist.*, 94 Fed. Rep. 1; *Jordan v. Cass County*, 3 Dillon C. C. 185, *supra*, § 893. In *California*, the right to maintain an action against the city on such bonds to prevent the bar of the statute of limitations has been sustained. *Meyer v. San Francisco*, 150 Cal. 131.

² *Gladstone v. Throop*, 71 Fed. Rep. 341.

³ *Spidell v. Johnson*, 128 Ind. 235. *As to remedy in equity.* *Washington County v. Williams* (U. S. Cir. Ct. of Appeals), 111 Fed. Rep. 801, *Sanborn, J.*, dissenting. Index, *Equity; Local Improvements*.

⁴ *Dime Deposit, &c. Bank v. Scranton*, 208 Pa. 383; *O'Hara v. Scranton*, 205 Pa. 142; *Gable v. Al-*

toona, 200 Pa. 15. The circumstances under which an action will lie against the municipality for negligence in failing to levy and collect an assessment will be found discussed in the chapter on Contracts, *ante*, § 827. Under the method of procedure adopted in some States the holder of the improvement bond has a right to begin a direct action against the owner of a property to foreclose the lien of the assessment on the property. For the practice and procedure in *Indiana*, in such actions, see *Lewis v. Albertson*, 23 Ind. App. 147; *Pittsburg, C. C. & St. L. R. Co. v. Fish*, 158 Ind. 525; *Scott v. Hayes*, 162 Ind. 548. Index, *Action and Liability; Equity; Local Improvements; Mandamus*.

§ 894. **Coupons.** — Coupons are merely instruments containing a promise to pay interest; and while it is true that the power to borrow money granted to a municipal corporation does not necessarily carry with it by implication the power to issue negotiable bonds,¹ yet an express power to issue bonds bearing interest carries with it the power to attach to those bonds interest coupons.² If the coupons refer upon their face to the bonds to which they were originally attached, a purchaser of the coupons is put upon inquiry for the bonds and is charged with notice of all that the bonds contain.³ In determining the question of validity, coupons are governed by the validity of the bonds to which they were attached.⁴ Coupons of negotiable bonds being drawn and executed in a form and mode for the very purpose that they may be separated from the bonds, *are negotiable*, and the holder may sue thereon in his own name without being interested in or producing the bonds to which they were originally attached.⁵ A cause of action on the coupons is distinct

¹ *Ante*, §§ 278-296; *supra*, § 874.

² *Atchison Board of Education v. DeKay*, 148 U. S. 591, 601; *supra*, § 883; *Index, Coupons*. Authority to include in the obligation such stipulations as to interest as might be agreed on implies authority to attach interest coupons. *Carter County v. Sinton*, 120 U. S. 517, 525. Under the *Nebraska* statute of 1893, a city has no authority to issue and deliver an interest coupon which will mature before a tax can be lawfully levied and become due for its payment. *Brinkworth v. Grable*, 45 Neb. 647.

Form of Instrument. Maker suable thereon in assumpsit, where the bonds are made by the defendant corporation and refer to the coupon, though the latter, signed by the agents of the corporation, is in the form of an order or check on a bank named therein. *Town of Queensbury v. Culver*, 19 Wall. (U. S.) 83. *Cases as to the form of coupons*, see *Daniel on Neg. Instr.*, §§ 1492-1496.

How signed. The coupons, where the bonds are properly signed and sealed, may be signed by a printed facsimile of the maker's autograph, adopted for the purpose, although there is no statute authorizing it. *Pennington v. Baehr*, 48 Cal. 565; s. c. 2 Cent. Law Jour. 92; see *McKee v. Vernon Co.*, 3 Dillon C. C. 210; *Lynde v. Winnebago County*, 16 Wall. (U. S.) 6; *State v. Terrebonne Parish Police Jury*, 30 La. An. 287; *Neeley v.*

Yorkville, 10 S. Car. 141; *Lexington v. Union Nat. Bank*, 75 Miss. 1. May be made payable beyond limits of the State, unless specially restrained by statute. *Lynde v. Winnebago County*, 16 Wall. (U. S.) 6.

³ *McClure v. Oxford*, 94 U. S. 429.

⁴ *Citizens Bank v. Terrell*, 78 Tex. 450. If part of an issue of bonds is valid and the remainder invalid, the validity or invalidity of the bonds determines the validity of the coupons. *Citizens Bank v. Terrell*, 78 Tex. 450. If during the pendency of an action to recover the amount of past due coupons, the city executes and delivers new bonds in lieu of the original bonds from which the coupons sued upon were detached, the city thereby recognizes the validity of the bonds and of the coupons and is estopped from contesting the validity of the bonds and coupons. *Coolidge v. General Hospital Society*, 9 Kan. App. 891. In an action on coupons, the bonds to which they were attached are admissible for the purpose of proving the terms of the contract. *Coler v. Santa Fe County*, 6 N. Mex. 88, 118.

⁵ *Knox County v. Aspinwall*, 21 How. (U. S.) 539; *Murray v. Lardner*, 2 Wall. (U. S.) 110; *Thomson v. Lee County*, 3 Wall. (U. S.) 327; *Aurora v. West*, 7 Wall. (U. S.) 82, 105; *Kenosha v. Lamson*, 9 Wall. (U. S.) 477; *Thompson v. Perrine*, 106 U. S. 589; *Edwards v. Bates County*, 163 U. S. 269, 271; *Chicago, B. & Q. R. Co.*

and separable from that upon the bonds. Each matured coupon is a separate promise and gives rise to a separate cause of action. It may be detached from the bond and sold by itself. Indeed, the title to several matured coupons may be in as many different persons and upon each a distinct and separate action may be maintained. While the promises of the bond and of the coupon are in the first instance upon the same paper and the coupons are for interest due upon the bond, yet the promise to pay the coupon is as distinct from that to pay the bond as though the two promises were placed in different instruments upon different paper.¹ The *statutory period of limita-*

v. Otoe County, 1 Dillon C. C. 338; *Lake County v. Platt*, 79 Fed. Rep. 567; *Johnson v. Stark County*, 24 Ill. 75. Where the plaintiff is the owner of the bond and of the past due coupon, we see no reason why he may not sue upon *covenant* in the bond to pay the interest which is evidenced by the coupon, and offer to bring the coupon into court for surrender and cancellation upon the rendition of judgment for the interest.

When payable to *bearer or order* are negotiable instruments. *Aurora City v. West*, 7 Wall. (U. S.) 82; *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175; *Clark v. Iowa City*, 20 Wall. (U. S.) 583. Instances where form of coupon was held not to give it a negotiable character. *Myers v. York, &c. R. Co.*, 43 Me. 282; but *quare*, and see *Woods v. Lawrence County*, 1 Black (U. S.) 386. The rights of a *bona fide* holder of coupons are not affected by the fact that he purchased them at a discount. *Cumberland County v. Randolph*, 89 Va. 614. See also *Cromwell v. Sac County*, 96 U. S. 51. To maintain action on valid coupons no consideration need have been given therefor by the holder or plaintiff. *Dudley v. Lake County*, 80 Fed. Rep. 672.

How declared on. *Ring v. Johnson County*, 6 Iowa, 265; *Chicago, B. & Q. R. Co. v. Otoe County*, 1 Dillon C. C. 338; *Wiley v. Minneapolis Board of Education*, 11 Minn. 371. The better practice, in the author's judgment, is to set out in the declaration the bond to which the coupon in suit was attached, or to allege its legal effect and recitals. Judgment in suit on coupons or for interest, *when a bar to subsequent suit*. *Louisiana State Bank v. Orleans Nav. Co.*, 3 La. An. 294; *Beloit v. Morgan*, 7 Wall. 619; *Bissell v. Spring Valley Township*, 124 U. S. 225; compare

Cromwell v. Sac County, 96 U. S. 51. Judgment in favor of the plaintiff on certain coupons against the municipality does not estop the municipality in a subsequent action by the same plaintiff on other coupons on the same bonds from making a defence which was not made or adjudicated in the first action. *Nesbit v. Riverside Ind. Dist.*, 144 U. S. 610.

¹ *Nesbit v. Riverside Independent Dist.*, 144 U. S. 610, 619; *Edwards v. Bates County*, 163 U. S. 269, 272. In *Edwards v. Bates County*, 163 U. S. 269, rev'g 55 Fed. Rep. 436, the jurisdiction of the circuit court of the United States was objected to in an action to recover on municipal bonds on the ground that the matter in controversy, exclusive of the interest and costs, *did not exceed* the sum of \$2000. The bonds sued on amounted to \$2000, and in addition unpaid coupons thereof for a period of thirteen years were included in the action. It was held that as the face of the bonds amounted to \$2000 and as the coupons represented separate original demands, the addition of the demand based upon the coupons to the demand based on the bonds brought the sum in dispute within the jurisdiction of the circuit court. Mr. Justice *White*, after referring to various decisions, said: "The logical effect of these rulings is that when the interest evidenced by a coupon has become due and payable, the demand based upon the promise contained in such coupon is no longer a mere incident of the principal indebtedness represented by the bond, but becomes really a principal obligation. Clearly, such would be the nature of the claim of one who, as owner of the coupons, and not of the bonds, brought his action to enforce payment of the indebtedness evidenced by the coupons.

tion applicable to actions upon coupons is that which applies to an action upon the bonds to which the coupons were originally attached.¹ But the statute of limitations commences to run on coupons detached from the bonds and negotiated separately, from the time the coupons mature, and the operation of the statute, in such a case, is not deferred until the maturity of the bonds to which the coupons belonged.² The statute also begins to run on coupons from the time they respectively mature, although they remain attached to the bond which represents the principal debt.³ If coupons are not paid at maturity, they *bear interest* from that date.⁴

§ 895. **Sale and Disposal of Bonds.** — Express statutory authority to issue bonds implies the power to issue them in the ordinary and usual manner; and the municipality may, by virtue thereof,

So, also, before maturity of the bonds their holder could still have sued upon the matured coupons as an independent indebtedness, and not as a mere accessory to a demand for a recovery of the face of the bonds. No good reason, therefore, exists for creating a distinction between such cases and the case at bar in which there is coupled with the demand to recover upon the coupons a demand for judgment upon the bonds. . . . The claim made by the plaintiff on the coupons was in no just sense accessory to any other demand, but was in itself principal and primary. In ascertaining, therefore, the jurisdictional sum in dispute, the sum of the coupons should have been treated as an independent principal demand and not as interest, and in holding otherwise the lower court erred."

¹ *Kenosha v. Lamson*, 9 Wall. (U. S.) 477; *Lexington v. Butler*, 14 Wall. (U. S.) 282.

² This point has been expressly adjudged by the Supreme Court in *Clark v. Iowa City*, 20 Wall. (U. S.) 583, and the prior decisions, which had been supposed to hold otherwise, explained to mean only that when the bonds were specialties, the coupons, though detached, partook of the same nature, and therefore the same statute of limitations applied to both the coupons and the bonds; that is, if the bonds were specialties, so were the coupons, and the statute of limitations as to sealed instruments, and not the more restricted statute applicable to simple contracts, applied. *Kenosha v.*

Lamson, 9 Wall. (U. S.) 477; *Lexington v. Butler*, 14 Wall. (U. S.) 282.

³ *Amy v. Dubuque*, 98 U. S. 470; *Nash v. El Dorado Co.*, 24 Fed. Rep. 232; *Galveston v. Loonie*, 54 Tex. 517. Coupons held to be *written instruments* and governed by the statute applicable thereto. *Coler v. Santa Fe County*, 6 N. Mex. 88, 113.

⁴ *Aurora City v. West*, 7 Wall. (U. S.) 82; *Clark v. Iowa City*, 20 Wall. (U. S.) 583; *Genoa v. Woodruff*, 92 U. S. 502; *Amy v. Dubuque*, 98 U. S. 470, 473; *Edwards v. Bates County*, 163 U. S. 269, 272; *Wilson v. Neal*, 23 Fed. Rep. 129; *Nash v. El Dorado County*, 24 Fed. Rep. 232; *Lake County v. Linn*, 29 Colo. 446, 459; *Cripple Creek v. Adams*, 36 Colo. 320, 327.

The settled rule in *Illinois* is that coupons draw interest after maturity. *Cairo v. Zane*, 149 U. S. 122, 143, citing *Harper v. Ely*, 70 Ill. 581, 586; *Humphreys v. Morton*, 100 Ill. 592; *Drury v. Wolf*, 134 Ill. 294, 297; *United States Mortgage Co. v. Sperry*, 138 U. S. 313, 340. So held in *Iowa*, *Rogers v. Lee County*, 1 Dillon C. C. 529. Also in *Mississippi*, *Lexington v. Union Nat. Bank*, 75 Miss. 1. After maturity, coupons bear interest at the rate fixed by the law of the place where payable. *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175; *Pana v. Bowler*, 107 U. S. 529, 546; *Scotland County v. Hill*, 132 U. S. 107. Payment of bonds does not extinguish detached coupons not paid. *New York Nat. Exchange Bank v. Hartford, P. & F. R. Co.*, 8 R. I. 375.

sell the bonds and use the proceeds for the purposes intended, that being the mode most generally adopted in similar cases.¹ When the statute prescribes the *method of sale*, such method is the only method that can be followed. Hence, if it is required that the bonds shall be sold to the highest bidder after advertisement, no other disposition of the bonds can be made.² Power of a municipality to issue and sell bonds carries with it the implied power to secure such reasonable and necessary assistance as may be requisite to bring about an advantageous sale, and to this end the municipality, acting in good faith, may *employ a broker* regularly engaged in the business.³

¹ *Thomas v. Grand Junction*, 13 Colo. App. 80; *supra*, §§ 882, 883. There can be no recovery for a breach of an executory contract with a county for the sale of bonds which the county had no authority to issue. *Robinson-Humphrey Co. v. Wilcox County*, 129 Ga. 104. When authority to issue is vested in the common council, a resolution of the council authorizing the mayor and clerk to *sign* the bonds does not confer authority on these officers to issue and dispose of them. *Portsmouth Sav. Bank v. Ashley*, 91 Mich. 670. Discretionary power of council to determine whether there shall be a sale of bonds, and, if so, in what amounts, who is highest bidder, and whether security shall be required, held *not to be capable of delegation to mayor*. *Elyria Gas, &c. Co. v. Elyria*, 57 Ohio St. 374, 382.

² *Roberts & Co. v. Taft*, 116 Fed. Rep. 228, s. c. 109 Fed. Rep. 825; *Cincinnati v. Guckenberger*, 60 Ohio St. 353; *Elyria Gas, &c., Co. v. Elyria*, 57 Ohio St. 374, 382. See also *Ft. Scott v. Eads Brokerage Co.*, 117 Fed. Rep. 71. Where a municipality is under no statutory or other restriction it may, we think, acting in good faith, make a sale of its bonds at less than par. See Index, *Usury*.

When, by statute, the sale is required to be made after advertisement to the *highest bidder*, such provision implies an absolute bid by intending purchasers, and a conditional bid cannot be received or considered. A bid subject to the approval of the regularity of the issue by counsel of bidder is conditional. *Trowbridge v. New York*, 24 N. Y. Misc. 517. As to right to award bonds to person offering "\$100 more than the best bid" see *Lamprecht v. Williamsport*, 22 Pa. Co. Ct. Rep. 603. If a statute requires bidders for an issue

of bonds to specify in their bid whether it is payable in current money or in evidences of indebtedness of the municipality, it is not necessary that the *notice of sale* of the bonds calling for bids should state that the bonds may be made payable either in current money or in evidences of indebtedness. *Givens v. Hillsboro County*, 46 Fla. 502. If the bid does not state the manner of payment contemplated, it will be construed as a bid payable in current funds. *Potter v. Lainhart*, 44 Fla. 647. A contract to purchase bonds from a city is not invalid as *ultra vires*, because the bonds contracted for are to run for *thirty years*, whilst the city's charter contains a provision that in all issues of bonds provision shall be made for *redemption at the option* of the city after five years. The presumption is that the charter provision was an implied condition of the contract. *Roberts v. Paducah*, 95 Fed. Rep. 62. Advertisement for bids required by statute to ask "bidders to give price and rates of interest at which they will purchase such bonds," held not to be invalid, although it failed to require bidders to name a rate of interest at which they would be willing to purchase. *Parkinson v. Seattle School Dist.*, 28 Wash. 335.

³ *Manitou v. First Nat. Bank*, 37 Colo. 344; *Armstrong v. Ft. Edward*, 159 N. Y. 315, rev'g 84 Hun, 261; *Mayor, &c. of New York v. Sands*, 105 N. Y. 210; *Ft. Edward v. Fish*, 156 N. Y. 363; *Brownell v. Greenwich*, 114 N. Y. 518. In *Kentucky*, the fiscal court of a county being authorized to fund the country's debt, has power to employ such agents and attorneys as may be necessary for that purpose. *Slayton v. Rogers (Ky.)*, 107 S. W. Rep. 696.

And its power is not confined to the employment of brokers only. It may employ any person, although not a regular broker, that the municipality may, in good faith, consider able to assist it in selling and disposing of the bonds.¹ In disposing of the bonds, municipalities are frequently prohibited from selling them "at less than the par value thereof." The words "*par value*" when so used mean a value equal to the face of the bonds and accrued interest to date of sale.² When the bonds draw interest from their date, and are disposed of after their date, with accrued interest attached, their face or "*par value*," within the meaning of the statute, is the sum of the principal and the accrued interest.³ Persons purchasing the bonds from the municipality are bound to take notice of the power of the municipality in this respect, and a sale of the bonds at less than par is absolutely void *inter partes* as expressly prohibited by law. Neither party to the contract is bound thereby, and it cannot be the subject of a valid claim by either against the other.⁴ A person employed as a broker to effect a sale contrary to the terms of the statute is also affected with notice of the power of the municipality, and his contract of employment, being in furtherance of a violation of the statutory prohibition, is void and cannot form the basis of a re-

¹ Mayor, &c. of New York v. Sands, 105 N. Y. 210; Armstrong v. Ft. Edward, 159 N. Y. 315, rev'g 84 Hun (N. Y.), 261.

² Ft. Edward v. Fish, 156 N. Y. 363, aff'g 86 Hun (N. Y.), 548. See also Jones Co. v. Board of Education, 30 N. Y. App. Div. 429; Oswego City Sav. Bank v. Board of Education, 35 N. Y. Misc. 540; s. c. 70 N. Y. App. Div. 538; 174 N. Y. 515. An exchange of railroad aid bonds for stock in the railroad aided at par held equivalent to a sale of the bonds at par. Germania Sav. Bank v. Darlington, 50 S. Car. 337.

Where a county agreed to pay a broker a commission of ten per cent in connection with which the broker stipulated to pay for lithographing and printing the blank bonds, for legal advice and services, and all other expenses incident to a sale, held that, while there might be cases where the facts would show that an agreed compensation of ten per cent for the sale of the bonds was an evasion of a statutory prohibition against a sale below par, the court could not hold it to be so on the facts then before it. State v. West Duluth Land Co., 75 Minn. 456. An agreement by the municipality to pay

to the purchaser a sum for expenses, which is intended in good faith to cover the cost of preparing the bonds, held not to be unlawful as reducing the price below par. Diefenderfer v. State, 13 Wyo. 387. Evasions of the requirement to sell at not less than par by side stipulations or understandings as to "commissions" are not uncommon, and provisions for payment of commissions will be carefully scrutinized by the courts as to their *bona fides*. Whelen's Appeal, 108 Pa. St. 162, 197, cited *infra*; Smith v. County of Los Angeles, 99 Cal. 628; Hunt v. Fawcett, 8 Wash. 396.

³ Ft. Edward v. Fish, 156 N. Y. 363, aff'g 86 Hun (N. Y.), 548; Illinois v. Delafield, 8 Paige (N. Y.), 527; 26 Wend. (N. Y.) 192; 2 Hill (N. Y.), 159; Diefenderfer v. State, 13 Wyo. 387. As to sales on credit, see Montpelier National Life Ins. Co. v. Huron Board of Education, 62 Fed. Rep. 778; Citizens' Savings Bank v. Greenburgh, 173 N. Y. 215, rev'g 60 N. Y. App. Div. 225; *infra*, § 956.

⁴ Ft. Edward v. Fish, 156 N. Y. 363, aff'g 86 Hun (N. Y.), 548; Illinois v. Delafield, 8 Paige (N. Y.), 526, 26 Wend. (N. Y.) 192, 2 Hill (N. Y.), 159; *infra*, § 956.

every for services rendered.¹ The purchaser of the bonds has, as a general rule, no concern with the *application of the proceeds* and cannot refuse to perform his contract on grounds which have reference thereto.² A sale of the bonds at less than par, contrary to the statutory direction, does not affect the fundamental power of the municipality to make and issue the bonds; it is a mere irregularity in the exercise of its powers, and the validity of the bonds is not affected thereby in the hands of innocent purchasers for value.³ Successful bidders for the bonds who have made the deposit required by the municipality are not obliged to accept the bonds if they are issued without authority and may sue to *recover the amount of the deposit* on the ground of the invalidity of the bonds. If the bonds are void, an agreement to buy and to pay for them is without consideration. The deposit is not such a voluntary payment as deprives the bidder of the right to demand its return.⁴ It has been held that when under the statute the obligation of the municipality and its officers to issue the bonds has become only ministerial in its nature, a bidder for the bonds whose bid has been accepted is *entitled to compel* the issue of bonds to him;⁵ and for the purpose of enforcing the right of the successful bidder to an issue of the bonds, he is entitled to a writ of *mandamus* directed to the proper municipal officers.⁶

¹ *Ft. Edward v. Fish*, 156 N. Y. 3, aff'g 86 Hun (N. Y.), 548.

² A person was employed to negotiate an entire issue of improvement bonds. The first series was negotiated and disposed of by him; the second series was tendered to him to be negotiated, but he refused to do so on the ground that the proceeds of the first series had not been expended exactly for the purposes for which the city was bound to expend them. It was held that the broker or agent employed to dispose of the bonds had no right to control the manner in which the work was to be prosecuted, and that as long as the expenditures were incurred for work within the authority of the city it was sufficient. *Moses v. City of West*, 15 N. Y. Misc. 15, aff'd 157 N. Y. 689.

³ *St. Paul Gas Light Co. v. Sandmeier*, 73 Minn. 225; *Citizens' Sav. Bank v. Greenburgh*, 173 N. Y. 215; *Hooper Co. v. Hackett*, 1 Wall. 83; *Bonds v. Lawrence*, 1 Black (U. S.), 3. See also *Montpelier National Life Ins. Co. v. Huron Board of Education*, 131 Fed. Rep. 778; *Gladstone v. Throop*,

71 Fed. Rep. 341; *Greenburg v. International Trust Co.*, 94 Fed. Rep. 755; same bonds, 173 N. Y. 215; *Knapp v. Newtown*, 1 Hun (N. Y.), 268; *Sherlock v. Winnetka*, 68 Ill. 530; *Atchison v. Butcher*, 3 Kans. 104. An act authorizing a sale of municipal bonds at not less than par impliedly forbids the allowance of a *commission to a purchaser* of the bonds from the city at par. *Whelen's Appeal*, 108 Pa. St. 162, 197.

⁴ *School City of Rushville v. Hayes*, 162 Ind. 193. Waiver by city of right to require purchaser to give notice of rejection of bonds for illegality within a prescribed time, see *Great Falls v. Theis*, 79 Fed. Rep. 943.

⁵ *Jones Co. v. Guttenberg*, 66 N. J. L. 659.

⁶ *Smalley v. Yates*, 36 Kan. 519; *Jones Co. v. Guttenberg*, 66 N. J. L. 659; *Halsey v. Nowrey*, 71 N. J. L. 481; *People v. Brennan*, 39 Barb. (N. Y.) 522; *People v. McGuire*, 31 N. Y. Misc. 324; *May v. Cass County*, 12 N. Dak. 137; *Diefenderfer v. State*, 13 Wyo. 387. See also chapter on *Mandamus*. Right to maintain a suit

§ 896 (514). **Lis Pendens not Applicable.** — Another doctrine established in reference to such securities is that the *principle of lis pendens* is not applicable thereto. There may be actions pending regarding the bonds, but this will not affect the purchaser with constructive notice. It is a general rule that all persons dealing with real property are bound to take notice of a suit pending with regard to the title thereof, and will, at their peril, purchase the same from any of the parties to the suit. But this rule does not apply to negotiable securities purchased before maturity.¹

§ 897 (515). **Course of Decision in the Supreme Court of the United States.** — In municipal bond cases, the Supreme Court of the United States has rejected, when necessary to protect the *bona fide* holders of such securities, narrow and rigid constructions of statutes and charters authorizing the creation of such debts.² Against such hold-

in equity to compel issue of bonds in payment of subscription denied and remedy held to be by *mandamus*. *Smith v. Bourbon County*, 127 U. S. 105.

¹ *Leitch v. Wells*, 48 N. Y. 586; *Stone v. Elliott*, 11 Ohio St. 252; *Kieffer v. Ehler*, 18 Pa. St. 388; *Durant v. Iowa Co.*, 1 Woolw. 69; *Winston v. Westfeldt*, 22 Ala. 760; *Olcott v. Fond du Lac Supervisors*, 16 Wall. (U. S.) 678; *Washington National Bank v. Texas*, 20 Wall. (U. S.) 72; *Mims v. West*, 38 Ga. 18; *Warren County v. Marcy*, 97 U. S. 96; *Warren v. Post*, 97 U. S. 110; *Warren v. Portsmouth Sav. Bank*, 97 U. S. 110; *Orleans v. Platt*, 99 U. S. 676; *Cass Co. v. Gillette*, 100 U. S. 585; *School Dist. No. 11 v. Chapman*, 152 Fed. Rep. 887; *Pickens Tp. v. Post*, 99 Fed. Rep. 659; *Stewart v. Lansing*, 104 U. S. 505; *Thompson v. Perrine*, 103 U. S. 806. In *Carroll County v. Smith*, 111 U. S. 556, a judgment had been given in favor of the county in a State court, between it and certain of its bondholders, and it was held to be no estoppel on holders of bonds who were not before the court. It has also been held that they cannot be made parties, and bound by publication made for them as unknown defendants. *Carroll Co. v. Smith*, 111 U. S. 563; *Pana v. Bowler*, 107 U. S. 529; *Brooklyn v. Ins. Co.*, 99 U. S. 362; *Empire v. Darlington*, 101 U. S. 87. The pendency of a suit relating to the validity of negotiable paper not yet due is not constructive notice to subsequent holders thereof before maturity; and this rule cannot

be changed by State laws or decisions, so as to affect the rights of persons outside the State. *Enfield v. Jordan*, 119 U. S. 680; *Scotland County v. Hill*, 132 U. S. 107. Although it is held by the Supreme Court of *Illinois* that a municipal corporation cannot lawfully make its obligations payable at any other place than the office of the treasurer (*ante*, § 867, note), yet if thus made payable, it does not affect the validity of the bond, or charge the *bona fide* holder with notice of judicial proceedings between a previous holder and the municipality so as to work an estoppel. *Enfield v. Jordan*, *supra*.

² *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175; *Meyer v. Muscatine* (charter authorizing borrowing of money), 1 Wall. (U. S.) 384; *Rogers v. Burlington*, 3 Wall. (U. S.) 654; overruled on one point in *Brenham v. German American Bank*, 144 U. S. 173; *Van Hostrup v. Madison City*, 1 Wall. (U. S.) 291; *Seybert v. Pittsburg*, *Ib.* 272. If the Supreme Court cannot be said to have adopted liberal constructions of statutes authorizing the issue of bonds, it may be indisputably affirmed that it has, in such cases, held the municipality firmly to the practical construction it had put upon the enabling acts, in cases where the acts fairly admitted of the construction adopted by the municipality, and the rights of *bona fide* holders were involved. *Supra*, § 863.

In *Andes v. Ely*, 158 U. S. 312, 321. Mr. Justice *Brewer*, who delivered the opinion of the court, said with reference to the principle to be applied in con-

ers it has given no favor to defences based upon mere irregularities in the issue of the bonds or upon non-compliance with preliminary requirements, not going to the question of statutory *power* to issue them.¹ It has held that the circuit courts of the United States were clothed with full authority, by *mandamus* or otherwise, to enforce the collection of judgments rendered therein on such bonds, and that this authority could not be interfered with to the injury of the creditor, either by the legislature or the judiciary of the States.² It has upheld and protected the rights of such creditors with a firm hand, asserting the jurisdiction and authority of the Federal courts with such striking energy and vigor as apparently, but not actually, to trench upon the lawful rights of the States and the acknowledged powers of the State tribunals. Upon the whole, however, there is little doubt that its course has had the approval of the profession in general and of the public, and the result ought to teach municipalities the lesson that if, having the power conferred upon them, they issue negotiable securities, they cannot escape payment if these find their way into the hands of innocent purchasers. The result, moreover, has been of incalculable value to municipalities in general by establishing upon a firm foundation the credit of their securities issued for needed permanent improvements, enabling them thereby to obtain money for these purposes on a lower interest basis than would otherwise have been possible. And for this the country at large is under lasting obligations to the wisdom, courage, foresight, and sense of justice of the Supreme Court of the United States. Unfortunately, perhaps, as will presently appear, the decisions upon this important subject in the Supreme Court of the nation and those in some of the State courts are not in all respects harmonious.³

struing statutes authorizing the issuance of municipal bonds, "While courts may properly see to it that proceedings for casting burdens upon a community comply with all the substantial requisitions of a statute in order that no such burden may be recklessly or fraudulently imposed, yet such statutes are not of a criminal character, and proceedings are not to be so technically construed and limited as to make them a mere snare to those who are encouraged to invest in the securities of the municipality."

¹ *Knox County v. Aspinwall*, 21 How. (U. S.) 539; *Moran v. Miami County*, 2 Black (U. S.), 722; *Bissell v. Jeffersonville*, 24 How. (U. S.) 287; *Marsh v. Fulton County*, 10 Wall. (U. S.)

676; *Louisiana City v. Wood*, 102 U. S. 294.

² *Von Hoffman v. Quincy*, 4 Wall. (U. S.) 535; *Galena v. Amy*, 5 Wall. (U. S.) 705; *Riggs v. Johnson County*, 6 Wall. (U. S.) 166; *Butz v. Muscatine*, 8 Wall. (U. S.) 575. See also *post*, chapter on *Mandamus*, and cases there cited.

³ This section of the text has been somewhat altered in this edition. The general questions relating to the *power* to aid railways are considered in a previous chapter. Distinction between municipal "donation" to a railroad company and a municipal "subscription" to its stock. *Hamilton County v. State*, 115 Ind. 64. Reference to decisions construing State statutes

In the determination of the validity of municipal bonds, two questions of controlling importance usually arise under the principles laid down by the Supreme Court of the United States. The first one is the question of *power*, that is to say whether the municipality was empowered by the legislature to issue bonds of the character of those in suit; and, secondly, if such authority is found, but some irregularity or fraud has attended their issue, what effect should be given to representations of facts contained in the bonds where they have come into the hands of *bona fide* purchasers, who have bought them for value, in reliance upon the truth of such representations? As to the question of power, there has been apparently a growing tendency in the courts to look with close scrutiny into the source of the authority for the making and issuing of such bonds, and to deny the power unless it is given expressly or by clear implication. But if the power is found to exist, and bonds have been issued in professed execution of the power, containing recitals of facts existing or of things done by the municipality or its officials in conformity with the requirements of the authorizing statute, and especially if those facts and things are peculiarly within the knowledge and duty of the officials executing the bonds, there has been no relaxation of the rule which protects *bona fide* purchasers relying upon the truth of representations made in the bonds against the irregularities and frauds of the municipality or the officials who represent it in the exercise of the power.¹

§ 898 (515). **Decisions of State Courts as Precedents in Federal Courts.**

— In municipal bond cases the Supreme Court of the United States does not hold itself concluded by decisions of the State courts made *after* the bonds have been negotiated, unless possibly where the question is one exclusively depending upon the construction of local and peculiar provisions of the State Constitution or enactments.²

authorizing municipal aid to railways, public, as distinguished from a private, as to requisites of petitions, notice, object, and that no sufficient case of regularity, and sufficiency of elections, clear and irreparable injury was shown see 22 Eng. & Am. Corp. Cases, 19, to justify the enjoining of the issue of note, 47, note, 54, note, 71, note. The of the bonds. *Ante*, chap. viii. § 313 & United States Circuit Court for the *seq.*
Northern District of Ohio, before *Jackson, J.*, in the case of *Fellows v. Walker*, Auditor, 39 Fed. Rep. 651, refused to enjoin the issue of municipal bonds under an act authorizing the issue of such bonds by the city of Toledo to secure *natural gas* for public and private use. The court considered the object authorized by the act to be a

public, as distinguished from a private, object, and that no sufficient case of clear and irreparable injury was shown to justify the enjoining of the issue of the bonds. *Ante*, chap. viii. § 313 & *seq.*

¹ Per *Severens*, D. J., in *Ridley v. Howell*, 64 Fed. Rep. 453, 455.

² *Gelpcke v. Dubuque*, 1 Wall. 175; *Havemeyer v. Iowa County*, 3 Wall. 294; *Thomson v. Lee County*, *ib.* 327; *Lee County v. Rogers*, 7 Wall. 181. See particularly on this point, *Olcott v. Fond du Lac Sup.*, 16 Wall. 678; *Buts v. Muscatine*, 8 Wall. 575, explained:

It has not decided that it would hold valid bonds issued *after* the Supreme Court of the State had held that bonds issued under similar circumstances are invalid, and it will not so hold, since such a doctrine is not necessary to protect the innocent owners of such securities, and would involve the consequence of the Federal courts setting up a policy in a State contrary to its Constitution and laws as expounded

Carroll County v. United States, 18 Wall. 71; *Chicago v. Sheldon*, 9 Wall. 50; *Pine Grove Tp. v. Talcott*, 19 Wall. 666; *Elmwood v. Marcy*, 92 U. S. 289; *Anderson v. Santa Anna*, 116 U. S. 356; *Claiborne County v. Brooks*, 111 U. S. 400; *Taylor v. Ypsilanti*, 105 U. S. 60; *New Buffalo v. Cambria Iron Co.*, 105 U. S. 73; *Ralls County v. Douglass*, 105 U. S. 728; *Foote v. Johnson Co.*, 5 Dill. 208; *Cass Co. v. Johnson*, 95 U. S. 360; *Wilkes County v. Coler*, 190 U. S. 437, 444; *Northwestern Sav. Bank v. Centerville Station*, 143 Fed. Rep. 81; *Onslow County v. Tollman*, 145 Fed. Rep. 753; *Cutler v. Madison County Sup.*, 56 Miss. 115; *Vicksburg v. Lombard*, 51 Miss. 126; *ante*, § 886; *post*, § 901; *Kenosha v. Lamson*, 9 Wall. 477; *Campbell v. Kenosha*, 5 Wall. 194. Read last two cases in connection with *Foster v. Kenosha*, 12 Wis. 616, which, in effect, is overruled or disregarded. See on this point *Steines v. Franklin County*, 48 Mo. 167; *Columbia County v. King*, 13 Fla. 451.

In speaking of the *force of the State court decisions* in the Federal courts in this class of cases, Mr. Justice *Strong*, in *Venice v. Murdock*, 92 U. S. 494, holds this language: "It is argued, however, that the New York decisions (*Starin v. Genoa*, 23 N. Y. 439; *Gould v. Sterling*, 23 N. Y. 439, 456) are judicial constructions of a statute of that State, and, therefore, that they furnish a rule by which we must be guided. The argument would have force if the decisions, in fact, presented a clear case of statutory construction. But they do not. They are not attempts at interpretation. They would apply as well to the execution of powers or authorities granted by private persons as they do to the issue of bonds under the statute of April 16, 1852. They assert general principles, to wit, that persons empowered to borrow money and give bonds therefor, for the purpose of paying it to an improvement company, are not authorized to deliver the bonds directly to the company, — a doctrine denied in this court, in the

Supreme Court of Pennsylvania, and even in the Court of Appeals of New York. *People v. Mead*, 24 N. Y. 114; *The Town of Venice v. Breed*, 65 Barb. 597. They assert, also, that where an authority is given to an officer to execute and issue bonds (on the assent of two-thirds of the voters of a town, the assent to be obtained by the officer, and filed in a public office, with an affidavit verifying the assent), the verification amounts to nothing, subverts no purpose, and that a *bona fide* holder of the bonds is bound to prove that the requisite number of voters did actually assent. They assert this as a general proposition. They do not assert that the statute so declares, or that such is even its implied requisition. There is, therefore, before us no such case of the construction of a State statute by State courts as requires us to yield our own convictions of the right and blindly follow the lead of others, eminent as we freely concede they are." *Infra*, § 643.

Where a railroad company procured negotiable bonds to be issued by a town under a statute, which was afterwards declared unconstitutional, and the railroad sold and transferred them to citizens of another State, who, in an action in the Federal court, fixed the liability of the town for the whole issue, it was held that the town had a good cause of action against the railroad company for the amount of the bonds and interest, on the ground that its act in procuring and negotiating the bonds was without authority of law and wrongful. *Town of Plainview v. Winona & St. Peter R. R. Co.*, 36 Minn. 505. The soundness of this conclusion is, perhaps, not so obvious as to prevent reargitation of the question. In *State v. Holladay*, 72 Mo. 499, it was held that where a State court had declared certain bonds issued in aid of a railroad void and the courts of the United States afterwards held them valid, the State court cannot deem them such absolute nullities as not to be the subject of compromise.

by its authorized and rightful tribunals.¹ Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is. Where, however, the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon, under a particular state of the decisions, or when there has been no decision of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts *after* such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the State courts. As, however, the very object of giving to the Federal courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent

¹ *King v. Wilson*, 1 Dillon C. C. 555; *Commercial Nat. Bank of Cleveland v. Iola*, 2 Dillon C. C. 353. See, however, on this subject, *Butz v. Muscatine*, 8 Wall. (U. S.) 575; *Olcott v. Fond du Lac*, 16 Wall. (U. S.) 578.

Since the text was written the Supreme Court of the United States has distinctly decided, in accordance with the prediction therein, that as to bonds issued *after* a construction of the State statute by the Supreme Court of the State, such construction is authoritative and binding upon the Federal courts. This subject is fully examined and discussed in *German Sav. Bank v. Franklin County (Ill.)*, 128 U. S. 526, 538. In this case bonds were issued after the Supreme Court of Illinois had construed the act under which they were issued. Referring to this, Mr. Justice *Blatchford*, giving the opinion of the Supreme Court, says: "This interpretation [of the Supreme Court of Illinois] accompanied all bonds subsequently issued into the hands of whoever took them, whether a *bona fide* holder or not. This court must recognize this decision of the Supreme Court of Illinois as an authoritative construction of the statute, made before the bonds [in suit] were issued, and to be followed by this court." *Douglas v. County of Pike*, 101 U. S. 677; *Burgess v. Seligman*, 107 U. S. 20; *Green County v. Connees*, 109 U. S. 104; *Anderson v. Santa Anna*, 116 U. S. 356; *Scotland County v. Hill*, 132 U. S. 107.

tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication.¹ On the general question whether a municipal bond is a negotiable instrument or not the Supreme Court of the United States has held that it is a matter of *mercantile or commercial law* and is not to be governed by the rules of any particular State, and that it is not bound to follow the decisions of the State in which the municipality making the bonds is situated.² If, however, the question at issue is whether a particular statute authorizing an issue of bonds was passed in such manner as to become a law under the Constitution of the State, the decisions of the highest court of the State on that subject, though made after the issue of the bonds, will be accepted and followed by the Federal courts.³

¹ Per *Bradley, J.*, in *Burgess v. Seligman*, 107 U. S. 20, 33, 34, a leading and thoroughly considered case. *Anderson v. Santa Anna*, 116 U. S. 356, 362; *Pine Grove v. Talcott*, 19 Wall. (U. S.) 666. See also *Folsom v. Ninety-Six*, 159 U. S. 611, 625; *Stanly County v. Coler*, 190 U. S. 437, 444, 445.

² *Mercer County v. Hackett*, 1 Wall. (U. S.) 83. In this case, the Supreme Court of the United States declined to follow the decision of the Supreme Court of Pennsylvania in *Diamond v. Lawrence County*, 37 Pa. St. 353, which held that municipal and county bonds are not negotiable securities, saying, "If this decision of that learned court was founded on the construction of the Constitution or statute law of the State, or the peculiar law of Pennsylvania, as to titles to land, we would have felt bound to follow it, but we have often decided that on questions of mercantile or commercial law or usages which are not peculiar to any place, we do not feel bound to yield our own judgment, especially if it be fortified by the decision of all other English and American courts. These securities are not peculiar to Pennsylvania, or governed by its statutes or peculiar law."

³ *Wilkes County v. Coler*, 180 U. S. 506; *Stanly County v. Coler*, 190 U. S. 107; *South Ottawa v. Perkins*, 94 U. S. 360. In *South Ottawa v. Perkins*, 94 U. S. 260, 267, the court said: "It would be a very unseemly state of things, after the courts of *Illinois* have determined that a pretended statute of that State is not such, having never been constitutionally passed, for the courts of the United States, with the same evidence before them, to hold otherwise. As a matter of propriety and right, the decisions of the State courts on the question as to what are the laws of the State is binding upon those of the United States. But the law under consideration has been passed upon by the Supreme Court of *Illinois*, and held to be invalid. This ought to have been sufficient to govern the action of the court below. In our judgment, it was not necessary to have raised an issue on the subject, except by demurrer to the declaration. The court is bound to know the law without asking the advice of a jury on the subject. When once it became the settled construction of the Constitution of *Illinois* that no act can be deemed a valid law unless, by the journals of the legislature, it appears to have been regularly passed by both houses, it became the duty of the courts to take judicial notice of the journal entries in that regard. The courts of *Illinois* may decline to take that trouble unless parties bring the matter to their attention; but, on general principles, the question as to the existence of a law is a judicial one, and must be so regarded by the courts of the United States."

The author with diffidence ventures to observe that where under express statute authority negotiable municipal bonds have been issued and sold in the markets and are in the hands of *bona fide* holders for value, there is no more logical or necessary reason why

§ 899. **Rule in Federal Courts when Decisions of State Courts are conflicting.** — It is the well-settled and long-established doctrine of the Supreme Court of the United States that when the question of the power of a municipal corporation under the Constitution and statutes of the State to make negotiable securities has been determined by the decisions of the highest court of the State, and the decisions are conflicting or do not adhere to a uniform rule, the same question, when it arises in the trial of a suit in the Federal courts, is to be determined by the law as judicially declared by the highest court of the State *at the time the securities were issued*; and that the rights and obligations of the parties accruing under such a state of the law will not be affected by a different course of judicial decisions *subsequently rendered* any more than by subsequent legislation.¹ As the late Chief

the Supreme Court of the United States should hold itself *conclusively* bound by a *subsequent* decision of the State courts as to whether the enabling act was passed with the formalities required by the State Constitution than exists in the case of the constitutionality or construction of such statute, supposing it to be a law of the State. In principle the question in the two cases where commercial securities are concerned is the same, and as it seems to the author the power and the duty of the Supreme Court to exercise its own independent judgment is, or may be, as great in the one case as in the other, and is a power and duty that should not be absolutely and unconditionally abdicated or renounced or declared to be beyond its rightful jurisdiction.

¹ Wilkes County v. Coler, 180 U. S. 506, 531; s. c. 190 U. S. 107, 111; Loeb v. Columbia Township Trustees, 179 U. S. 472, 492; Wade v. Travis County, 174 U. S. 499, 510; German Savings Bank v. Franklin County, 128 U. S. 526, 539; Anderson v. Santa Anna, 116 U. S. 356, 361; Green County v. Conness, 109 U. S. 104, 105; Burgess v. Seligman, 107 U. S. 20; Ralls County v. Douglass, 105 U. S. 728; Taylor v. Ypsilanti, 105 U. S. 60, 71; Thompson v. Perrine, 103 U. S. 806; s. c. 106 U. S. 589; Douglass v. Pike County, 101 U. S. 677; Olcott v. Fond du Lac, 16 Wall. (U. S.) 678; Kenosha v. Lamson, 9 Wall. (U. S.) 477; Butz v. Muscatine, 8 Wall. (U. S.) 575; Lee County v. Rogers, 7 Wall. (U. S.) 181; Mitchell v. Burlington, 4 Wall. (U. S.) 270; Thomson v. Lee County, 3 Wall. (U. S.) 327; Havemeyer v. Iowa County, 3 Wall. (U. S.) 294, 303; Gelpcke v. Dubuque, 1 Wall.

(U. S.) 175, 206; Ohio Life Ins. & Trust Co. v. Debolt, 16 How. (U. S.) 416, 432; Rowan v. Runnels, 5 How. (U. S.) 134; Henderson County v. Travellers' Ins. Co., 128 Fed. Rep. 817; Rees v. Olmsted, 135 Fed. Rep. 296.

The cases are numerous in the Supreme Court of the United States to the effect that the decisions in a State court rendered *after* the issuance of bonds by some municipality in such State are not binding on the Federal courts.

It well illustrates the subject, however, to mention a decision of the Supreme Court of the United States made *after* certain decisions had been made by so eminently respectable a court as the Court of Appeals of the State of New York, in which the United States Supreme Court distinctly declines to follow the rulings of the State court, these decisions being made with reference to railroad aid bonds. In Venice v. Murdock, 92 U. S. 494, certain railroad aid bonds issued in 1853 by the town of Venice, New York, were sued upon in the United States Circuit Court for the Northern District of New York. Bonds like these had been held invalid in the Court of Appeals of the State of New York in Starin v. Genoa and in Gould v. Sterling, 23 N. Y. 439, 456, and by numerous subsequent cases in the Court of Appeals in the State of New York. See *infra*, § 856. Notwithstanding this fact, however, these bonds were held good by the Supreme Court of the United States. The court in giving its opinion, says (p. 499): "We are aware that in the State of New York it has been held adversely to the opinions we have expressed. It was so held in Starin v. Town of Genoa.

Justice *Waite* declared¹: "The true rule is to give a change of judicial construction in respect to a statute the same operation on

and in *Gould v. Town of Sterling*, 23 N. Y. 439, 456. In the former case the court rules, that under the act of April 16, 1852 (the same act which conferred powers conditionally upon the supervisors and commissioners of the town of Venice), the onus was on the bondholder to show, in a suit against the town, that two-thirds of the resident taxables had given their written assent to the creation of the bonds. In the latter case a similar decision was given when the bonds had been issued under another act, much like the act of 1852, though differing in some material particulars. These decisions are in conflict with the rulings of the court in *Bissell v. Jeffersonville*, 24 How. (U. S.) 287; *Knox County v. Aspinwall*, 21 How. (U. S.) 539; *Mercer County v. Hackett*, 1 Wall. (U. S.) 83, and other cases which we have cited. They are in conflict also with the decisions in other State courts. . . . But assuming that what was ruled in *Gould v. Sterling* and in *Starin v. Genoa* is still the doctrine of the New York courts, we find ourselves unable to yield to it our assent. It is against the whole current of our decisions, as well as against the decisions made in other States; and we think it is not supported by the soundest reasons." See also to the same effect, *Burgess v. Seligman*, 107 U. S. 20, where the court says: "When contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued." Says Justice *Bradley*: "Federal courts . . . exercise their own judgment . . . always . . . in reference to the doctrines of commercial law." See also to the same effect, *Pine Grove v. Talcott*, 19 Wall. (U. S.) 666, 677, where the court said (p. 677): "It is insisted that the invalidity of the [railroad aid] statute has been determined by two judgments of the Supreme Court of Michigan, and that we are bound to follow those adjudications. We have examined those cases with care. With all respect for the eminent tribunal by which the judgments were pronounced, we must be permitted to say that they are not satisfactory to our minds. We think the dissenting opinion in the one first decided is unanswered. Similar laws have been passed in twenty-one States. In all of them but two it is believed their validity has been sustained by the highest local courts. It is not easy to resist the force of such a current of reason and authority. The question before us belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgment of the courts of the States where the cases arise. It must hear and determine for itself. Here, commercial securities are involved. When the bonds were issued, there had been no authoritative intimation from any quarter that such statutes were invalid. The legislature affirmed their validity in every act by an implication equivalent in effect to an express declaration. And during the period covered by their enactment, neither of the other departments of the government of the State lifted its voice against them. The acquiescence was universal. The general understanding of the legal profession throughout the country is believed to have been that they were valid. The National Constitution forbids the States to pass laws impairing the obligation of contracts. In cases properly brought before us, that end can be accomplished unwarrantably no more by judicial decisions than by legislation. Were we to yield in cases like this to the authority of the decisions of the courts of the respective States, we should abdicate the performance of one of the most important duties with which this tribunal is charged, and disappoint the wise and salutary policy of the framers of the Constitution in providing for the creation of an independent Federal judiciary. The exercise of our appellate jurisdiction would be but a solemn mockery."

It is, therefore, the general and settled rule that the Federal courts should and will follow the decisions which were

¹ *Douglass v. Pike County*, 101 U. S. 677.

contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself; and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment." Hence, when the validity of municipal bonds is at issue, the rights of the parties are to be determined according to *the law as it was judicially construed to be by the State courts* when the bonds in question were put upon the market as commercial paper.¹

in existence when the bonds were issued, if there are any, or, if not, then they should consider the questions for themselves, and they are not bound by any subsequent decisions of the State Supreme Court. Hence, decisions of the Supreme Court of a State *construing* the enabling act made *after* the bonds were issued, do not bind the Federal courts, if such subsequent decisions of the Supreme Court of the State are not in accordance with the general principles of jurisprudence, but the Federal courts may, and should, exercise their own independent judgment. There is a long line of decisions to that effect above cited in the Supreme Court of the United States, and these decisions relating to the construction of statutes are expressly recognized and distinguished by the Supreme Court of the United States in its opinion in *Wilkes County v. Coler*, 180 U. S. 506-531. (On page 519 of the case last cited, this court says, referring to the acts of 1868, 1879, and 1881, as follows: "Observe that the issue is not as to the construction, meaning, or scope of a statute, but whether that which purports to be a legislative enactment ever became a law for any purpose." See also *s. c.* 190 U. S. 107, 111.

If there be any inconsistencies in the decisions of the State courts, the general rule is that the courts of the United States follow the *latest settled adjudication* in preference to the earlier ones. *Wade v. Travis County*, 174 U. S. 499, 508.

This principle also receives some effect in the decisions of the courts of the different States which have under various circumstances recognized the rule that a judicial construction of a statute becomes a part of it, and as to rights which have accrued afterward,

it should be adhered to for the protection of these rights; to divest them by a change of construction is to legislate retroactively. *St. Louis O. & N. R. Co. v. Fowler*, 142 Mo. 670, 687; *Farrior v. New England Mortgage Security Co.*, 92 Ala. 176. And it has been held to apply to questions affecting the validity of municipal bonds. *Cincinnati v. Taft*, 63 Ohio St. 141; *Stallcup v. Tacoma*, 13 Wash. 141, 152.

¹ In *Ohio Life Ins. & Trust Co. v. Debolt*, 16 How. (U. S.) 416, 432, *Taney*, C. J., said: "The sound and true rule is that if the contract, when made, is valid by the laws of the State, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the State, or decision of its courts, altering the construction of the law." In *Kenosha v. Lamson*, 9 Wall. (U. S.) 477, 485, Mr. Justice *Nelson*, speaking for the court, said: "It is urged, also, that the Supreme Court of Wisconsin has held that the act of the legislature conferring authority upon the city to lend its credit, and issue the bonds in question, was in violation of the provisions of the Constitution above referred to. But at the time this loan was made and these bonds were issued, the decisions of the courts of the State favored the validity of the law. The last decision cannot, therefore, be followed." In *Taylor v. Ypsilanti*, 105 U. S. 60, 71, Mr. Justice *Harlan* said on this subject: "The position taken by counsel for the city is that the established settled construction, given by the highest court of a State of the laws and Constitution of that State, must be deemed, in all cases, binding upon the courts of the

This principle of the law has its fullest application and force in actions which have their origin in the Circuit Court of the United States. If the action is brought in a State court, the Supreme Court of the United States is without jurisdiction under the statute which gives it authority to review the judgment of the highest court of a State, if the action of the State court is impeached simply on the ground that it had not determined the rights of the plaintiff in error in accordance with its decisions in force when those rights accrued, but has followed decisions of a contrary character rendered after his rights accrued. A mere change of decision in the State court does not present a case of Federal right under that clause of the Constitution of the United States prohibiting a *State from passing any law* impairing the obligation of contracts; the question of such impairment does not arise unless the judgment complained of may affect some provision of the State Constitution or some enactment claimed by the defeated party to impair the obligation of the particular contract in question.¹ As, however, the circuit courts of the United States are courts of independent jurisdiction in the administration of State laws, co-ordinate with and not subordinate to that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws, they may, in suits within their jurisdiction, properly hold, as in numerous cases the Supreme Court of the United States has held, that the rights of parties arising under contracts not involving questions of a Federal nature, are to be determined in accordance with the settled principles of local law as maintained by the highest court of the State *at the time* such rights

Union; this, because the statute defining and regulating the jurisdiction of the Federal courts declares that the laws of the several States, when they apply, shall constitute rules of decision in cases at common law tried in those courts. This proposition, in the general terms in which it is announced, is undoubtedly supported by the language of some of the opinions which have emanated from this court. But all along through the reports of our decisions are to be found adjudications in which, upon the fullest consideration, it has been held to be the duty of the Federal courts, in all cases within their jurisdiction, depending upon local law, to administer that law, so far as it affects contract obligations and rights, as it was judicially declared to be by the highest court of the State at the time such obligations were incurred or such rights accrued. And

this doctrine is no longer open to question in this court. It has been recognized for more than a quarter of a century as an established exception to the general rule that the Federal courts will accept or adopt the construction which the State courts give to their own Constitution and laws."

The fact that the plaintiff purchased the bonds sued on *after* an adverse decision by the State court rendered subsequently to the making of the bonds, does not preclude him from receiving the benefit of a statutory construction by the State court sustaining the bonds adopted prior to their issue. *Thompson v. Perrine*, 103 U. S. 806; 106 U. S. 589.

¹ *Central Land Co. v. Laidley*, 159 U. S. 103, 111, as explained and distinguished in *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 493. See also *Turner v. Wilkes County*, 173 U. S. 461.

accrued. The statutory provision¹ that the laws of the several States, except where the Constitution or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in courts of the United States in cases where they apply, has not been construed as absolutely requiring conformity in such cases to decisions of the State courts rendered *after* the rights of the parties have accrued under previous decisions of those courts of a contrary character.² It follows, of necessity, that the converse of the principles before laid down is also true; and that if the highest courts of a State have, *before* municipal bonds were issued, held bonds issued under the same or similar circumstances to be invalid, persons *afterwards* taking or dealing in such bonds, including *bona fide* purchasers thereof, are chargeable with knowledge and notice of the principles laid down by the State courts, and in such case the Federal courts will hold, following the decisions of the State courts, that the bonds are invalid.³

§ 900 (516). **Railway Aid Bonds.**— Under the *line of decision in the several States* heretofore adverted to, sustaining the constitutionality of municipal railway aid bonds,⁴ millions upon millions of these securities have been issued by townships, counties, and cities in the different States, and sooner or later their issue has been often followed by attempts to escape payment. The misrepresentations which have oftentimes induced the issue of the bonds, and the disappointment arising from the over-estimated benefits of the railroads to the localities which aided their construction, make the attempts to avoid payment of the bonds not unnatural, and more excusable than they would otherwise be. The judicial history of these attempts is found in the law reports of the different States and in those of the Federal tribunals; and a comparison of their judgments shows such a diversity of opinion upon some important questions connected with such securities as to render it most expedient to refer separately to the decisions of the two classes of courts. It is particularly material to notice with some fulness and care the opinions of the Supreme Court of the United States, since, for the reasons above mentioned, the course of this tribunal and of the State tribunals has been such as to draw to the Federal courts in most of the States nearly all of the litigation arising from this source. Wherein the State courts and the Federal courts differ,

¹ U. S. Rev. St. § 721.

² *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 493.

³ *German Savings Bank v. Franklin County*, 128 U. S. 526, 538.

⁴ *Ante*, § 313 *et seq.*

and wherein they agree, will best appear by referring to some of the principal adjudications.

§ 901 (517). **Iowa Municipal Bond Cases.** — In the well-known *Iowa municipal railway aid bond cases*,¹ the bonds were issued *after* the State Supreme Court had affirmed the constitutional power of the legislature to authorize their issue, and *before* the same court had reversed its holding in this respect; and in these cases the Supreme Court of the United States held it was at liberty to take, and did take, the view which obtained in the highest judicial tribunal of the State *at the time the bonds were issued*; and hence it adjudged that the bonds were binding upon and enforceable against the municipalities and counties, although the Supreme Court of the State was at the same time holding that, under the Constitution and laws of Iowa, the bonds were utterly void. Subsequently the Supreme Court of the United States went further, and held that such bonds in the hands of innocent holders are valid, although the State Supreme Court had held otherwise, the latter basing its judgment, however, upon the general principles of the law, and not upon any special and peculiar provision of the Constitution of the State.²

§ 902. **When Bonds are deemed to be "issued."** — Under varying circumstances a question arises as to the *date of the issue* of bonds for the purpose of determining the validity of the power to issue, the regularity of the proceedings, or the rights of the purchaser. It may be laid down that as a general rule the *date of delivery* of the bonds by the municipality to the creditor or purchaser is to be regarded as the date of issue.³ But this meaning is not uniform and

¹ *Gelpcke v. Dubuque*, 1 Wall. 175; *Homson v. Lee County*, 3 Wall. 327; *in German Sav. Bank v. Franklin Co.*, *Lavemeyer v. Iowa County*, *ib.* 294; 128 U. S. 526; *Parmelee v. Chicago*, 60 Ill. 267.

Burlington, 4 Wall. 270; *ante*, § 900; *see County v. Rogers*, 7 Wall. 175; *Watts v. Muscatine*, 8 Wall. 575. King

Wilson, 1 Dillon C. C. 555, gives a review of the decisions of the State and federal courts upon the subject of municipal railway aid bonds in Iowa.

That obligations of contracts cannot be impaired by subsequent decisions, see also *Chicago v. Sheldon*, 9 Wall. 50; *Jenisha v. Lamson*, *ib.* 477; *County*

Randolph v. Post, 93 U. S. 502; *American L. Ins. Co. v. Bruce*, 105 U. S. 28; *Pana v. Bowler*, 107 U. S. 529; *regon v. Jennings*, 119 U. S. 74; *Concord v. Robinson*, 121 U. S. 165.

² *Olcott v. Fond du Lac*, 16 Wall. 678; *ante*, § 886, note.

³ *Kent v. Dana*, 100 Fed. Rep. 56; *Corning v. Meade County*, 102 Fed. Rep. 57; *Perkins County v. Graff*, 114 Fed. Rep. 441; *Chicago B. & Q. R. Co. v. Dundy County (Neb.)*, 91 N. W. Rep. 554; *School Dist. v. First Nat. Bank*, 19 Neb. 89. See also *Anthony v. Jasper County*, 101 U. S. 693; s. c. *ante*, § 888; *Young v. Clarendon Township*, 132 U. S. 340; *Onslow County v. Tollman*, 145 Fed. Rep. 753, 769; *Fletcher v. Hickman*, 136 Fed. Rep. 568, 571. In *Brownell v. Greenwich*, 114 N. Y. 518, 529, the court

unvarying. It is always a question of the intention of the legislature to be derived from a consideration of the entire statute in which the term is used. It is true that no obligation is created upon a bond until it has been sold and delivered, but "issued" as used in an act concerning municipal bonds is a relative term. It may mean *executed* (i. e., signed and sealed), under some circumstances, and *delivered* under others. Hence, municipal bonds legally signed, certified and registered, but not yet sold, have been held to be "issued" for some purposes.¹

§ 903 (518). **General Result stated.** — As preliminary to a more immediate view of some of the leading cases decided by the Supreme Court of the United States upon municipal railway aid securities, it may be observed that the *general result of its decisions* has been very clearly summarized in one of its judgments relating to bonds of this character. "Bonds, payable to bearer," says the learned justice who delivered the opinion of the court, "issued by a municipal corporation to aid in the construction of a railroad, if issued in pursuance of a power conferred by the legislature, *are valid commercial instruments*; but if issued by such a corporation which possessed *no power* from the legislature to grant such aid, they are invalid, even in the hands of innocent holders. Such a power is frequently conferred *to be exercised in a special manner*, or subject to certain regulations, conditions, or qualifications; but if it appears that the bonds issued show by their *recitals* that the power was exercised in the manner required by the legislature, and that the bonds were issued in conformity with those regulations and pursuant to those conditions and qualifications, proof that any or all of those recitals are incorrect will not constitute a defence to the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition, or qualification which it is alleged was not fulfilled."²

said: "Executing is not issuing, for they might be fully executed but never issued. . . . The bonds had no legal inception and could not become valid obligations aside from any other question until actually delivered for a valuable consideration. Under the circumstances, we think that the delivery of the bonds to the plaintiff determines the date when the bonds were issued."

¹ Potter v. Lainhart, 44 Fla. 647; Kansas Mut. Life Ins. Co. v. Cookson, 22 Tex. Civ. App. 64, 73; Moller v. Galveston, 23 Tex. Civ. App. 603; Yesler v. Seattle, 1 Wash. St. 306, 322. See also May v. Cass County, 12 N. Dak. 137.

² St. Joseph Township v. Rogers, 16 Wall. 644, opinion by Clifford, J. In general throughout this work the author has not referred at length in the text to particular cases, but the importance of this subject, as well as the

It is definitely settled by this court that mere *irregularities* in the exercise of the power will not avail as a defence against an innocent holder for value, and that the only defence open against such a holder is the *want of power to issue the bonds*. Obviously, then, the most important inquiries to be considered are those which relate to the question, *when* the power exists or arises; *who* is to decide whether it existed or had arisen when the bonds were issued; and what will *estop* the corporation which issued them to set up in defence a non-compliance with antecedent or preliminary conditions: and it is these inquiries that we shall seek to illustrate by a reference to the leading decisions of the courts in cases which have arisen for judgment.

§ 904 (519). **Condition precedent to Exercise of Power; Popular Vote; Non-compliance with Condition Precedent; Recital; restraining Issue of Bonds.** — Generally, the power of the municipality, county, or other local civil subdivision of the State, to subscribe for the stock of railway companies or for some other purpose, and issue bonds in payment, is conferred upon certain officers, not absolutely but *on the condition of a previous approving popular vote*, or the assent of a majority or of some greater proportion of the resident taxpayers. If the sanction is given, then the officers, by the usual legislation, are authorized to make the subscription and to issue bonds in payment therefor. A very common defence to such bonds consists in a denial that the condition precedent, *i. e.*, the approving vote, the assent of the taxpayers, or whatever else it may be, has in fact been complied with; and hence, as contended, the power to issue the bonds did not exist, or never arose.¹ But *power* in such cases means an act of the legislature giving the authority, not the *manner* in which such authority is carried into execution.

Where the legislation is of this character, — namely, requiring compliance with some such condition before issuing the bonds, — the Supreme Court of the United States does not hold, as we understand its decisions, that the power can be rightfully exercised unless

impossibility of otherwise presenting it with the requisite fulness and accuracy, has induced him to depart to some extent from his usual course.

¹ Mere informalities in the returns of such an election not prejudicing substantial rights, failing to comply with statutory requirements which are directory only, and clerical errors, will not defeat an appropriation in aid of a railroad. *Irwin v. Lowe*, 89 Ind. 540.

Further, as to statutory requirements in respect of municipal bond elections, see *State v. Harris (Mo.)*, 23 Eng. & Am. Corp. Cases, 43, 47, note, and cases. In the case of *State v. Harris, supra*, the statute of Missouri was construed to require two-thirds of the qualified voters of the county to attend not merely two-thirds of the votes actually cast. But see *ante*, §§ 69, note, 317, note. Index — *Elections; Majority*.

the condition precedent has been performed. As between the immediate parties, the municipality and the railroad company, doubtless, the inquiry is open, and fully open, whether the condition on which the rightful exercise of the power depends has been complied with; and if it has not been, on due application the issue of the bonds will be enjoined,¹ or if they are in the hands of the original party or of holders with notice, an action to enforce the bonds may, if no estoppel exists, be successfully defended.² Want of power is a good defence against a railroad company, endeavoring to enforce by *mandamus* the execution and delivery to it of such bonds by the municipality.³ In a suit by the payee, with notice, or by a person not an innocent holder, there is no legal ground for maintaining that the action of the local officers in issuing the bonds, or any recital that they may make therein, will conclude the question whether the condition precedent has been performed; and there is no decision of the Supreme Court of the United States in conflict with this statement of the law, but several which distinctly establish it.⁴

§ 905 (520). **Estoppel by Recital to show Non-compliance with Conditions Precedent; Knox County v. Aspinwall.** — When the bonds have been issued and sold in the market, and before maturity have come for value, and without notice, into the hands of innocent holders, another element of great importance is, according to the settled doctrine of the Supreme Court, introduced into the transaction, as respects compliance with conditions precedent, — *the element of estoppel*. This is so important in its practical relations to the

¹ So where a city voted to issue bonds in aid of a railway when the track was laid and the cars running on sections of ten miles each, "provided, the eastern terminus, general offices, and headquarters of said railroad should be in" the city, the court refused a writ of *mandamus* to compel their issue, for the reason that it did not appear that these conditions had been fulfilled. *State v. Minneapolis*, 32 Minn. 501.

As to the duty of enjoining the issue of bonds on the pain of being estopped to set up irregularities in the exercise of the power, see *post*, §§ 950, 951.

² *Chambers County v. Clews*, 21 Wall. 317, 321; *Madison v. Smith*, 83 Ind. 502, approving the text.

³ *Lamoille Valley R. Co. v. Fairfield*, 51 Vt. 257.

⁴ *Chambers County v. Clews*, 21 Wall. (U.S.) 317. That court has several times adverted to the duty of the corporation or taxpayer to interfere by injunction to restrain the issue of bonds where the statute has not been complied with. *Injunction lies to restrain issue of bonds where there has been a material departure from the statute*. *Union Pac. R. Co. v. Lincoln County*, 3 Dillon C. C. 300; *Same v. Merrick County*, *ib.* 359; *State v. Montgomery*, 74 Ala. 226; *McClure v. Oxford Township*, 94 U. S. 429; *Portland & Oxford Central Railroad Co. v. Hartford*, 58 Me. 23. "In cases arising before the issue of the bonds, estoppel has no place, and the sound doctrine is, that compliance with all substantial or material conditions is essential." *Ib.* *Ante*, § 323, and cases cited.

subject as to require careful and minute consideration. Conceding that the rightful exercise of the power to issue the bonds depends upon a condition precedent, for example, a popular vote in favor of the proposition, *when, how, and by whom is it to be ascertained whether the condition precedent has been performed?* Is it to be ascertained, once for all, before the bonds are issued? Or is it open to inquiry and contestation in every action upon a coupon or bond? Is the municipality estopped, in favor of a *bona fide* holder of the bonds, from setting up this defence? and in what cases will the estoppel be available in favor of the holder? These are grave questions, and cases involving them have during the last fifty years been frequently before the Supreme Court, — the first and leading case being *The Commissioners of Knox County v. Aspinwall*.¹

§ 906 (521). *The Case of Knox County v. Aspinwall*,² respecting the liability of municipal and public corporations on their negotiable railway aid bonds, deserves to be particularly noticed, as it stands in the order of time at the head of the important line of decisions of the Supreme Court on this subject. The action was by a *bona fide* holder for value of certain coupons attached to negotiable bonds issued by Knox County, Indiana, in payment of a subscription to railroad stock. The defence was that the bonds were not binding upon the county because the county commissioners possessed no power to execute them. By statute, the county commissioners were authorized “to take stock in the railroad, payable in county bonds, such as had been issued, *provided a majority of the qualified voters of said county, at a designated election, shall vote for the same.*” The ground upon which the want of power to execute the bonds was placed by the county was the omission to comply with the requirement of the statute in respect to the *notices for the election* (which the statute provided should be held on a fixed day), at which a vote was to be taken for and against a subscription to the stock of the railroad company. It was admitted in the case that the notices, such as the statute prescribed, were not given; and the court seemed to concede “that this would be decisive against the authority of the county to issue the bonds, were it not for the question which underlaid it; and that is, Who is to determine whether or not the election has been properly held, and a majority of the votes cast in favor of the subscription? . . . Is it,” the court inquires, “to be determined by the

¹ *Knox County v. Aspinwall*, 21 How. 539. See further reference to this case, *infra*, § 909, note.

² 21 How. 539.

court, in this collateral way, in every suit upon the bond, or coupon attached, or by the board of commissioners, as a duty imposed upon it before making the subscription?" The court was of the opinion, and so decided, that the county commissioners were, under the enabling statute, the proper judges whether or not a majority of the votes in the county had been cast in favor of the subscription to the stock, and whether or not the election had been properly held, and that these questions cannot be determined collaterally in an action upon the bonds or coupons, at least when brought by a *bona fide* holder for value. The court, in assigning the reasons for this holding, speaking through Mr. Justice Nelson, says: "The right of the board [of county commissioners] to act in execution of the authority [conferred by the statute] is placed upon the fact that a majority of the votes had been cast in favor of the subscription; and to have acted without first ascertaining it, would have been a clear violation of duty; and the ascertainment of the fact was necessarily left to the inquiry and judgment of the board itself, as no other tribunal was provided for the purpose. The board was one, from its organization and general duties, fit and competent to be the depository of the trust thus confided to it. The persons composing it were elected by the county, and it was already invested with the highest functions concerning its general police and fiscal interests. . . . We do not say," he adds, "that the decision of the board would be conclusive in a direct proceeding to inquire into the facts previously to the execution of the power, and before the rights and interests of third parties had attached; but after the authority has been executed, the stock subscribed, and the bonds issued and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question. Much less can it be called in question to the prejudice of a *bona fide* holder of the bonds in this collateral way."¹

§ 907 (522). **Comments on Knox County v. Aspinwall.** — The author ventures to remark that he believes the decision upon the special facts of the case to be right, and for the reasons thus clearly stated by this able and experienced judge. But as sustaining the decision, a further position by way of argument is taken, which, unless it is to be understood in the limited sense herein suggested, he considers to be untenable, of a most dangerous nature, and subversive of an important principle in the law of agency applicable both to private and public agents. That position is this: that a purchaser of the bonds had a right to assume, from the mere fact that they

¹ Knox County v. Aspinwall, 21 How. (U. S.) 539, 544; *infra*, § 909, note.

were issued, that the condition on which the county was authorized to issue them had been complied with, and that a *recital* in the bonds that they were issued in pursuance of the statute amounts to an *estoppel in pais* upon the corporation, of which the officers issuing the bonds were the public agents. That this is the position assumed by the court will appear by the following extract: "Another answer," continues Mr. Justice Nelson, "to this ground of defence is, that the purchaser of the bonds had a right to assume that the vote of the county, which was made a condition to the grant of the power, had been obtained, from the fact of the subscription by the board to the stock of the railroad company and the issuing of the bonds. The bonds, on their face, import a compliance with the law under which they were issued. 'This bond,' we quote, 'is issued in part payment of a subscription of \$200,000, by the said Knox County, to the capital stock, &c., by order of the board of commissioners, in pursuance of the third section of the act, &c., passed by the general assembly of the State of Indiana, and approved Jan. 15, 1849.' *The purchaser was not bound to look further for evidence of a compliance with the conditions to the grant of the power.*"¹ This principle

¹ *Ib.* 545. In the case before the court there was an election, and the county commissioners were the judges of the result, and the remark that the purchaser was not bound to look beyond the recital is doubtless correct. But if by the remark quoted in the text it is meant that where the power to issue bonds is given upon the condition of a previous majority vote in favor of the proposition, the public or municipal officers can, where in point of fact *no vote has been taken or the proposition has been voted down*, bind the county by the issue of bonds with false recitals therein, the author feels bound respectfully to suggest that, in his judgment, the principle is unsound, and certainly it is one which will entail needless and incalculable injury upon public and municipal corporations. These securities, it is true, are intended to be sold in distant markets, and therefore it cannot reasonably be required that purchasers shall be affected with irregularities, but they ought to be held to ascertain whether the substantial precedent conditions of the power have been, in fact, complied with, and it ought not to be in the power of public officers, unless the decision of this question is by statute expressly or at least plainly committed to them, to bind the cor-

poration for which they act by their mere statements of what is in point of fact untrue. So stood the foregoing note in the previous editions. The suggestion of the author that recitals ought not to estop in cases where the required election was not held at all or attempted to be, seems to be without foundation as inconsistent with the decision of the United States Supreme Court in *Evansville v. Dennett*, 161 U. S. 434. See on this point the answers to certified questions 3, 4, and 5 where recitals were held to cover the defect that *no petition* to the council for an election was in fact presented as required by the charter of the city. See also cases cited in the next note.

On grounds similar to those above suggested it has been held by the Supreme Court of *Missouri* that bonds issued where an election is required, but none ever held and no vote taken, are void, because of want of power to issue them, — void in the hands of all persons; but they may be validated by the legislature. *Steines v. Franklin County*, 48 Mo. 167. *Wagner, J.*, in this case reviews the prior adjudications of the United States Supreme Court and of the Supreme Court of the State of *Missouri*, and limits the language used by the judges to the facts

has been reiterated and this case frequently referred to and followed, and one of the two grounds on which it rests, if not indeed both of them, has had the uniform and continuous approval of the court, as will be seen by its subsequent judgments.¹

before them, and distinguishes between the case of irregularities in an election and no election whatever. See also *Carpenter v. Lathrop*, 51 Mo. 483. But see text, § 909, and cases cited in the next note to the present section.

¹ The cases in which Knox County Com'rs v. Aspinwall has been cited and followed or applied, are: *Bissell v. Jeffersonville*, 24 How. 287; *Woods v. Lawrence County*, 1 Black (U. S.), 386; *Moran v. Miami County*, 2 Black, 722, 724; *Mercer County v. Hackett*, 1 Wall. 83; *Gelpcke v. Dubuque*, *Id.* 175, 203; *Van Hostrup v. Madison*, *Id.* 291; *Meyer v. Muscatine*, *Id.* 384, 393; *Cincinnati v. Morgan*, 3 Wall. 275; *Rogers v. Burlington*, *Id.* 654; *Marshall County Sup. v. Schenck*, 5 Wall. (U. S.) 772; *Lexington v. Butler*, 14 Wall. (U. S.) 282; *Grand Chute v. Winegar*, 15 Wall. 355; *Lynde v. Winnebago County*, 16 Wall. 6; *Kenicott v. Jefferson County*, *Id.* 452; *St. Joseph Tp. v. Rogers*, *Id.* 644; *Pendleton County v. Amy*, 13 Wall. 297; *Coloma v. Eaves*, 92 U. S. 484; *Venice v. Murdock*, *Id.* 494; *Moultrie v. Rockingham T. C. Sav. Bank*, *Id.* 631; *Marcy v. Oswego Tp.*, *Id.* 637; *Humboldt Tp. v. Long*, *Id.* 642; *Randolph County v. Post*, 93 U. S. 502; *Callaway County v. Foster*, *Id.* 567; *Leavenworth County v. Barnes*, 94 U. S. 70; *Douglas County Com'rs v. Bolles*, *Id.* 202; *Johnson County Com'rs v. January*, *Id.* 202; *Same v. Thayer*, *Id.* 631; *Scotland County v. Thomas*, *Id.* 682; *East Lincoln v. Davenport*, *Id.* 801; *Cass County v. Johnston*, 95 U. S. 360; *San Antonio v. Mehaffy*, 96 U. S. 312; *Same v. Barnes*, *Id.* 315; *Warren County v. Marcy*, 97 U. S. 96; *Macon County v. Shores*, *Id.* 272; *Nauvoo v. Ritter*, *Id.* 389; *Daviess County v. Huidekoper*, 98 U. S. 98; *Schuyler County v. Thomas*, *Id.* 169; *Hackett v. Ottawa*, 99 U. S. 86; *Weyauwega v. Ayling*, *Id.* 112; *Calhoun County Sup. v. Galbraith*, *Id.* 214; *Wilson v. Salamanca*, *Id.* 499; *Orleans v. Platt*, *Id.* 676 (citing among other cases *Royal British Bank v. Turquand*, 6 El. & Bl. 325); *Lyons v. Munson*, 99 U. S. 684; *Anthony v. Jasper County*, 101 U. S. 693; *Roberts v. Bolles*, *Id.* 119; *Pompton v. Cooper*

Union, *Id.* 196; *Douglass v. Pike County*, *Id.* 677; *Darlington v. Jackson County*, *Id.* 688; *Foote v. Pike County*, *Id.* 688; *Menasha v. Hazard*, 102 U. S. 81; *Ottawa v. Portsmouth First Nat. Bank*, 105 U. S. 342; *Toledo Northern Bank v. Porter Tp.*, 110 U. S. 608; *Cary v. Ottawa*, 8 Fed. Rep. 199; *Third Nat. Bank of Syracuse v. Seneca Falls*, 15 Fed. Rep. 783; *Nicolay v. St. Clair County*, 3 Dillon C. C. 163; *Huidekoper v. Buchanan County*, *Id.* 175; *Mygatt v. Green Bay*, 1 Biss. C. C. 292; *Smith v. Clark County*, 54 Mo. 58, 81; *St. Louis v. Shields*, 62 Mo. 247; *Wilkinson v. Peru*, 61 Ind. 1; *Black v. Cohen*, 52 Ga. 621; *Shorter v. Rome*, 52 Ga. 621; *Webb v. Herne Bay Com'rs*, L. R. 5 Q. B. 642; *In re Imperial Land Co. of Marseilles*, L. R. 11 Eq. 478; *Bargate v. Shortridge*, 5 Cl. H. L. C. 297; and a certificate of the proper officer that the bonds have been duly issued and the signatures are genuine, and that the same have been duly registered in his office according to law, cannot be contradicted by evidence that there was actually no registration in his office. *Rock Creek Tp. v. Strong*, 96 U. S. 271.

The foregoing cases, and there are others, hold the general proposition that a *bona fide* holder of a negotiable municipal bond is protected by a recital therein that an election has been duly held or that a statute has been complied with or that any act has been done, the performance of which is entrusted to the authorities issuing the bonds.

Estoppel to set up irregularities in issue of bonds by reason of the subsequent payment of interest. *Marshall County Sup. v. Schenck*, 5 Wall. 772; compare *Marsh v. Fulton Co.*, 10 Wall. 676; *Eminence v. Grasser's Exrs.*, 81 Ky. 52; *Aroma v. Auditor*, 15 Fed. Rep. 843; *Oswego First Nat. Bank v. Walcott*, 7 Fed. Rep. 892; *Whiting v. Potter*, 2 Fed. Rep. 517; *Parkersburg v. Brown*, 106 U. S. 487. See also *Portsmouth Sav. Bank v. Springfield*, 4 Fed. Rep. 276.

Estoppel by former final judgment on demurrer. Where, in an action upon coupons from bonds issued in aid of a

§ 908 (523). **Author's Statement of Rule.** — Notwithstanding the broad language in some of the opinions, to the effect that where under any circumstances the power exists in the corporation to issue negotiable securities, the *bona fide* holder has the right to presume that they were duly issued, yet when the facts of the cases in which such language is used are considered, we are unable, after a careful review of the decisions of the Supreme Court, to say that they lay down the doctrine that *merely* by recital in the bonds the corporation will, under all circumstances, in favor of an innocent holder, be estopped from showing that in point of fact no election whatever was holden, or that any other condition precedent to the exercise of the power has not been complied with. If upon a true construction of the legislative enactment conferring the authority the corporation or certain officers, or a given body or tribunal, are invested with power to decide whether the condition precedent has been complied with, then it may well be that their recital of their determination of a matter *in pais* which they are authorized to decide will, in favor of the bondholder for value, bind the corporation.¹

railway, a final judgment in favor of the municipality was entered upon plaintiff's demurrer to its answer setting up facts showing that the bonds were *never executed by it*, the plaintiff was held to be estopped to deny the matters so determined when suing the same municipality upon other coupons from the same bonds subsequently maturing. *Bissell v. Spring Valley Township*, 124 U. S. 225; compare *Cromwell v. Sac County*, 96 U. S. 51. The former action of *Bissell* on other coupons of the same issue of bonds is reported in 110 U. S. 162. After the opinion of the Supreme Court in the case of the same plaintiff (reported 124 U. S. 25) had been printed, and during the term, the author, having been employed as counsel for the plaintiff, filed a petition and argument for a rehearing of the opinion holding the judgment in the former action to be an estoppel. He urged, upon an examination of the pleading in the first record, (a) that it was *not* adjudged therein that the bonds were never signed by the proper officer, but that it was only adjudged that if the bonds were registered and purchased by the plaintiff, as alleged in his petition, this is in law no answer to the plea that the clerk did not sign the bonds or authorize any one else to sign them for him; (b) that the adjudication in the first suit is no bar to a suit upon other

coupons when the plaintiff proposes to establish as a fact for the first time that the clerk, being ill, did authorize the bonds to be signed in his name by his brother, who was also his deputy, and that they were signed accordingly. The petition for a rehearing was overruled, and no further opinion was filed. The importance and difficulty of the question seem to justify this further statement concerning the cause which does not appear in the reports. The extent to which the doctrine of estoppel is *seemingly* carried in this case, the author suggests with deference, goes beyond the line of the principle of previous adjudications in the same court, and to an extent which deserves further consideration as to its soundness. Since the foregoing was written the court has held that judgment in favor of the plaintiff on certain coupons against the municipality does not estop the municipality in a subsequent action by the same plaintiff on other coupons of the same bonds from making a defence which was *not made or adjudicated* in the first action. *Nesbit v. Riverside Ind. Dist.*, 144 U. S. 610.

Estoppel by retaining *proceeds of bonds*. *Pendleton County v. Amy*, 13 Wall. 297. *Post*, § 950.

¹ The language in this section stands as in a previous edition; but it must now be regarded as authoritatively

§ 909 (524). **Qualification of Last Section by the Supreme Court.** — "This," says Mr. Justice Strong, in *Coloma v. Eaves*,¹ referring to the language of the author in the last preceding section, "is a very cautious statement of the doctrine" of the Supreme Court. And he adds: "It may be re-stated in a slightly different form. Where legislative authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact and binding upon the municipality, for the recital is itself a decision of the fact by the appointed tribunal."² In *Bissell v. Jeffersonville*, it appeared that the common council of the city were authorized by the legislature to subscribe for stock in a railroad company, and to issue bonds for the subscription, on the *petition of three-fourths of the legal voters of the city*. The council adopted a resolution to subscribe, reciting in the preamble that more than three-fourths of the legal voters had petitioned for it, and authorized the mayor and city clerk to sign and deliver bonds for the sum subscribed. The bonds recited that they were issued by authority of the common council, and that three-fourths of the legal voters had petitioned for the same, as required by the charter. In a suit subsequently

qualified by the judgment of the Supreme Court of the United States, referred to in § 909. See *Oregon v. Jennings*, 119 U. S. 74, where Mr. Justice *Blatchford* said: "The supervisor and town clerk . . . were the persons entrusted with the duty of deciding, before issuing the bonds, whether the conditions determined at the election existed. If they have certified to that effect in the bonds, the town is estopped from asserting, as against a *bona fide* holder, that the conditions prescribed by the popular vote were not complied with." In this case the terms of the vote were that the bonds should not be issued and the vote should be void unless the road should be completed by a specified day, and the bonds specially recited that it was so completed, though the fact was otherwise. *Oregon v. Jennings* was distinguished in *German*

Savings Bank v. Franklin County, 128 U. S. 526, 543.

¹ *Coloma v. Eaves*, 92 U. S. 484.

² The proposition here stated has been re-asserted and applied in subsequent cases. *Anderson County v. Beal*, 113 U. S. 227; *Dixon County v. Field*, 111 U. S. 83; *Northern Bank of Toledo v. Porter Tp.*, 110 U. S. 608; *Buchanan v. Litchfield*, 102 U. S. 278; *Lane v. Embden*, 72 Me. 354; *Anderson Co. v. Houston & G. N. R. R. Co.*, 52 Tex. 228; *Carrier v. Shawangunk*, 10 Fed. Rep. 220; *Hopper v. Covington*, 8 Fed. Rep. 777; *Irwin v. Town of Ontario*, 3 Fed. Rep. 49; *Phelps v. Lewiston*, 15 Blatchf. 131. On the other hand, a recital of facts which the officers had no authority to determine, or a recital of matters of law, will not estop the municipal corporation. *Dixon County v. Field*, 111 U. S. 83. See this case, *post* § 922.

brought by an innocent holder for value, to recover the amount of unpaid coupons for interest, it was held inadmissible for the defendants to show that three-fourths of the legal voters of the city had not signed the petition for the stock subscription. A similar ruling was made in *Van Hostrup v. Madison City*, and in *Mercer County v. Hackett*. The same principle has recently been asserted in this court, after very grave consideration, and it must be considered as settled. In *St. Joseph Township v. Rogers*, it is stated thus: 'Power to issue bonds to aid in the construction of a railroad is frequently conferred upon a municipality in a special manner, or subject to certain regulations, conditions, or qualifications; but if it appears by their recitals that the bonds were issued in conformity with such regulations and pursuant to such conditions and qualifications, proof that any or all these recitals were incorrect will not constitute a defence for the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition, or qualification which it is alleged was not fulfilled.' There is nothing in the case of *Marsh v. Fulton County* at all inconsistent with the rule thus asserted. In that case *there were no recitals* in the bonds, and there was no decision that the conditions precedent to a subscription, or to the gift of authority to subscribe, had been performed. The question was, therefore, open. What we have said disposes of the present case without the necessity of particular consideration of the matters urged in the argument of the defendant below. It was inadmissible to show what was attempted to be shown; and even if it had been admissible, the effort to assimilate the case to *Marsh v. Fulton County* would fail. There the subscription was for the stock of a different corporation from that for which the people had voted."¹

¹ *Town of Coloma v. Eaves*, 92 U. S. 484. In this case, legislative authority was given to the town to make the subscription and issue the bonds on the previous sanction of a popular vote, to be ascertained, as the court construed the enactment, by the officers of the town, who were empowered to execute the bonds. The bonds were executed in due form by the proper officers, and duly registered with the auditor of State. They contained the recital that they "*are issued under and by virtue of the act incorporating the railroad company*," approved March 24, 1869, "*and*

in accordance with the vote of the electors of said township of Coloma, at a regular election held July 28, 1869, in accordance with said law."

The scope and effect of the doctrine of the court are shown by the brief separate opinion in the case, given by Mr. Justice Bradley, who says:

"I dissent from the opinion of the court in this case, so far as it may be construed to reaffirm the first point asserted in the case of *Knox County v. Aspinwall*, 21 How. (U. S.) 539, to wit, that the mere execution of a bond by officers charged with the duty of ascer-

§ 910 (525). **Estoppel by Recital; Failure to give Notice of Election, or Notice for the Required Time.** — As showing the application and

taining whether a condition precedent has been performed is conclusive proof of its performance. If, when the law requires a vote of taxpayers before bonds can be issued, the supervisor of a township, or the judge of probate of a county, or other officer or magistrate, is the officer designated to ascertain whether such vote has been given, and is also the proper officer to execute and who does execute the bonds; and if the bonds themselves contain a statement or recital that such vote has been given, then the *bona fide* purchaser of the bonds need go back no further. He has a right to rely on the statement as a determination of the question. But a mere execution and issue of the bonds without such recital is not, in my judgment, conclusive. It may be *prima facie* sufficient; but the contrary may be shown. This seems to me to be the true distinction to be taken on this subject, and I do not think that the contrary has ever been decided by this court. There have been various *dicta* to the contrary, but the cases, when carefully examined, will be found to have had all the prerequisites necessary to sustain the bonds, according to my view of the case. This view was distinctly announced by this court in the case of *Lynde v. The County of Winnebago*, 16 Wall. 6. In the case now under consideration, there is a sufficient recital in the bond to show that the proper election was held and the proper vote given; and the bond was executed by the officers whose duty it was to ascertain these facts. On this ground, and this alone, I concur in the judgment of the court."

In the same case Mr. Justice *Strong*, in the main opinion, after resting the judgment on the principle stated in the text (§ 909), makes this reference to the case of *Knox County v. Aspinwall*:

"Indeed, some of our decisions have gone farther. In the leading case of *Knox County v. Aspinwall*, 21 How. (U. S.) 539, the decision was rested upon two grounds. One of them was that the mere issue of the bonds, containing a recital that they were issued under and in pursuance of the legislative act, was a sufficient basis for an assumption by the purchaser that the conditions on which the county (in that case) was authorized to issue them had been

complied with, and it was said the purchaser was not bound to look farther for evidence of such compliance, though the recital did not affirm it. This position was supported by reference to *The Royal British Bank v. Turquand*, 6 Ellis & Blackburn, 327, a case in the Exchequer Chamber which fully sustains it, and the decision in which was concurred in by all the judges. This position taken in *Knox County v. Aspinwall*, 21 How. (U. S.) 539, has been more than once reaffirmed in this court. It was in *Moran v. Miami County*, 2 Black (U. S.), 722; in *Mercer County v. Hackett*, 1 Wall. (U. S.) 83; in *Marshall County Supervisors v. Schenck*, 5 Wall. (U. S.) 772; and in *Meyer v. Muscatine*, 1 Wall. (U. S.) 384. It has never been overruled, and whatever doubts may have been suggested respecting its correctness to the full extent to which it has sometimes been announced, there should be no doubt of the entire correctness of the other rule asserted in *Knox County v. Aspinwall*, 21 How. (U. S.) 539. That, we think, has been so firmly seated in reason and authority that it cannot be shaken."

In further explanation we may add that the *recital* in *Knox County v. Aspinwall*, 21 How. (U. S.) 539, was in these words: "This bond is issued in part payment of a subscription of \$200,000, by the said Knox County, to the capital stock, &c. by order of the board of commissioners, in pursuance of the third section of the act, &c., approved January 15, 1849." The act required the previous sanction of a majority of the qualified voters of the county, and the defence was failure to comply with the statute in respect to the *notices* for the election. And the proposition which has been doubted elsewhere, and from which Mr. Justice *Bradley* dissents, is contained in the following sentence, extracted from the opinion of Mr. Justice *Nelson* in that case, who, after quoting the foregoing recital in the bond (which, it will be seen, does not *expressly* state that there was an election), says: "The purchaser was not bound to look further for evidence of a compliance with the conditions to the grant of the power." In *Moran v. Miami County*, 2 Black (U. S.), 722, 732, the court say: "We

effect of the doctrine stated in the preceding sections as to compliance with conditions precedent, — particularly in respect of the very common one of a previous election, or the assent of a given proportion of the taxpayers, — a brief reference may be made to some of the leading decisions of the Supreme Court, in which it is evident that the whole subject underwent thorough consideration. In *Humboldt Township v. Long*, bonds issued under legislative authority, requiring a popular vote at an election of which thirty days' notice was to be given, and which contained a recital (made by the officers having the power, *as construed*, to determine whether the conditions of fact had been complied with, and to issue the bonds) to the effect that they were "issued *in pursuance of and in accordance* with the act of the legislature," stating it, were held not to be invalid in the hands of a holder for value, before due, without notice, *because the election was held within less than thirty days* after the date of the order providing for it.¹ The principle adopted, and the reasoning of the court by which it is sustained,

think and adjudge that the recitals in the bonds are conclusive [of compliance with the precedent condition], constituting an estoppel *in pais* upon the defendants in this suit." Other cases to the same effect in the Supreme Court will be adverted to as we proceed. In *Marcy v. Oswego Township*, 92 U. S. 637, the doctrine as contained in the text (§ 909) was reasserted almost in the same language.

¹ *Humboldt Township v. Long*, 92 U. S. 642. The court thus state the grounds of its decision: "The board of county commissioners, who caused the bonds to be issued, were constituted the authority to determine whether the conditions of fact, made by the statute precedent to the exercise of the authority granted to execute and issue the bonds, had been performed, and their recital in the bonds issued by them is conclusive in a suit against the township brought by a *bona fide* holder." (So held also in *Marcy v. Township of Oswego*, 92 U. S. 637.) "In so ruling we but decided what had often before been decided, and what ought to be regarded as a fixed rule. Applying it to the solution of the question now before us, it is plain that the bonds are not invalid because *all the notice* of the popular election was not given which the legislative act directed. The election was a step in the process of execution of the power granted to issue bonds

in payment of a municipal subscription to the stock of a railroad company. It did not itself confer the power. Whether that step had been taken or not, and whether the election had been regularly conducted, with sufficient notice, and whether the requisite majority of votes had been cast in favor of a subscription, and consequent bond issue, were questions which the law submitted to the board of county commissioners, and which it was necessary for them to answer before they could act. In the present case the board passed upon them and issued the bonds, asserting by the recitals that they were issued 'in pursuance of and in accordance with the act of the legislature.' Thus the plaintiff below took them, without knowledge of any irregularities in the process through which the legislative authority was exercised, and relying upon the assurance given by the board that the bonds had been issued in accordance with the law. In his hands, therefore, they are valid instruments." See *Town of Elmwood v. Marcy*, 92 U. S. 289; *St. Joseph Township v. Rogers*, 16 Wall. 644; *Anderson County v. Beal*, 113 U. S. 227; *Lincoln v. Cambria Iron Co.*, 103 U. S. 412; *American L. Ins. Co. v. Bruce*, 105 U. S. 328, distinguished in later case of *German Sav. Bank v. Franklin County*, 128 U. S. 526, 541; *ante*, § 901, note.

lead, it would seem, logically to the conclusion (although there is, perhaps, no case in the Supreme Court where the *facts* required a direct decision of the point) that, where the power to issue the bonds is given upon the condition of a previous vote in favor of the proposition, the public or municipal officers can, *where no vote whatever has been taken, or the proposition has been voted down*, bind the county or municipality by the *false recitals* in such unauthorized bonds, provided they are issued by the officers entrusted by the statute with the power, and the bonds are in the hands of *bona fide* holders for value. Under this doctrine, limitations upon the exercise of the power, intended to prevent fraud, and to secure a compliance with the conditions upon which the bonds are authorized, are of little practical value, unless the citizens are vigilant and invoke the protection of the courts before the issue and sale of the bonds, and hence will frequently prove illusory or ineffectual. So, in *Coloma v. Eaves, supra*,¹ — a case from Illinois, — where the local officers of the town were empowered by the statute to issue bonds, provided a majority of the voters of the town voted for the subscription, — which fact, the statute provided, shall appear by the statement of the town-clerk, filed with the county clerk, showing the vote given, the amount voted, and the rate of interest; it was held, in favor of a *bona fide* owner of the bonds issued containing a recital of an election, that such an owner need not look beyond the recitals made in the bonds by the local officers authorized to issue them for evidence of the existence of the facts *in pais* thus recited, the decision and declaration of that decision in the bonds being conclusive upon the town. The court said: "After all, this is not an open question, as between a *bona fide* holder of the bonds and the township, whether all the prerequisites to their issue have been complied with. Apart from and beyond the reasonable presumption that the officers of the law, the township officers, discharged their duty, the matter has passed into judgment. The persons appointed to decide whether the necessary prerequisites to their issue had been completed have decided and certified their decision. They have declared the contingency to have happened on the occurrence of which the authority to issue the bonds was complete. Their recitals are such a decision, and beyond those a *bona fide* purchaser is not bound to look for evidence of the existence of things *in pais*. He is bound to know the law conferring upon the municipality power to give the bonds on the

¹ 92 U. S. 484; followed in *Pana v. Franklin County*, 128 U. S. 526. See *Bowler*, 107 U. S. 529; last case distinguished in *German Sav. Bank v. Jersey City*, 18 Fed. Rep. 719.

happening of a contingency, but whether that has happened or not is a question of fact, the decision of which is by the law confided to others, to those most competent to decide it, and which the purchaser is, in general, in no condition to decide for himself." The Supreme Court, while asserting its adherence to the previous decisions on this subject, has declared its unwillingness to enlarge or extend them.¹

§ 911 (526). **Condition Precedent; Onus Probandi; Estoppel by Recital.** — In another important case it appeared that legislative authority was given to certain officers of a town to borrow money to aid the building of a railway, and to issue bonds therefor, *provided the written assent of two-thirds of the resident taxpayers* should be previously obtained by said town officers, and filed in the county clerk's office, with an affidavit of such officers verifying such assent. A list of assenting taxpayers was filed in the clerk's office, and also the required affidavit; bonds were issued, and were in the hands of a

¹ Recitals by officers invested with authority to determine whether precedent conditions have been performed, that the bonds have been issued "*in pursuance of*," or "*in conformity with*," or "*by virtue of*," or "*by authority of*," the statute, have been held, in favor of *bona fide* purchasers for value, to import full compliance with the statute, and to preclude inquiry as to whether the precedent conditions have been performed before the bonds were issued. "But in all such cases, as a careful examination will show, the recitals fairly imported a compliance, in all substantial respects, with the statute giving authority to issue the bonds. We are unwilling to enlarge or extend the rule, now established by numerous decisions." Mr. Justice Harlan, *Steamboat Rock, &c. School District v. Stone*, 106 U. S. 183. See also *Moulton v. Evansville*, 25 Fed. Rep. 382. A recital that bonds are issued "*under*" the provisions of a certain statute simply asserts that they are subject to or controlled by the statute, and puts a purchaser upon notice to acquaint himself with its provisions and limitations. In this case the municipality was held not to be estopped from showing that the bonds were void for conflicting with a constitutional provision limiting municipal indebtedness, which was also contained in the statute. *Bates v. Riverside Independent School District*, 25 Fed. Rep. 192. *Quære?* As to effect of the constitutional provision in such case, see *infra*, §§ 922, 923, 924; *Gunnison County v. Rollins*, 173 U. S. 255, and previous cases there cited. A recital that bonds were issued "*in pursuance of law*" was held not to estop the town from showing that it did not have a population large enough to be within the terms of a certain act, it not appearing that the officers issuing the bonds were required by law to ascertain the population. *Kelly v. Town of Milan*, 21 Fed. Rep. 842; but compare with *School District v. Stone*, *supra*. Where bonds are issued under proper authority, with recitals showing that they conformed to the requirements of the statutes authorizing their issue, and that the city was liable for them, the city is estopped as against an innocent holder for value from showing that it had imposed conditions upon its liability, even when the statute provided for conditions, and that the bonds should not be binding until the conditions were performed. *American L. Ins. Co. v. Bruce*, 105 U. S. 328. But this case, on the ground that its recital of compliance with the statute was specific, and on the further ground that the bonds were issued prior to the decision of the Supreme Court of the State adversely construing the statute, was distinguished in *German Sav. Bank v. Franklin County*, 128 U. S. 526, 541.

holder for value: on the trial the question arose whether the plaintiff must prove the signatures to the assent to be genuine, and it was held by the Supreme Court of the United States, denying *Starin v. Genoa*, and *Gould v. Sterling*, cited in the note, that no such *onus* rested on him; that the town officers were created a tribunal to determine whether two-thirds of the resident taxpayers had assented, and that on their decision the purchaser might rely, without looking further; and that the town was concluded, in favor of an innocent holder, from denying that the conditions precedent had been performed.¹

¹ *Venice v. Murdock*, 92 U. S. 494; *Rock Creek Tp. v. Strong*, 96 U. S. 271; *Mobile Sav. Bank v. Oktibbeha Co. Sup.*, 24 Fed. Rep. 110; *McCall v. Hancock*, 10 Fed. Rep. 8; *Montclair v. Ramsdell*, 107 U. S. 147 (deciding also that a holder of bonds is presumed to have acquired them for value and in good faith; and that when in a suit upon them it is necessary for him to show that value was paid, his title will be sustained if he proves that any previous holder paid value). In *People v. Mead*, 36 N. Y. 224, the decision in *Starin v. Genoa* and *Gould v. Sterling*, 23 N. Y. 439, referred to in the text, was adhered to by the Court of Appeals of New York, although the court admitted it was contrary to the decisions of the Supreme Court of the United States as to the evidence of the assent of the taxpayers. In *Venice v. Murdock*, *supra*, Mr. Justice Strong, speaking of *Starin v. Genoa* and *Gould v. Sterling*, says: "These decisions are in conflict with the rulings of this court in *Bissell v. Jeffersonville*, 24 How. 287; *Knox County v. Aspinwall*, 21 How. 539; *Mercer County v. Hackett*, 1 Wall. (U. S.) 83, and other cases which we have cited. They are in conflict also with decisions in other State courts. *Society for Savings v. New London*, 29 Conn. 174; *Evansville, I. & C. S. L. R. Co. v. Evansville*, 15 Ind. 395; *Knox County Com'rs v. Nichols*, 14 Ohio St. 260. We have carefully considered the reasons given for the judgments in the *New York* cases, without being convinced by them. They ignore the paramount purpose for which the bonds were authorized by the legislature, and they treat the written assent of the taxables as the authority to the township officers, when, in fact, the power was given by the legislature, and it was only left to the town to determine by the action of two-thirds of the resident taxables whether the supervisors and commissioners might act under the power. In *Gould v. Sterling*, 23 N. Y. 439, the legislative act required no affidavit to be filed with a statement of the assenting taxpayers, and in *Starin v. Genoa* the affidavit filed was regarded as merely verifying that the persons whose names appeared on the assents comprised two-thirds of all the resident taxpayers. But it is obvious that if no more than this was meant by the required affidavit, it was wholly useless, for the assessment rolls of the township would have shown as much." The case, *Venice v. Murdock*, is so important in overturning, so far as the Federal courts are concerned, the judgment of the Court of Appeals of *New York*, and as respects the proposition it establishes, that we reproduce the additional reasons given by the Supreme Court in support of its judgment. "It is very obvious," says Strong, J., "that if the act of the legislature which authorized an issue of bonds in aid of the construction of the railroad on the written assent of two-thirds of the resident taxpayers of the town, intended that the holder of the bonds should be under obligation to prove by parol evidence that each case of the two hundred and fifty-nine names signed to the written assent was a genuine signature of the person who bore the name, the proffered aid to the railroad company was a delusion. No sane person would have bought a bond with such an obligation resting upon him whenever he called for payment of principal or interest. If such was the duty of the holder, it was always his duty. It could not be performed once for all. The bonds retained in the hands of the company would have been no help in the con-

§ 912 (527). **Estoppel by Recital to set up Defence of an Over-issue contrary to the Enabling Act.**— Among the limitations, or attempted limitations, upon the exercise of the power to issue bonds, one not infrequently provided is that *the amount voted or issued shall not exceed* a specified proportion of the taxable property of the municipality, or such a sum as will require a greater levy of taxes than a specified rate on the taxable property to pay the annual interest on the bonds. The effect of a disregard of a statutory limitation of this character by the officers entrusted by the statute with the exercise of the power came, for the first time, before the Supreme Court in 1875, in a case arising under the legislation of Kansas.¹

struction of the road. It was only because they could be sold that they were valuable. Only thus could they be applied to the construction. Yet it is not to be doubted the legislature had in view and intended to give substantial aid to the railroad company, if a sufficient number of the taxpayers assented. They must have contemplated that the bonds would be offered for sale, and it is not to be believed they intended to impose such a clog upon their salableness as would rest upon it if every person proposing to purchase was required to inquire of each one whose name appeared to the assent whether he had in fact signed it." In later cases the Court of Appeals adheres to its position. *Cagwin v. Town of Hancock*, 84 N. Y. 532; *Town of Lyons v. Chamberlain*, 89 N. Y. 587; *Craig v. Town of Andes*, 93 N. Y. 405; *infra*, § 953, note. See *Citizens Sav. Bank v. Greenburgh*, 173 N. Y. 215, and course of decision in the courts of New York, *infra*, § 956. In a suit by taxpayers to declare void bonds issued in aid of a railroad, on the ground that conditions precedent had not been complied with, *the burden of proof* is upon the plaintiffs. *Connor v. Green Pond, W. & B. R. R. Co.*, 23 S. Car. 427. Where the validity of a subscription depends upon its ratification "by a majority of the taxpayers," proof of that fact, in a suit upon bonds which recite that they were issued in payment of the subscriptions, may be made by the poll books and the proceedings of the council, showing the result by a certificate of the election officers. It is not necessary to prove that each person voting was a lawful voter. *Hannibal v. Fauntleroy*, 105 U. S. 408.

¹ *Marcy v. Township of Oswego*, 92 U. S. 637. The legislative provision is essential to an accurate understanding of the opinion and judgment of the court. The act of the legislature, under which the bonds purported to have been issued, was passed February 25, 1870. *Laws of Kansas*, 1870, p. 189. The first section enacted that whenever fifty of the qualified voters, being freeholders, of any municipal township in any county, should petition the board of county commissioners of such county to submit to the qualified voters of the township a proposition to take stock in the name of such township, in any railroad proposed to be constructed into or through the township, designating in the petition, among other things, the amount of stock proposed to be taken, it should be the duty of the board to cause an election to be held in the township to determine whether such subscription should be made; *provided* that the *amount of bonds voted* by any township *should not be above such a sum* as would require a levy of more than one per cent per annum on the taxable property of such township to pay the yearly interest. The second section directed the board of county commissioners to make an order for holding the election contemplated in the preceding section, and to specify therein the amount of stock proposed to be subscribed, and also to prescribe the form of the ballots to be used. The fifth section enacted that if three-fifths of the electors voting at such election should vote for the subscription, the board of county commissioners should order the county clerk to make it in the name of the township, and should cause such bonds as might be required by the terms of the vote and subscription to be

§ 913 (528). **Same Subject.**— In the case referred to in the last section — *Marcy v. Township of Oswego*, 92 U. S. 637 — the

issued in the name of such township, to be signed by the chairman of the board, and attested by the clerk under the seal of the county.

In *Marcy v. Township of Oswego*, 92 U. S. 637, the bonds to which the coupons were attached contained the following recital: "This bond is executed and issued by virtue of, and in accordance with, an act of the legislature of the said State of Kansas, entitled 'An act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same, approved February 25, 1870,' and in pursuance of and in accordance with the vote of three-fifths of the legal voters of said township of Oswego, at a special election duly held on the 17th day of May, A. D. 1870." Each bond also declared that the board of county commissioners of the county of Labette, of which county the township of Oswego is a part, had caused it to be issued in the name and in behalf of said township, and to be signed by the chairman of the said board of county commissioners, and attested by the county clerk of the said county, under its seal. Accordingly, each bond was thus signed, attested, and sealed. The bonds were registered in the office of the State auditor and certified by him in accordance with the provisions of an act of the legislature. His certificate on the back of each bond declared that it had been regularly and legally issued; that the signatures thereto were genuine, and that it had been duly registered in accordance with the act of the legislature.

The defence to the bonds was that there had been an *overissue*, contrary to the statute. The bond, it will be observed, contains no statement on this point; but it was held by the Supreme Court that the above quoted recital in the bonds estopped the township from making this defence against a *bona fide* holder.

The case of *Marcy v. Township of Oswego*, 92 U. S. 637, was cited and approved in *Humboldt Township v. Long*, 92 U. S. 642, the court observing:

"There is no essential difference between this case and that. The assessment rolls of the township may have been proper evidence for the consideration of the board of county commis-

sioners when they were inquiring what the value of the taxable property of the township was, but the bonds are not invalid in the hands of a *bona fide* holder by reason of their having been voted and issued in excess of the statutory limit, as shown by the rolls. Whatever may be the right of the township, as against those who issued the bonds, it cannot be set up against a *bona fide* holder of the bonds that the amount issued was too large, in the face of the decision of the board, and their recital that the bonds were issued pursuant to and in accordance with the act of 1870." Compare *Davies County v. Dickinson*, noted *infra*, and see *Sherman County v. Simons*, 109 U. S. 735; *Potter v. Chaffee Co. Com'rs*, 33 Fed. Rep. 614, and leading case of *Gunnison County v. Rollins*, 173 U. S. 255, where the subject was thoroughly reconsidered. *Recitals* in bond held, in favor of a *bona fide* holder, to estop the debtor municipality to set up that the bond was issued in excess of the amount authorized by statute. *New Providence v. Halsey*, 117 U. S. 336, a New Jersey case, in which the court follows the decision on this point in *Cotton v. New Providence*, 47 N. J. L. 401, and *Mutual Benefit Life Ins. Co. v. Elizabeth*, 42 N. J. L. 235; *Bergen Co. Freeholders v. Mer. Ex. Nat. Bank of N. Y.*, 12 Fed. Rep. 743. See also *supra*, § 910, and note; *post*, §§ 922, 923, 924. Negotiable bonds containing no recitals, actually issued in excess of the number of bonds authorized by the act, and as security for the personal debt of a fiscal officer of the corporation to the original holder, are not binding upon the corporation. *Merchants' Exchange Nat'l Bank v. Bergen County*, 115 U. S. 384. Bonds were voted to the amount of \$250,000; but the presiding judge and clerk of the county court issued without power to do so bonds in excess of that amount. The bonds contained no recital on their face as to the Act under which they were issued, but each bond had a certificate thereon, signed by the county judge only, that it was issued authorized by the statute (naming it) and by an order of the county court in pursuance thereof. It was held that the bonds in excess of the \$250,000 were void in the hands of even *bona fide* holders for value, for want of power to

bonds were duly executed, and contained a *recital* of the act, and that they were issued "*in virtue of and in accordance*" with it, and "*in pursuance of and in accordance with the vote* of three-fifths of the legal voters of the township, at an election held on" a specified day. The plaintiff was a *bona fide* holder for value, without notice. The defence was that the bonds were voted and issued at one time, as one act, and in payment of one subscription, *in excess* of the amount authorized by the statute. The circuit justice of the United States for the circuit (Mr. Justice Miller) distinguished the case from *Knox County v. Aspinwall*, before referred to, on the ground that the statute imposing the limitation, the order for the election, the proposition submitted, the order for the issue of the bonds, and the latest assessment roll were not, properly, matters *in pais*, but were all public, all open, all accessible, and all of record, and if consulted by the purchaser would have shown the bonds to have been voted and issued in violation of the express limitation upon the power contained in the statute. But the judgment of the circuit court was reversed, three judges dissenting, and the defence held unavailing. The case was considered to fall within the principle of the previous decisions. Mr. Justice Strong, speaking for the court, after stating the facts as we have given them, observed: "In view of these facts, and of the decisions heretofore made by this court, the question cannot be considered an open one. We have recently reviewed the subject in the case of *The Town of Coloma v. Eaves*¹ [*supra*], and reasserted what had been decided before; namely, that where legislative authority has been given to a municipality to subscribe for the stock of a railroad company, and to issue municipal bonds in payment of the subscription, on the happening of some precedent contingency of fact, and where it may be gathered from the legislative enactment that the officers or persons designated to execute the bonds were invested with power to decide whether the contingency had happened, or whether the fact existed which was a

issue them, and that the county was not estopped; that the bonds to the amount of \$250,000 which were valid were the bonds which were *first* delivered. *Daviess County v. Dickinson*, 117 U. S. 657. Where bonds were issued by a municipal corporation to fund a debt part of which only was in excess of the constitutional limitation, it was held to be an entire and indivisible transaction, and that *the whole issue of bonds was void*. On this point the court says: "It is impossible to distinguish the valid from the invalid portion of the debt secured by the bonds; the transaction involved in the issue of the bonds was entire and indivisible, and therefore the whole is invalid." *Millerstown Bor. v. Frederick*, 114 Pa. St. 435, 441. Compare *Daviess County v. Dickinson*, *supra*. *Infra*, §§ 913, 914.

¹ 92 U. S. 484.

necessary condition precedent to any subscription or issue of the bonds, their decision is final in a suit by the *bona fide* holder of the bonds against the municipality, and a recital in the bonds that the requirements of the legislative act have been complied with is conclusive. And this is more emphatically true when the fact is one peculiarly within the knowledge of the persons to whom the power to issue the bonds has been conditionally granted.”¹

¹ In the dissenting opinion of Mr. Justice Miller (with whom concurred Davis and Field, JJ.), the view of the court is strongly combated. A few extracts will show the opinion of the dissentients and bring into clearer relief the views of the court:—

“In the cases under consideration,” says Miller, J., “this provision of the statute was wholly disregarded. I am not sure that the relative amount of the bonds, and of the taxable property of the towns, is given in these cases with exactness, but I do know that in some of the cases tried before me last summer in *Kansas* it was shown that the first and only issue of such bonds exceeded in amount the entire value of the taxable property of the town, as shown by the tax list of the year preceding the issue. This court holds that such a showing is no defence to the bonds, notwithstanding the express prohibition of the legislature. It is therefore clear that, so long as this doctrine is upheld, it is not in the power of the legislature to authorize these corporations to issue bonds under any special circumstances, or with any limitation in the use of the power, which may not be disregarded with impunity. It may be the wisest policy to prevent the issue of such bonds altogether. But it is not for this court to dictate a policy for the States on that subject. The result of the decision is a most extraordinary one. It stands alone in the construction of powers specifically granted, whether the source of the power be a State constitution, an act of the legislature, a resolution of a corporate body, or a written authority given by an individual. . . . No such principle has ever been applied by this court, or by any other court, to a State, to the United States, to private corporations, or to individuals. I challenge the production of a case in which it has been so applied. In the *Floyd Acceptances*, 7 Wall. (U. S.) 666, in which the Secretary of War had accepted time drafts drawn on him by a contractor, which, being

negotiable, came into the hands of *bona fide* purchasers before due, we held that they were void for want of authority to accept them. And this case has been cited by this court more than once without question. No one would think for a moment of holding that a power of attorney made by an individual cannot be so limited as to make any one dealing with the agent bound by the limitation, or that the agent’s construction of his power bound the principal. Nor has it ever been contended that an officer of a private corporation can, by exceeding his authority, when that authority is express, is open and notorious, bind the corporation which he professes to represent. The simplicity of the device by which this doctrine is upheld as to municipal bonds is worthy the admiration of all who wish to profit by the frauds of municipal officers. It is that, whenever a condition or limitation is imposed upon the power of those officers in issuing bonds, they are the sole and final judges of the extent of those powers. If they decide to issue them, the law presumes that the conditions on which their powers depended existed, or that the limitation upon the exercise of the power has been complied with; and especially and particularly if they make a *false recital* of the fact on which the power depends, in the paper they issue, this false recital has the effect of creating a power which had no existence without it. This remarkable result is always defended on the ground that the paper is negotiable, and the purchaser is ignorant of the falsehood. But in the *Floyd Acceptance Cases*, this court held, and it was necessary to hold so there, that the inquiry into the authority by which negotiable paper was issued was just the same as if it were not negotiable, and that if no such authority existed, it could not be aided by giving the paper that form. In county bonds it seems to be otherwise. In that case the court held that the party taking such

§ 914 (529). **Same Subject.** — The cases referred to in the last two sections afford, perhaps, a more striking illustration than any previously decided by that court, that the *purchaser may implicitly rely upon the recitals in the bonds*, made by the proper officers, that the authority to issue them has arisen, and that he is under no obligation unless the statute so prescribes to consult the records of the municipality, and is not charged with constructive notice of their contents; and this, too, it will be observed, where the recital in the bonds was general and not specific in its nature, and where the facts which would have shown the issue of the bonds to have

paper was bound to know the law as it affected the authority of the officer who issued it. In county bond cases, while this principle of law is not expressly contradicted, it is held that the paper, though issued without authority of law, and in opposition to its express provisions, is still valid. There is no reason in the nature of the condition on which the power depends in these cases, why any purchaser should not take notice of its existence before he buys. The bonds in this case were issued at one time, as one act, of one date, and in payment of one subscription. All this was a matter of record in the town where it was done.

"So, also, the valuation of all the property of the town for the taxation of the year before the bonds were issued, is of record both in that town and in the office of the clerk of the county in which the town is located. A purchaser had but to write to the township clerk or the county clerk to know precisely the amount of the issue of bonds and the value of the taxable property within the township. In the matter of a power depending on these facts, in any other class of cases, it would be held that before buying these bonds the purchaser must look to those matters on which their validity depended. They are all public, all open, all accessible — the statute, the ordinance for their issue, the latest assessment roll. But in favor of a purchaser of municipal bonds, all this is to be disregarded; and a debt contracted without authority and in violation of express statute is to be collected out of the property of the helpless man who owns any in that district. I say 'helpless' advisedly, because these are not *his* agents. They are the officers of the law, appointed or elected without his consent, acting contrary, perhaps, to his wishes.

Surely if the acts of any class of officers should be valid only when done in conformity to law, it is those who manage the affairs of towns, counties, and villages, in creating debts which not they, but the property-owners, must pay. . . . It is easy to say, and looks plausible when said, that if municipal corporations put bonds on the market, they must pay them when they become due. But it is another thing to say that when an officer created by the law exceeds the authority which that law confers upon him, and in open violation of law issues these bonds, the owner of property lying within the corporation must pay them, though he had no part whatever in their issue and no power to prevent it. This latter is the true view of the matter. As the corporation could only exercise such power as the law conferred, the issuing of the bonds was not the act of the corporation. It is a false assumption to say that the corporation put them on the market. If one of two innocent persons must suffer for the unauthorized act of the township or county officers, it is clear that he who could, before parting with his money, have easily ascertained that they were unauthorized, should lose, rather than the property-holder, who might not know anything of the matter, or if he did, had no power to prevent the wrong." The objections here urged by Mr. Justice *Miller* are answered in the *Gunnison County Case*, 173 U. S. 255, by Mr. Justice *Harlan*, giving the opinion of the court at p. 275, where the subject of overissue and effect of recitals are thoroughly considered and prior cases examined and reviewed. See also *Lewis v. Barbour Co. Com'rs*, 105 U. S. 739, notes; *infra*, § 916, note. Compare with the case of *Daviess County v. Dickinson*, 117 U. S. 657, *supra*, § 912, note.

been illegal were matters appearing upon the public records of the township.¹

§ 915 (530). **Estoppel by Recital of Matter of Fact, e. g. Date of Subscription.** — The effect of recitals in the bonds, and of statements in the records of the county which issued the bonds, is considered in *Concord v. Portsmouth Savings Bank*.² A controlling question in the case was whether the power to subscribe for stock and issue bonds therefor, given by the act March 26, 1869, was annulled by the new Constitution of the State (which took effect July 2, 1870) before the subscription was made, or a valid contract to subscribe was completed. The court held that, in point of fact a legal and binding subscription was made, or agreed to be made, in December, 1869, and hence the defence of want of legal power failed; and it then proceeded to view the case as affected by *estoppel*, the plaintiff being a *bona fide* holder for value without notice of any defence. The opinion was expressed that a recital in the bonds that the subscription was made in December, 1869, being the recital of a matter of fact, and a fact, too, peculiarly if not exclusively within the knowledge of the board of supervisors, estopped the county under the circumstances to set up that the subscription was not made until after July 2, 1870, when their authority to subscribe had expired.³ As the same judgment could

¹ The author allows this section to stand as in the last edition. The Supreme Court has not overruled the propositions therein stated, but it has reached a different result where the overissue is in violation of a *constitutional* provision, and where there is an express recital that the issue does not exceed the limit prescribed by the Constitution, as will appear by §§ 922, 923, 924, and the cases there cited.

² *Concord v. Portsmouth Savings Bank*, 92 U. S. 625.

³ *Concord v. Portsmouth Savings Bank*, 92 U. S. 625; *infra*, § 943. The point is so material that we subjoin the opinion delivered by *Strong, J.*, on this point. He says: "There is, however, another consideration that is worthy of notice. The findings of the court are that the plaintiff below is a purchaser of the bonds for a valuable consideration, having purchased them before their maturity and without notice of any defence. They were executed by the president of the board of supervisors and the county clerk. They recite that

they are issued by the county of Moultrie, 'in pursuance of the subscription of the sum of eighty thousand dollars to the capital stock of the Decatur, Sullivan, and Mattoon Railroad Company, made by the board of supervisors of said county of Moultrie, in December, A. D. 1869, in conformity to the provisions of an act of the General Assembly of the State of Illinois, approved March 26, A. D. 1869.' Now, if it be supposed that the purchaser of bonds with such recitals was bound to look further and inquire what was the authority for the issue, where was he to look? Had he looked to the act of the General Assembly of March 26, 1869, he would have found plenary authority for a stock subscription and for the issue of bonds in payment thereof. If he was bound to know that the constitutional provision terminated that authority after July 2, 1870, he knew that any subscription made before that time continued binding notwithstanding the Constitution, and that bonds issued in payment of it were, therefore, lawful—

be reached on the ground that a valid contract to subscribe had been made *before* the Constitution took effect, it may be a question whether the last point was a point really adjudged by the court.

§ 916 (531). **Rationale of Estoppel.**—A correct view of this subject would seem to be this: Officers are the agents of the corporate body; and the ordinary rules and principles of the law of agency are applicable to their acts. Their unauthorized acts are not binding upon the corporate body of which they are the public agents. Ordinarily, their unauthorized representation that they have power to do an act is not binding upon the corporation; that is, the question is as to their power, *in fact and in law*, not what they have represented it to be. The only exception to this rule,

If, then, he had inquired whether a subscription had been made before July 2, 1870, at the only place where inquiry should have been made, namely at the records of the board, he would have found an order to subscribe, equivalent to a subscription made, in December, 1869, corresponding with the assertions of the recitals, and declared by them to have been a subscription. He could have made inquiry nowhere else with any prospect of learning the truth. Every step he could have taken assured him that the recitals were true. How, then, can the county be permitted to set up against a *bona fide* holder of the bonds that the authority to make a subscription, with all its legitimate consequences, had expired before the subscription was made, in the face of the recitals and of the county records? Whether it had expired was a matter of fact, not of law, and it was peculiarly, if not exclusively, within the knowledge of the board of supervisors. After having assured a purchaser that their subscription was made in December, 1869, when they had power to make it, it would be tolerating a fraud to permit the county to set up, when called upon for payment, that it was not made until after July 2, 1870, when their authority expired." If the records of the county had contradicted the express recitals in the bonds, and had affirmatively shown that no subscription was made until *after* the Constitution took effect, would the purchaser of the bonds be bound to notice that fact? See on this point *Gunnison County v. Rollins*, 173 U. S. 255 (1899); *Waite v. Santa Cruz*, 184 U. S. 302, 314; *Evansville v.*

Dennett, 161 U. S. 434, to the effect that an innocent holder may, in such a case, rely upon the recitals where the legislature has not imposed upon the purchaser the duty of examining the records of the municipality. See *infra*, § 922, and note; *post*, §§ 943, 944, 952.

Purchaser not affected by statements in county records contrary to recitals in the bonds issued by the county. *Nicolay v. St. Clair County*, 3 Dillon C. C. 163. In *Aller v. Cameron*, *ib.* 198, the defendant town was held estopped to set up against a holder of its bonds for value that it was *not legally incorporated*.

Effect of recital by authorized officers. See also *Chambers County v. Clews*, 21 Wall. 317, 321; *Grand Chute v. Winegar*, 15 Wall. 355; *Lynde v. County of Winnebago*, 16 Wall. (U. S.) 6; *Chicago, B. & O. R. R. Co. v. Otoe County*, 16 Wall. (U. S.) 667; *Mercer County v. Hackett*, 1 Wall. (U. S.) 83; *Woods v. Lawrence County*, 1 Black (U. S.), 386; *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175; *Meyer v. Muscatine*, *ib.* 384; *Kennicott v. Wayne County*, 16 Wall. (U. S.) 425. The Supreme Court of Illinois refused to follow the ruling in the last cited case. *Scates v. King*, 110 Ill. 456. A recital in a bond issued in payment of a subscription to railway stock, that it is authorized by a certain statute, containing no statement as to any election and not even stating that the bond is issued in pursuance of the statute, will not estop the municipal corporation from asserting that the issue was not authorized by a proper vote as required by law. *Carroll County v. Smith*, 111 U. S. 556.

in addition to the one hereinbefore treated the sole province of the officers who issue whether conditions precedent have been complied with, and whether both parties have not equal means of knowing the extent and scope of their powers, and where the agent's commission and authority is, from instances, peculiarly known to the officer or agent, whether the principal will or may be bound by the false agent respecting his authority, and its extent. The authority to act is solely conferred by the officer, and is the letter of attorney of the officer, all to the peril, see that the act of the agent on which the power under which the agent acts; and this is affirmed by the Supreme Court of the United States in *Accordingly, bonds issued in violation of a constitutional provision* are void, though in the hands of bona fide holders for value,² unless (it must be added) protected by recitals which operate as an estoppel, that there can be no *de facto* officer unless the bonds executed by persons purporting to be officers of the county when there was no lawful statute in that office, are absolutely void for want of power

¹ The Floyd Acceptances, 7 Wall. (U. S.) 666; *Marsh v. Fulton County*, 10 Wall. (U. S.) 676. See also *Clark v. Des Moines*, 19 Iowa, 199, 210; *Treadwell v. Hancock County Commissioners*, 11 Ohio St. 190, reviewing and criticizing *Knox County v. Aspinwall*, 21 How. (U. S.) 539. See also *Gould v. Sterling* (action on bonds), 23 N. Y. 439; *Starin v. Genoa*, 23 N. Y. 452; *People v. Mead*, 36 N. Y. 224; *Dodge v. County of Platte*, 82 N. Y. 218. *United States v. City Bank of Columbus*, 21 How. 356, is a very striking illustration of the general principle that a corporate officer cannot bind the corporation by his unauthorized acts or representations concerning the authority of himself or others. *De Voss v. Richmond*, 18 Gratt. (Va.) 338. Upon this principle it was held that the legislature may make the negotiability of municipal bonds dependent upon their delivery by a State officer, and that a purchaser of bonds purporting to have been issued under a statute containing such a condition, is not a *bona fide* purchaser without notice, in case the bonds are fraudulently issued without being delivered by

the design, *Lewis v. B. Rep.* 191; s.

² *Aspinwall v. How.* (U. S.) 539. *New York, text. As to constitutionality see supra, §§*

³ *Gunn v. U. S.* 255; *U. S.* 302; *infra, §§ 92.*

⁴ *Anne, County, 118 appeared to local matter. Nessee had vested in a called, quasi-justices of the county and incorporation. Before the legislature the county powers, inc*

§ 917 (532). **Estoppel by Recitals in the Bond; Illustration.** — So in a subsequent case, similar in character, *the common council of a city* were, by virtue of various statutes, authorized to subscribe for stock in a railroad company, and to issue bonds in payment therefor *on the petition of three-fourths of the legal voters of the city*. Before the issue of the bonds, the council decided that three-fourths of the citizens had petitioned, and the bonds themselves thus recited. The Supreme Court of the United States held that the council was the tribunal to decide whether the requisite number had petitioned; that it was contemplated that this question, which was one of fact, should be ascertained and conclusively settled prior to the issue of the bonds; and that when the city was sued upon the bonds by innocent holders for value, parol testimony was inadmissible to show that the petitioners did not constitute three-fourths of the legal voters of the city.¹

scribe for stock and issue bonds, in a board of county commissioners. The county commissioners issued the bonds. The act abolishing the quarterly court and creating the board of county commissioners was held, after the issue of the bonds, to be unconstitutional by the Supreme court of the State of Tennessee, on the ground that the county court was one of the institutions of the State recognized in the Constitution, and that the act creating the board of county commissioners and conferring on them the powers of the county or quarterly court was unconstitutional and void; and hence it was held by the Supreme Court of the United States that the bonds had no validity even in the hands of *bona fide* holders. The validity of the bonds was attempted to be sustained on the ground that the acts of the county commissioners under a statute *subsequently* held to be unconstitutional, were to be regarded as the acts of officers *de facto*, and hence binding in favor of the *bona fide* holders of the bonds. But the Supreme Court decided otherwise; and, in a very learned and elaborate opinion, reviewing the authorities, by Mr. Justice *Field*, it is held: First, that it was the duty of the Federal court on a question of this kind to follow the decision of the highest court of the State. Second, that there could, in law, be no such thing as an officer either *de jure* or *de facto* if there be *no office* to fill; and that the act attempting to create the office of commissioners never became a law and

the office never came into existence. The view of the court on this point is tersely summed up in this sentence (*Ib.*, 442): "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." As to *de facto* corporations and *de facto* officers see Index, *Office and Officers*; *ante*, §§ 67, 395.

¹ *Bissell v. Jeffersonville*, 24 How. (U. S.) 287, approving *Knox County v. Aspinwall*, 21 How. (U. S.) 539; *s. r.* *Evansville, I. & C. S. L. R. R. Co. v. Evansville*, 15 Ind. 395; *Moran v. Miami County*, 2 Black (U. S.), 722, 724; *Marshall County Sup. v. Schenck*, 5 Wall. (U. S.) 772; *Rogers v. Burlington*, 3 Wall. 654; *Cincinnati v. Morgan*, *Ib.* 275; *Mercer County v. Hackett*, 1 Wall. (U. S.) 83; *Meyer v. Muscatine*, *Ib.* 384, 393, *per Swayne, J.*; *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175, 203; *Pendleton Co. v. Amy*, 13 Wall. 297; *St. Joseph Township v. Rogers*, 16 Wall. 644. In the case last cited it was insisted that the bonds were invalid for want of the required vote. One of the answers of the court to this objection was that "the act of the legislature made it the duty of the supervisor who executed the bonds to determine the question whether an election was held, and whether a majority of the votes cast were in favor of the subscription, and inasmuch as he passed upon that question and subscribed for the stock, and subsequently executed and de-

§ 918 (533). **Estoppel by Recitals in the Bond; Illustration.** — In another case,¹ the action was upon coupons payable to bearer

livered the bonds, it was clearly too late to question their validity, where it appears, as in this case that they are in the hands of an innocent holder." The decision in the case referred to in the text is clearly right, for the reason that the council were the body to decide the preliminary fact, and because, also, according to the rule before stated, the fact was one not of a nature to be ascertained by purchasers in the market to whom the bonds were designed to be sold.

Recitals in bonds. Where a bond recites that it is issued "under authority of" an act, reciting its title, such recital estops the municipality from making, as against a *bona fide* holder for value, the defence that the road was not completed in time. *Oregon v. Jennings*, 119 U. S. 74. To the effect that such a recital estops a town, as against a *bona fide* holder for value, from showing that conditions imposed on its liability by the vote of the people had not been complied with, although the statute declared that the bonds should not be valid and binding until compliance with such conditions, see *Am. L. Ins. Co. v. Bruce*, 105 U. S. 328. In *Pana v. Bowler*, 105 U. S. 529, 539, recitals in bonds in favor of a *bona fide* holder were held effectual to estop the municipality, as against an alleged defect in the mode of conducting an election held prior to the adoption of the Constitution of Illinois of 1870, the bonds being issued after its adoption, although that instrument forbade the issuing of the bonds, unless their issue

should have been authorized under then existing laws by a vote of the people prior to the adoption of the Constitution.

Recitals in a bond merely that it is issued in payment of a subscription authorized by a statute referred to, held not to estop the municipality to show that the issue was not authorized by a vote of two-thirds of the voters of the corporation, as required by the Constitution of the State. *Carroll County v. Smith*, 111 U. S. 556, *supra*, § 915. Recitals in bonds that they were issued "in pursuance to the vote of the electors of Anderson County, September 13, 1869," held, in favor of a *bona fide* holder thereof, to be equivalent to a statement that the vote was one lawful and regular in form; and that evidence to show that the thirty days' notice of the election required by the statute was not given was not available to the municipality as a defence. The case was considered to fall within *Town of Coloma v. Eaves*, 92 U. S. 484, 491. *Anderson County Commissioners v. Beal*, 113 U. S. 227. Where the Constitution required the question of local taxation to be submitted to the electors, a statute which empowered the resident taxpayers to authorize a town to issue bonds in aid of a railroad, was declared unconstitutional and void. *Harrington v. Plainview*, 27 Minn. 224, followed in *Plainview v. Winona & St. Peter R. R. Co.*, 36 Minn. 505.

As to proceedings preliminary to issuing of bonds. *Ante*, §§ 323, 897, 898, note; *Knox Co. Com'rs v. Nichols*, 14

¹ *Mercer County v. Hackett*, 1 Wall. (U. S.) 83. This case, and the case of *Woods v. Lawrence County*, 1 Black (U. S.), 386, are cited by Mr. Justice Hunt in the case of *Grand Chute v. Winegar*, 15 Wall. (U. S.) 355. The learned justice says: "The same principles were announced in *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175, and in *Meyer v. Muscatine*, *Id.* 384. In the latter case the court said that if the legal authority [that is, the legislative enabling Act] was sufficiently comprehensive, a *bona fide* holder for value has a right to presume that all precedent requirements have been complied with. By the act of February 10, 1854, the legislature of Wisconsin authorized the

supervisors of the town of Grand Chute to make a plank-road subscription to the amount of ten thousand dollars. The bonds in question were signed by the chairman of the board of supervisors of that town, and recited that the subscription had been made by the supervisors of the town, and that these bonds were issued in pursuance thereof for the purpose of carrying out the provisions of that act. The plaintiff was the *bona fide* holder for value of the bonds in suit, and his title accrued before their maturity. The cases cited are an answer to the numerous offers to show want of compliance with the form of law, or to show fraud in their own agents."

belonging to negotiable bonds issued by a county in payment of stock subscribed for in a railroad company. By an act of assembly, the county commissioners were authorized to subscribe the stock and *issue the bonds only upon the following* "restrictions, limitations, and conditions, and in no other manner or way whatever:" 1. "After, and not before, the amount of such subscription shall have been designated, advised, and recommended by a grand jury of the county." 2. Said "bonds shall, in no case, be sold by the railroad company at less than par." 3. That the acceptance of this act shall be deemed the acceptance of another act fixing the gauges of railroads in the county of Erie. The plaintiff was a *bona fide* holder for value, of a number of the bonds issued by the county. To defeat a recovery, the county on the trial offered to show, not that *no* recommendation by a grand jury was ever made, but that no *such* recommendation was made as the act required. The following was the recommendation:

Ohio St. 260; Atchison v. Butcher, 3 Kan. 104; Mercer County v. Hachett, 1 Wall. (U. S.) 83; Rogers v. Burlington, 3 Wall. (U. S.) 654; Moran v. Miami Co., 2 Black (U. S.), 722; Flagg v. Palmyra, 33 Mo. 440; Commonwealth v. Allegheny Co. Com'rs, 37 Pa. St. 237; compare Marsh v. Fulton County, 10 Wall. (U. S.) 676; Treadwell v. Hancock Co. Com'rs, 11 Ohio St. 190; *post*, § 550; Pendleton County v. Amy, 13 Wall. (U. S.) 297; Lexington v. Butler, 14 Wall. (U. S.) 282; St. Joseph Township v. Rogers, 16 Wall. (U. S.) 644; Grand Chute v. Winegar, 15 Wall. (U. S.) 355; New Haven, M. & W. R. Co. v. Chatham, 42 Conn. 465; *infra*, §§ 956, 957.

Where authority to issue town bonds could be exercised only upon the petition of a majority of taxpayers, "not including those taxed for dogs or highway tax only," a petition stating that the petitioners were "a majority of the taxpayers of the town" was held to be fatally defective. Town of Mentz v. Cook, 108 N. Y. 504; *ante*, § 897, 898, note.

A city was authorized to take stock in a railroad company "on the petition of two-thirds of the citizens, who are freeholders," &c. Bonds of the city were duly issued, signed by the proper officers and attested by the seal of the city, and on their face recited that they were issued by virtue of an ordinance of the city making subscription. The minutes of the city council simply stated that "the freeholders of the city, with great

unanimity, had petitioned," &c. It was held that the city council were the proper judges whether or not the required number had petitioned, and that the city, as against *bona fide* holder for value, was "concluded" by the ordinance "as to any irregularities that may have existed in carrying into execution the power granted to subscribe the stock and issue the bonds." Van Hostrup v. Madison City, 1 Wall. (U. S.) 291; *s. p.* Meyer v. Muscatine (where charter required "a majority of two-thirds of the votes given") *Id.* 384, 393; Aurora v. West, 22 Ind. 88; *contra*, People v. Mead, 36 N. Y. 224; *post*, § 953, note.

Where the act authorizing a municipality to issue bonds was not to take effect until "approved by two-thirds of the electors present at a city meeting held for that purpose, and a copy of its doings lodged in the office of the Secretary of State," *bona fide* purchasers of such bonds are not bound to look beyond the certificate thus lodged, and are not affected by the action of the city, refusing at prior meetings to approve the act. Society for Savings v. New London, 29 Conn. 174.

Fraud in the election authorizing the subscription must be set up before rights have accrued. Butler v. Dunham, 27 Ill. 474; People v. San Francisco, 27 Cal. 655. Further as to the construction of powers to aid in the building of railways, see *ante*, chap. viii. § 313 *et seq.* *Ante*, §§ 897, 898, 904, and notes.

The grand jury "would recommend (omitting the words 'designate and advise') the commissioners of Mercer County to subscribe an amount not exceeding \$150,000," — but not otherwise designating the amount. The bonds referred on their face to the act of assembly and its date, which authorized their issue and recited that they were issued *in pursuance* thereof. This was regarded by the court not as an offer to show "that no law exists to authorize their issue, but as one to show that the recitals in the bonds are not true, and to show that they were *not* made 'in pursuance of the acts of assembly' authorizing them;" and, following *Knox County v. Aspinwall*,¹ it was adjudged that the matters thus offered to be shown constituted no defence against a *bona fide* holder, on the principle that "where bonds on their face import a compliance with the law under which they were issued, the purchaser is not bound to look further." And following *Woods v. Lawrence County*,² it was also ruled that it was no defence against such a holder that the bonds were sold by the railroad company for less than par, they being negotiable and the plaintiff innocent. And it was also decided that the acceptance by the railroad company of the bonds authorized by the act operated *per se* as an acceptance of the gauge law.

§ 919 (534). **Estoppel by Recitals in the Bond; Illustration.**—

In another case, authority to a city "to take stock in any chartered company for making a road, or roads, *to the said city*," was held, in favor of a *bona fide* purchaser of its bonds, to *authorize* it to subscribe to a railroad which, by the terms of its charter, and in fact *did not terminate at said city*, but whose nearest terminus was forty-six miles distant, it appearing that there was, at the time of said subscription, another railroad leading from that terminus to the city.³ Authority was given by the legislature to the city of Mil-

¹ *Knox County v. Aspinwall*, 21 How. (U. S.) 539.

² *Woods v. Lawrence County*, 1 Black (U. S.), 386. In *Woods v. Lawrence County*, above cited, it was also held where the statute requires the grand jury to fix the amount of a subscription to railroad stock, and to approve of it, and upon their report being filed empowers commissioners to carry the same into effect by making its subscription in the name of the county, that if these things be done agreeably to the law, the county cannot afterwards deny its obligation to pay the amount subscribed. In a suit brought to recover the arrears of interest on

such bonds, it is not necessary for the holder to show that the grand jury fixed the manner and terms of paying for the stock; nor is it a defence for the county to show that the grand jury omitted to do so. It is enough that the manner and terms of payment were agreed upon between the company and the commissioners. This case, among others, was cited and approved in *Grand Chute v. Winegar*, 15 Wall. (U. S.) 372.

³ *Van Hostrup v. Madison City*, 1 Wall. (U. S.) 291. See *Aurora v. West*, 9 Ind. 74; s. c. 22 Ind. 88, 96, 503. The decision in *Van Hostrup v. Madison City* was undoubtedly influenced

waukee to issue bonds in aid of a railroad company specially named, "and any other railroad company duly incorporated and organized for the purpose of constructing railroads leading from the city of Milwaukee," &c., and it was held, such having been the construction put upon it by the city authorities at the time, that the power to issue bonds *was not confined to companies then in existence*, but extended to companies afterwards created.¹

§ 920 (535). **Estoppel by Recitals in the Bond; Illustration.** — In another case,² the *city was held liable upon bonds* issued to a railway company under the following circumstances, viz.: The legislature authorized the city to subscribe on the condition of a majority vote; the city embodied three conditions in the proposition submitted to the voters, one of which was that \$1,000,000 should be subscribed by other parties; the vote carried; other parties did not subscribe the \$1,000,000; the city refused to subscribe and issue bonds, but was compelled to do so by a *mandamus* of an inferior court, whose judgment was afterwards reversed by the Court of Appeals of the State, which held that the city had no authority to take the stock or issue the bonds until the \$1,000,000 had been subscribed by other parties. Meanwhile, however, bonds were issued by the city, bearing its seal and signed by its mayor and clerk, reciting that they were duly issued under a specified act of the General Assembly.

§ 921 (536). **Same Subject.** — The Supreme Court of the United States held in the case last cited that a *bona fide* holder for value of these bonds, who had no actual notice of the facts relied on for a defence, could recover thereon. Mr. Justice Clifford, delivering the opinion of the court, makes use of this language in stating the ground

by the natural desire to protect the holders of the bonds. Doubts can but be entertained that the Columbus and Shelby Road, distant and between different points, was a road leading to Madison. Note remarks of *Nelson, J.* The court held that it was a proper case in which to hold the municipality to the practical construction it had put upon the enabling act. *Supra*, § 883. See also *Kirkbride v. Lafayette Co.*, 108 U. S. 208.

¹ *James v. Milwaukee*, 16 Wall. (U. S.) 159.

In *Lynde v. Winnebago County*, 16 Wall. (U. S.) 6, a special submission, under the laws of *Iowa*, to a popular vote, was construed to give the requi-

site authority to issue the bonds of the county to raise money to build a *court-house*. *Sealing outside of jurisdiction.* The case also holds that it was competent for the proper county official (the county judge) to visit *New York* for purposes connected with the disposition of the bonds, and while there, *and out of his jurisdiction*, to issue and seal new bonds with a new seal procured at the time, in exchange for bonds already issued, but not yet put on the market, and it was so held, although the statute of the State provided that in the case of the *absence* of that officer the county clerk should take his place.

² *Lexington v. Butler*, 14 Wall. (U. S.) 282.

of the judgment: "Admitted, as it is, that the corporation defendants possessed the power to subscribe for the stock and issue the bonds, it is clear that the plaintiff is entitled to recover upon the merits, as the repeated decisions of this court have established the rule that when a corporation *has power under any circumstances to issue negotiable securities, the bona fide holder has a right to presume* that they were issued under the circumstances which give the requisite authority, and that they are no more liable to be impeached in the hands of such a holder than any other commercial paper." By the expression that it is admitted that the city "possessed the power to subscribe for the stock and to issue the bonds," reference is undoubtedly made to the act of the legislature which gave this power on condition of a majority vote, and possibly to the fact that it was admitted in the plea that the vote was cast in favor of the subscription, for otherwise it seems to have been denied that the power existed; and that it did not exist as between the city and the railroad corporation was decided by the Court of Appeals of the State. The substance of the decision of the United States Supreme Court in this case would seem to be that a *bona fide* purchaser of the bonds had under the legislation and recitals in the bond the right to presume that the condition annexed by the city as to the \$1,000,000 of other subscriptions had been complied with; and thus viewed, the judgment of the court rests upon grounds whose soundness cannot admit of question.

§ 922. **Constitutional Limitations of Indebtedness; when Estoppel will not be implied.** — The Supreme Court of the United States in a long line of decisions has considered and adjudged the scope and effect of peremptory constitutional provisions that municipalities shall not incur debt or issue bonds exceeding a specified percentage of the value of the taxable property within the municipality to be ascertained by the official assessments or valuations for the purposes of taxation. These constitutional provisions are regarded as fixing a *limit beyond which the power to issue bonds cannot be legislatively conferred*, and if bonds be issued in excess of the limit they are, in the absence of estoppel, void.¹ A mere recital that the bond is issued under the authority of a *statute* and in pursuance of an *ordinance* of the city does not preclude the municipality from asserting

¹ Buchanan v. Litchfield, 102 U. S. 366; Sutliff v. Lake County Com'rs. 278; Dixon County v. Field, 111 U. S. 147 U. S. 230; Hedges v. Dixon 83; Litchfield v. Ballou, 114 U. S. 190; County, 150 U. S. 182. As to estoppel Lake County v. Rollins, 130 U. S. 662; see *infra*, §§ 923, 924. Doon Township v. Cummins, 142 U. S.

the invalidity of the bonds under the *constitutional* limitation.¹ If the aggregate amount of the issue of bonds appears upon the face of

¹ *Buchanan v. Litchfield*, 102 U. S. 278. *Buchanan v. Litchfield*, 102 U. S. 278, involved the construction of a provision of the Constitution of *Illinois* of 1870 (art. ix, § 12), which ordains that "no county, city, township, school district, or other municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness." A statute of *Illinois* authorized cities to construct water works and for that purpose to borrow money and issue bonds. Bonds were issued pursuant to the statute, each reciting that "it is issued under authority of an act of the General Assembly of the State of *Illinois* (describing it), and in pursuance of an ordinance of the said city of *Litchfield* entitled 'An ordinance to provide for the issuing of bonds and the construction of the *Litchfield Water Works*.'" The constitutional provision was not referred to in the statute authorizing the issue of bonds or in the ordinance or in the bonds. At the time of the issue of the bonds the indebtedness of the city already exceeded the constitutional limit. Suit was brought for overdue coupons on these bonds by a *bona fide* holder for value without any notice that the bonds were issued in excess of the constitutional restriction. The Supreme Court of the United States held that the city was not liable, and that the plaintiff could not invoke the doctrine of estoppel; and reference was made to the absence of an express statement in the bonds that the aggregate indebtedness of which they were a part was not in excess of the constitutional limit. In the opinion, Mr. Justice *Harlan* said (p. 289): "The purchaser of the bonds was certainly bound to take notice not only of the constitutional limitation upon municipal indebtedness, but of such facts as the authorized official assessments disclosed concerning the valuation of taxable property within the city for the year 1873. But in what way was of the city's indebtedness existing at the time the bonds in question were issued? The extent of that indebtedness was a fact peculiarly within the knowledge of the constituted authorities of the city. It was necessarily left, both by the Constitution and the statute of 1873, to their examination and determination, under the constitutional injunction, however, that no municipal corporation should exceed the prescribed amount of indebtedness. It was, nevertheless, a fact which, so far as we are advised by the record, could not at all times and absolutely or with reasonable certainty, be ascertained from any official documents to which the public had access." After examining the cases in which an estoppel had been held to exist under the provisions of the statute Justice *Harlan* further said (p. 292): "It will be observed that the bonds issued by the city of *Litchfield* contain no recital whatever of the circumstances which, under the Constitution of the State, must have existed before the city could legally incur the indebtedness for which the bonds were issued. They purport, it is true, to be issued under the authority of the act of April 15, 1873, and in pursuance of the ordinance of the city based upon that statute. But that statute does not expressly restrict the exercise of the power to erect and maintain a system of water works to cases in which the aggregate indebtedness of the city was within the limit which the Constitution declared no municipal corporation should exceed. Nor does the city ordinance recite or state, even in general terms, that the proposed indebtedness was incurred in pursuance of or in accordance with the Constitution of the State, or under the circumstances which permitted the issue of the bond. Consequently, a recital that the bonds were issued under the authority of the statute, and in pursuance of the city ordinance, did not necessarily import a compliance with the Constitution. . . . Any different conclusion from that indicated would extend the doctrines of this court upon the subject of municipal bonds farther than would be consistent with reason and sound policy, and farther than we are now willing to go. The present action can-

each bond, and if a reference to the proper assessment roll of the municipality shows that the total issue thus disclosed exceeds the constitutional limit of indebtedness, a recital that the bond is issued under and by virtue of a statute and the Constitution of the State, does not in such a case estop the municipality from pleading that the issue was made in violation of the constitutional limitation. The court declared that the amount of the assessed value of the taxable property was ascertainable in one way only, and that was by a reference to the assessment itself, a public record specified in the Constitution as the standard, equally accessible to all intending purchasers of bonds as well as to the municipal officers making the issue. No recital involving the amount of the assessed taxable valuation of the property to be taxed for the payment of the bonds could take the place of the assessment roll or record itself, for it is the amount as fixed by reference to that roll or record that is made by the Constitution the standard for measuring the limit of municipal power. Nothing in the way of inquiry, ascertainment, or determination as to that fact, namely, the value of the taxable property in the county, is submitted to the county officers. They are bound, it is true, to learn from the assessment what the limit upon their authority is, as a necessary preliminary in the execution of their functions and in the performance of their duty. But the information is for themselves alone. All the world besides must have it from the same source and for themselves. The fact, as it is recorded in the assessment, is extrinsic and proves itself by inspection, and concludes all determinations that contradict it. Therefore, when the total aggregate amount of bonds appears upon the face of each, the validity or invalidity of the issue can necessarily be determined by any person by a simple reference to the assessment roll, and there is no room for an estoppel.¹ In the next case in which an estoppel was claimed

not be maintained, unless we should hold that the mere fact that the bonds were issued, without any recitals of the circumstances bringing them within the limit fixed by the Constitution, was, in itself, conclusive proof, in favor of a *bona fide* holder, that the circumstances existed which authorized them to be issued. We cannot so hold."

¹ *Dixon County v. Field*, 111 U. S. 83. This case arose under the Constitution of *Nebraska*, which ordained (art. xii, § 2) that, "No city, county, town, precinct, municipality, or other subdivision of the State shall ever make donations to any railroad or other works of internal improvement, unless a prop-

osition so to do shall have been first submitted to the qualified electors thereof, at an election by authority of law; provided, that such donations of a county, with the donations of such subdivisions, in the aggregate, shall not exceed ten per cent of the assessed valuation of such county; provided further, that any city or county may, by a two-thirds vote, increase such indebtedness five per cent in addition to such ten per cent, and no bonds or evidences of indebtedness so issued shall be valid unless the same shall have indorsed thereon a certificate signed by the secretary and auditor of the State, showing that the same is

on behalf of a *bona fide* holder of the bonds against a defence that the bonds were issued in violation of the constitutional limitation, the statute authorized the county commissioners, after a vote of the taxpayers, to issue county bonds to fund the floating debt, such bonds not to exceed the amount of the debt which should be ascertained by the commissioners. No reference was made in the statute to the constitutional limitation. County commissioners fixed the amount of the debt in excess of the constitutional limitation and issued bonds to that amount, each of which referred to the statute and in which it was "certified that all the provisions and requirements of the act had been fully complied with by the proper officers in the issuing of this bond." It was held that the municipality was not estopped to plead the invalidity of the bonds. The court declared that there was no estoppel in regard to the constitutional question, because there was no recital in regard to it. It recognized the fact that it

issued pursuant to law." In defence of an action by a *bona fide* holder on negotiable bonds issued by Dixon County, it was alleged that the bonds were issued in violation of this constitutional provision. The plaintiff contended that the municipality was estopped from setting up this defence by reason, among other things, of the recitals in the bonds. There were eighty-seven bonds of \$1000 each, all issued at one time. Each bond recited that it "was issued under and in pursuance of an order of the county commissioners of the County of Dixon and authorized by an election held in said county on the 27th day of December, 1875, and under and by virtue of chap. xxxv. of the General Statutes of Nebraska, and amendments thereto, and the Constitution of the State, art. xii, adopted October, A. D. 1875." On each bond was also indorsed the certificate of the county clerk that "the question of issuing said bonds was duly submitted to the people of the county, November 24, 1875, in the following form: Shall Dixon County issue to the C. C. & B. H. R. R. Co. \$87,000, ten per cent twenty year bonds? which was decided in the affirmative by 462 votes against 120." The certificate of the secretary and auditor of the State of Nebraska that the bond was issued pursuant to law was also indorsed on it. In point of fact the assessed valuation of the County of Dixon for 1875 was \$587,331, the bonds issued being thus more than ten per cent of the assessed valuation. On the principle that there must be authority of law by statute for every issue of bonds of a municipal corporation; that the corporation is bound by the recitals in such bonds only in respect of facts which the corporate officers had by law authority to determine, but not in respect of facts which they had no authority to determine, the Supreme Court decided that the county was not liable, saying: "There was no power at all conferred to issue bonds in excess of an amount equal to ten per cent upon the assessed valuation of the taxable property of the county. The amount of bonds issued was known. It is stated in the recital itself. It was \$87,000. The holder of each bond was apprised of that fact. The amount of the assessed value of the taxable property in the county is not stated; but, *ex vi termini*, it was ascertainable in one way only, and that was by reference to the assessment itself, a public record equally accessible to all intending purchasers of bonds, as well as to the county officers. . . . Nothing in the way of inquiry, ascertainment, or determination as to that fact is submitted to the county officers. . . . The fact as it is recorded in the assessment itself is extrinsic, and proves itself by inspection, and concludes all determinations that contradict it." Similar facts and same principle, *Nesbit v. Riverside Ind. Dist.*, 144 U. S. 610; *s. c. infra*, § 924.

might be said that inasmuch as the bonds recited that all the requirements of the statute had been fully complied with by the proper officers and inasmuch as one of those requirements was that the officers should determine the amount of the county debt, the inference was fair and reasonable that the statute meant that the commissioners should recognize only what was a just and lawful debt, not claims that were void and therefore no debt; and that the recital was in effect a statement that the whole matter had been examined by the board, and that they had issued bonds for only such warrants as were found to be issued in conformity to the law, the whole law, — organic as well as statute. But the court declared that this consideration did not help the bondholder, because even if the bond had expressly stated that the board canvassed the debt and found the same to be binding and valid under the law and the Constitution, and that the same was \$500,000 (the amount of the issue), the recital did not work an estoppel. Each bond *showed on its face* the total amount of the issue, and it was the duty of the purchaser to refer to the assessed valuation for the purpose of determining whether the issue exceeded the constitutional limit based thereon, and this for the reason that the bonds contained no recital upon that point.¹ After having had before it a case in which the bonds contained an *express recital that the total amount of the issue did not exceed the constitutional limit, and did not show on their face the amount of the issue*, and the county records showed only the valuation of the property, and after having held that upon these facts that the county was estopped from attacking the validity of the bonds in the hands of a *bona fide* holder for value on the ground that the issue exceeded the constitutional limitation,² another case came before the Supreme Court of the United States which involved the validity of an issue of bonds made by a board of county commissioners, and each of which recited that it was issued by virtue of and

¹ *Lake County v. Graham*, 130 U. S. 674; so explained in *Sutliff v. Lake County*, 147 U. S. 230, 237. In *Lake County v. Graham*, 130 U. S. 674, the facts were in general similar to those in *Dixon County v. Field*, 111 U. S. 83, and the court regarded the latter case as controlling. Mr. Justice Lamar, speaking for the court, said: "The question here is distinguishable from that in the cases relied on by counsel for the defendant in error (over-issue cases contrary to a statute). In this case, the standard of validity is created by the Constitution. In that standard two factors are to be considered, one the amount of assessed value and the other the ratio between the assessed value and the debt proposed. These being the exactions of the Constitution, it is not within the power of the legislature to dispense with them either directly or indirectly by the creation of a ministerial commission whose finding shall be taken in lieu of the facts."

² *Chaffee County v. Potter*, 142 U. S. 355. Approved and followed, *Gunnison County v. Rollins*, 173 U. S. 255. These cases are examined and discussed in § 923, *post*.

in compliance with the vote of a majority of the qualified electors at an election duly had, and under and by virtue of and in compliance with an act of the State of Colorado, and each of which also certified that all of the provisions of the act had been fully complied with by the proper officers in the issuing of the bond. The constitutional limitation of the State of Colorado measured the power of the county to become indebted by the assessed valuation of the taxable property within the county, and the same statute under which the bonds were issued required the boards of county commissioners of each county to prepare, record, and publish semi-annual statements showing the amount of debt owing by the county, and in what the debt consisted, with other particulars as to the financial condition of the county. The court declared that the plaintiff, although a purchaser for value before maturity of the bonds, was charged with the duty of examining the record of indebtedness provided by the statute in order to ascertain whether the bonds increased the indebtedness of the county beyond the constitutional limit; and that the recitals in the bonds did not estop the county to prove by the records of the assessment and of the indebtedness that the bonds were issued in violation of the Constitution. It declared that inasmuch as the amount of the indebtedness was, by statute, made a matter of public record, open to the inspection of every one, there could be no implication that it was intended to leave that matter to be determined and concluded contrary to the facts so recorded, by the officers charged with the duty of issuing the bonds. It therefore held that the case before it fell within the principles of its previous decisions, where it held that the parties were obliged at their peril to take notice of the assessed valuation as recorded in the assessment roll,¹ which, by constitutional requirement, was made the test of the power of the municipality to contract debt. The only difference was that in these cases the single fact required to be shown by the public record was the valuation of the property of the county, whereas in the case then before it, two facts were to be so shown, the valuation of the property and the amount of the county debt. But as both these facts were equally required, by the statute, to be entered on the public records of the county, they were both facts of which all the world was bound to take notice, and as to which, therefore, the county could not be concluded by any recitals in the bonds.²

¹ *Dixon County v. Field*, 111 U. S. 83; *Lake County v. Graham*, 130 U. S. 674.

² *Sutliff v. Lake County*, 147 U. S. 230. The distinguishing feature of this case is the "financial statements" as to

§ 923. **Constitutional Limitations of Indebtedness; Circumstances under which Estoppel will be implied.** — Although the first cases in which the question whether an estoppel might exist precluding the municipal corporation from pleading invalidity of its bonds for a failure to comply with constitutional limitations, were decided adversely to the existence of any estoppel upon the facts of each particular case, yet, in one or more of the cases in which the court denied the existence of any estoppel, the possibility of an estoppel being conferred under other and different circumstances was clearly recognized.¹ After the court had on several occasions declared

the county's indebtedness required to be entered of record. They were so required in another part of the *same act* (Act March 24, 1877), which authorized the issue of the bonds. This was a long act of 143 sections, dealing generally with county affairs, and it did not expressly provide or apparently contemplate that the financial statements prescribed to be made in § 30 had any connection with the issuing of county bonds, and it did not prescribe that these financial statements should be constructive notice of anything to anybody. This case of *Suliff* is, in our judgment, limited if not in effect overruled on one point by the later case of *Gunnison County v. Rollins*, 173 U. S. 255, in the same State in which it is held, *inter alia*, that a *bona fide* holder of negotiable bonds issued under the Funding Act of February 21, 1881, was not bound to examine the orders, proceedings, or records of the county, nor the so-called financial statements entered upon the records of the county (under § 30, Act of March 24, 1877), although, if he had consulted them, he might have had notice that the refunding bonds were issued to refund invalid warrants. This decision in the *Gunnison County Case* proceeds upon the ground of giving full meaning and effect to the negotiability of municipal bonds and to the recitals therein. It is a distinct decision to the effect that the holder of negotiable bonds where the legislature or Constitution had made no such requirement was not bound to examine the ordinances, orders, resolutions, and other proceedings for the issue of the bonds. The court, *Harlan, J.*, in concluding its unanimous opinion, made the following important observations (p. 275):

"It is insisted with much earnest-

ness that the principles we have announced render it impossible for a State by a constitutional provision to guard against excessive municipal indebtedness. By no means. If a State Constitution, in fixing a limit for indebtedness of that character, should prescribe a definite rule or test for determining whether that limit has already been exceeded or is being exceeded by any particular issue of bonds, all who purchase such bonds would do so subject to that rule or test, whatever might be the hardship in the case of those who purchased them in open market in good faith. Indeed, it is entirely competent for a State to provide by statute that all obligations, in whatever form executed by a municipality existing under its laws, shall be subject to any defence that would be allowed in cases of non-negotiable instruments. But, for reasons that every one understands, no such statutes have been passed. Municipal obligations executed under such a statute could not be readily disposed of to those who invest in such securities."

The opinion of the court does not expressly enumerate all the orders, financial statements, records, and proceedings which the defendants introduced in evidence over the objections and exceptions of the plaintiff in that case. In regard to these the court says (p. 276): "What has been said renders it unnecessary to consider various questions arising upon exceptions to specific rulings in the Circuit Court as to the admission and exclusion of evidence, and as to those parts of the charge to which objections were made. *Those rulings are inconsistent with the principles herein announced.*" s. c. *infra*, § 924.

¹ In *Buchanan v. Litchfield*, 102 U. S. 278, after referring to the fact

that the bonds were invalid because issued in violation of a constitutional provision limiting the indebtedness of the municipality, and that on the particular recitals before the court there was no estoppel upon the municipality to plead the invalidity, a case came before the court involving the validity of an issue of bonds which contained a direct reference to the constitutional provision. In this case¹ county bonds were issued for the purpose of funding floating indebtedness. Each bond recited that it was issued by the county commissioners in exchange at par for valid floating indebtedness of the county under and by virtue of and in full conformity with the statute, and that all the requirements of law had been fully complied with by the proper officers in the issuing of the bond. It was further certified that the total amount of the issue of bonds *did not exceed the limit prescribed by the Constitution of the State*, and

that the purchaser of bonds was bound to take notice of the constitutional limitation and of the assessed valuation of the property, and also to the fact that no means existed by which the purchaser could ascertain with any reasonable degree of certainty the amount of the indebtedness of the municipality, the court said (p. 290): "As neither the Constitution nor the statute prescribed any rule or test by which persons contracting with municipal corporations should ascertain the extent of their 'existing indebtedness,' it would seem that if the bonds in question had contained recitals which, upon any fair construction, amounted to a representation on the part of the constituted authorities of the city that the requirements of the Constitution were met, — that is, that the city's indebtedness, increased by the amount of the bonds in question, was within the constitutional limit, — then the city, under the decisions of this court, might have been estopped from disputing the truth of such representations as against a *bona fide* holder of its bonds. The question might then perhaps be brought within the rule announced by this court in *Town of Coloma v. Eaves*, 92 U. S. 484."

¹ *Chaffee County v. Potter*, 142 U. S. 355. This case was expressly followed and approved in the *Gunnison County Case*, 173 U. S. 255 (1899), referred to *infra*, and also in § 924.

The recital in the bond in *Chaffee County v. Potter* was as follows: "*It is further certified that the total amount of this issue does not exceed the limit*

prescribed by the Constitution of the State of Colorado" (p. 357). The court distinguished the case of *Lake County v. Graham*, 130 U. S. 674, and *Dixon County v. Field*, 111 U. S. 83, saying (p. 362): "We held in that case [*Lake County v. Graham*] that the county was not estopped from pleading the constitutional limitation, because there was no recital in the bonds in regard to it, and because, also, the bonds showing upon their face that they were issued to the amount of \$500,000, the purchaser, having that data before him, was bound to ascertain from the records the total assessed valuation of the taxable property of the county, and determine for himself, by a simple arithmetical calculation, whether the issue was in harmony with the Constitution; and that the bonds, having been issued in violation of that provision of the Constitution were not valid obligations of the county. Our decision was based largely upon the ruling of this court in *Dixon County v. Field*, 111 U. S. 83. To the views expressed in that case we still adhere; and the only question for us now to consider, therefore, is: *Do the additional recital in these bonds, above set out, and the absence from their face of anything showing the total number issued of each series, and the total amount in all, estop the county from pleading the constitutional limitation?*" In our opinion these two features are of vital importance in distinguishing this case from *Lake County v. Graham* and *Dixon County v. Field*, and are sufficient to operate as an estoppel against the county."

that the issue had been authorized by a vote of a majority of the duly qualified electors of the county, voting at an election held on a specified date. There was nothing on the face of the bonds to show the total amount issued, and the question before the court was whether the additional recital in the bonds referring to the constitutional requirement, and the absence from their face of anything to show the total number issued and the total amount of the bonds, estopped the county from pleading the constitutional limitation. The court distinguished its previous decisions,¹ and held that the additional recital and the absence of anything in the bonds to show the amount of the issue were features of vital importance and were sufficient to operate as an estoppel against the county. The purchaser of the bonds in open market was, under these circumstances, bound to take notice of the constitutional limitation upon the power of the county to incur indebtedness. But when upon the face of the bonds there was an express recital that the constitutional limitation had not been passed and the bonds themselves did not show that it had, he was bound to look no further. The purchaser might even know, indeed it might be admitted that he would be required to know, the assessed valuation of the taxable property of the county, and yet he could not ascertain by reference to one of the bonds and the assessment roll whether the county had exceeded its power under the Constitution in the premises. It was true that if a purchaser had seen the whole issue of each series of bonds and then compared it with the assessment roll, he might have been able to discover whether the issue exceeded the amount of indebtedness limited by the Constitution. But that is not the test to apply to transactions of this nature. It is not supposed that any one person would purchase all of the bonds at one time, as that is not the usual course of business of this kind. The test in the absence of actual notice is, — What does each individual bond disclose? If the face of one of the bonds had disclosed that, as a matter of fact, the recital in it, with respect to the constitutional limitation, was false, of course the county would not be bound by that recital, and would not be estopped from pleading the invalidity of the bonds. But that was not the question before the court. By virtue of the statute under which the bonds were issued, the county commissioners were to determine the amount to be issued, which was not to exceed the total amount of the indebtedness at the date of the first publication of the statutory notice requesting the holders of county warrants to exchange the warrants

¹ *Dixon v. Field*, 111 U. S. 13; *Lake County v. Graham*, 130 U. S. 674.

for bonds at par. The statute in terms gave to the commissioners the determination of a fact, *i. e.*, whether the issue of bonds was in accordance with the Constitution of the State and the statute under which they were issued, and required them to spread a certificate of that determination upon the records of the county. The recital in the bond to the effect that such determination had been made and that the constitutional limitation had not been exceeded in the issue of the bonds, taken in connection with the fact that the bonds themselves did not show such recital to be untrue, under the law, estopped the county from saying that it is untrue.

In a later case, where the subject was thoroughly debated and considered, the Supreme Court had before it the question of the validity of other bonds issued by a county under a different statute but the same constitutional provision as that involved in the case last referred to, and containing recitals in identically the same terms. The court referred to and examined its previous decisions at great length and reaffirmed its decision in the earlier case of Chaffee County that the recitals contained in the bond, taken in conjunction with the fact that the total amount of the issue did not appear upon the face of the bond, were sufficient to estop the county from attacking the validity of the bond in the hands of an innocent holder for value, upon the ground that the amount of the issue exceeded the constitutional limit of indebtedness.¹

¹ *Gunnison County v. Rollins*, 173 U. S. 255. The recital in each bond was: "This bond is issued by the Board of County Commissioners of said Gunnison County in exchange, at par, for valid floating indebtedness of said county outstanding prior to September 1, 1882, under and by virtue of and in full conformity with the provisions of an act of the General Assembly of the State of Colorado entitled 'An act to enable the several counties of the State to fund their floating indebtedness,' approved February 21, 1881; and it is hereby certified that all the requirements of law have been fully complied with by the proper officers in the issuing of this bond. It is further certified that the total amount of this issue does not exceed the limit prescribed by the Constitution of the State of Colorado, and that this issue of bonds has been authorized by a vote of a majority of the duly qualified electors of the said county of Gunnison, voting on the question at a general election, duly held in said county on the 7th day of November, A. D. 1882." The defence was that the constitutional debt-limit had been exceeded. In this case, after stating the facts and examining at length the case of *Chaffee County v. Potter*, 142 U. S. 355, *supra*, the court referred to the contention of the county that the case was governed by *Sutliff v. Lake County Commissioners*, 147 U. S. 230, *supra*, rather than by *Chaffee County v. Potter*, *supra*. It examined the authorities and the law laid down in the *Sutliff Case* and declared that in that case the court neither modified nor intended to modify but distinctly recognized the principle announced in the previous case of *Chaffee County v. Potter*, *supra*, viz., that the recitals in the bonds that the debt thereby created did not exceed the limit prescribed by the Constitution estopped the county from asserting, as against a *bona fide* holder for value, that the contrary was the fact. Mr. Justice Harlan, who delivered the opinion of the court, said (p. 273): "We have made this extended reference to ad-

In a still more recent case,¹ the court had under consideration the effect of recitals that the bond was issued by a city "for the purpose of refunding the bonded indebtedness of said city and issuing bonds therefor" "pursuant to and in conformity" with the enabling act, "and in pursuance of and in conformity with the Constitution of the State of California," &c. It held that the nature and extent of the indebtedness to be funded were matters peculiarly within the knowledge of the constituted authorities of the city, and that the recitals contained in the bonds amounted to representations by the city that it issued them under and in pursuance of and in conformity with the *refunding statute and the Constitution of the State*,² and the bonds therefore were not subject in the hands of *bona fide* holders to attack on the ground that the issue exceeded the limit prescribed by the Constitution or that the debt funded or part of it was not an "indebtedness of the city evidenced by the bonds and warrants thereof," within the meaning of the enabling act. These decisions, therefore, clearly commit the Supreme Court of the United States to the view that a recital of compliance with a constitutional requirement or restriction is sufficient to bind the municipality and to estop it from contesting the validity of the bond as against a *bona fide* holder when the recital is limited to such matters as are properly left to the determination of the duly constituted municipal authorities. The general result of the de-

judged cases because of the wide difference among learned counsel as to the effect of our former decisions. This course has also been pursued in order to bring out clearly the fact that the present case is controlled by the judgment in *Chaffee County v. Potter*. The views of the Circuit Court, as expressed in its charge in this case and as enforced by its peremptory instruction to find for the defendant, cannot be approved without overruling that case. It was expressly decided in the *Chaffee County Case* that the statute [Funding Act, February 21, 1881] under which the bonds there in suit (the bonds here in suit being of the same class) authorized the county commissioners to determine whether the proposed issue of bonds would in fact exceed the limit prescribed by the Constitution and the statute; and that the recital in the bond to the effect that such determination had been made and that the constitutional limitation had not been exceeded, taken in connection with the fact that the bonds themselves did not show such recital to be untrue, estopped the county, under the law, from saying that the recital was not true. We decline to overrule *Chaffee County v. Potter*, and upon the authority of that case, and without re-examining or enlarging upon the grounds upon which the decision therein proceeded, we adjudge that as against the plaintiff the county of Gunnison is estopped to question the recital in the bonds in question to the effect that they did not create a debt in excess of the constitutional limit and were issued by virtue of and in conformity with the statute of 1881 and in full compliance with the requirements of law." In answer to the contention that the decision of the court had the effect of rendering ineffectual the restrictions and limitations of the Constitution, Mr. Justice Harlan made the important observations, quoted *supra*, § 922.

¹ *Waite v. Santa Cruz*, 184 U. S. 302.

² *Ante*, § 202, *post*, §§ 939, 940.

cisions of the Supreme Court on the subject under consideration we endeavor to summarize in the next section.

§ 924. **Constitutional Limitations; Result of the Decisions.** —

From an examination of the decisions of the United States Supreme Court, the author is of the opinion that the following general conclusions are established, — which, though framed with care, he states with some hesitation, knowing the difficulties that attend any attempt to embody in few words the results of cases involving complex considerations, and the necessary imperfections of such attempts, and the latent dangers that lie concealed in abstract or general legal propositions:

1. The fact that a limitation of indebtedness or other requirement is contained in a *Constitution does not of itself preclude* the application of the doctrine of estoppel. Under proper recitals a municipality may be estopped from taking advantage of conditions precedent or constitutional limitations upon power as effectually as it can be from taking advantage of similar conditions or limitations contained in statutes. There is no difference in this respect between the organic and the statute law,¹ unless, possibly, in

¹ *Chaffee County v. Potter*, 142 U. S. 355; *Gunnison County Commissioners v. Rollins*, 173 U. S. 255; Justice *Blatchford* said: "In respect to this compliance with the conditions imposed by the vote of the people, whether the question is to be regarded as arising under the provisions of the Constitution or that of a statute, it must equally be regarded as concluded by the recitals in the bonds made by the supervisors and town clerk." See also *Hughes County v. Livingston*, 104 Fed. Rep. 306, 317; *Gunnison County v. Rollins*, 173 U. S. 255. The statement of Justice *Jackson* in *Hedges v. Dixon County*, 150 U. S. 182, 187, that recitals in bonds issued under legislative authority may estop the municipality from disputing their authority as against a *bona fide* holder for value, but when the municipal bonds are issued in violation of a constitutional provision, no such estoppel can arise by reason of any recitals contained in the bonds, is contrary to the decisions of the Supreme Court of the United States. It has also been pointed out that the remark was entirely unnecessary to the decision of the case. *National Life Ins. Co. v. Board of Education*, 62 Fed. Rep. 778, 790. *Prickett v. Marceline*, 65 Fed.

¹ *Chaffee County v. Potter*, 142 U. S. 355; *Gunnison County Commissioners v. Rollins*, 173 U. S. 255; Justice *Blatchford* said: "In respect to this compliance with the conditions imposed by the vote of the people, whether the question is to be regarded as arising under the provisions of the Constitution or that of a statute, it must equally be regarded as concluded by the recitals in the bonds made by the supervisors and town clerk." See also *Hughes County v. Livingston*, 104 Fed. Rep. 306, 317; *Gunnison County v. Rollins*, 173 U. S. 255. The statement of Justice *Jackson* in *Hedges v. Dixon County*, 150 U. S. 182, 187, that recitals in bonds issued under legislative authority may estop the municipality from disputing their authority as against a *bona fide* holder for value, but when the municipal bonds are issued in violation of a constitutional provision, no such estoppel can arise by reason of any recitals contained in the bonds, is contrary to the decisions of the Supreme Court of the United States. It has also been pointed out that the remark was entirely unnecessary to the decision of the case. *National Life Ins. Co. v. Board of Education*, 62 Fed. Rep. 778, 790. *Prickett v. Marceline*, 65 Fed.

supra, § 922; *Hamilton County v. Montpelier Sav. Bank*, 157 Fed. Rep. 19, 27. See also *Buchanan v. Litchfield*, 102 U. S. 278, 290. It has been declared that there is no distinction to be made as to the conclusiveness of a recital whether it be of a fact required by constitutional law or by statute law. *King v. Superior*, 117 Fed. Rep. 113. See also *Montpelier Nat. Life Ins. Co. v. Huron Board of Education*, 62 Fed. Rep. 778, 791; *Lake County Com'rs v. Sutliff*, 97 Fed. Rep. 270, 276. In *Pana v. Bowler*, 107 U. S. 529, 539, a recital in bonds was held to constitute an estoppel as against an alleged defect in the mode of conducting an election held prior to the adoption of a Constitution of Illinois, when the bonds were issued after its adoption and in the face of a prohibition contained in that Constitution against the issuing of any bonds, unless their issue had been authorized under then existing laws by a vote of the people prior to the adoption of the Constitution. In *Oregon v. Jennings*, 119 U. S. 74, it was held that recitals in bonds to the effect that a constitutional provision

respect of the effect of the assessment roll, which is prescribed in the Constitution itself as the test or measure of the debt-limit powers of the municipality.

2. To make a recital effectual as an estoppel, it is necessary that it should *in express terms state* that the issue of the bonds does not exceed the constitutional limit, or if the Constitution be not mentioned, the language must be such that there can be no doubt as to the intention of the authorities issuing the bond to certify that the constitutional limit has not been exceeded. A simple recital that a bond is issued pursuant to or in conformity with or in compliance with the requirements of a *statute* will not operate as an estoppel in the absence of some provision in the statute expressly embodying the *constitutional* limitation.¹

Rep. 469, in so far as it follows and applies the remark of *Jackson, J.*, in *Hedges v. Dixon County*, quoted above, is also contrary to the established rules of law.

In *Iowa*, it has been declared that the Supreme Court of that State is committed to the doctrine that the purchaser of negotiable bonds issued by a municipal corporation is charged with notice that the debt of the corporation was in excess of the amount limited by the Constitution at the time of the issue. *Decorah First Nat. Bank v. Doon District Township*, 86 Iowa, 330. See also *French v. Burlington*, 42 Iowa, 614; *McPherson v. Foster*, 43 Iowa, 48; *Mosher v. Ackley Independent School Dist.*, 44 Iowa, 122; *Kane v. Independent District*, 82 Iowa, 5; *Anderson v. Orient Fire Ins. Co.*, 88 Iowa, 579; *Holliday v. Hildebrandt*, 97 Iowa, 177.

¹ *Buchanan v. Litchfield*, 102 U. S. 278; *Lake County v. Graham*, 130 U. S. 674, 681. See also *Montpelier, &c. Trust Co. v. School Dist.*, 115 Wis. 622. Where the statute authorizing the issue of the bonds contains the same limitation upon the power to contract indebtedness as the Constitution, it was held that a recital that the bonds were issued "under and by virtue of and in compliance with the statute" and "that all the provisions of said act have been fully complied with by the proper officers in the issuing of these bonds" was necessarily a certificate that they had been issued in compliance with and not in violation of the constitutional as well as the statutory limitation. *Lake County Com'rs v.*

Sutliff, 97 Fed. Rep. 270, 276. See also *Dudley v. Lake County Com'rs*, 80 Fed. Rep. 672. Assessment roll held to be properly excluded for erasures, alterations, and failure to properly authenticate. *Coler v. Santa Fe County*, 6 N. Mex. 88, 120. In *Montpelier Nat. Life Ins. Co. v. Huron Board of Education*, 62 Fed. Rep. 778, bonds issued by the board of education recited "that all conditions and things required to be done precedent to and in the issuing of said bonds have duly happened and been performed in regular and due form as required by law." One of the things required to be done precedent to and in the issuance of the bonds was to provide in accordance with a constitutional requirement for the collection of an annual tax to pay the principal and interest of the bonds. It was held that the recital amounted to a certificate that the requirements of the Constitution had been met, although the recital contained no specific mention of the Constitution. To the same effect, *King v. Superior*, 117 Fed. Rep. 113.

The rule that the recital must amount to an express declaration of compliance with constitutional requirements is probably subject to qualification in the case of funding and refunding operations, where the refunding bonds import or recite an adjudication or determination that the debt which is funded or refunded is a valid debt, and therefore not affected by any constitutional provision. This seems to be the necessary result of *Waite v. Santa Cruz*, 184 U. S. 302, 314. It is the conclusion which has been

3. The fact against which an estoppel is claimed must be one which, either expressly or by necessary or reasonable implication, the *officers* issuing the bonds *had authority to adjudicate* and determine.¹

4. The constitutional provisions usually determine the limit of indebtedness by a reference to a specified public record, *viz.*, the assessment roll of the taxable property of the municipality. The aggregate amount of indebtedness which the municipality can incur being thus ascertainable by a reference to such *specified public record*, all persons dealing in municipal bonds, including *bona fide* purchasers for value, are chargeable with notice of such facts as are disclosed by an examination of the assessment roll, and the municipality will not be estopped by a recital in bonds which is contrary to the facts appearing upon such roll if the bonds disclose or the purchaser has actual knowledge that the constitutional debt-limit is in fact exceeded.²

reached in numerous decisions of the lower courts of the United States. See *Fairfield v. Rural Independent School Dist.*, 116 Fed. Rep. 838, and cases cited; also §§ 939, 940. In *Waite v. Santa Cruz*, 184 U. S. 302, the bonds recited that they were issued to refund the bonded indebtedness of the city "in pursuance of and in conformity with the Constitution of the State and the ordinances of the city and in pursuance of and in conformity with a vote of more than two-thirds of all the qualified electors of said city." It was further certified "that all acts, conditions, and things required by law to be done precedent to and in the issue of said bonds have been properly done, happened and performed, in due and legal form, as required by law." It was held that the recitals were sufficient to estop the municipality from asserting that bonds violated a provision of the Constitution requiring a two-thirds vote of the qualified electors, and provision for the collection of an annual tax sufficient to pay the interest on the bonds and to constitute a sinking fund.

¹ *Dixon County v. Field*, 111 U. S. 83; *Lake County v. Graham*, 130 U. S. 674; *Sutliff v. Lake County Commissioners*, 147 U. S. 230. Compare *Gunnison County v. Rollins*, 173 U. S. 255; *Nat. Life Ins. Co. v. Mead*, 13 S. Dak. 37, 342.

² *Dixon County v. Field*, 111 U. S. 83; *Lake County v. Graham*, 130 U. S. 674; *Sutliff v. Lake County Commis-*

missioners, 147 U. S. 230; *Shaw v. Independent School Dist.*, 62 Fed. Rep. 911; *Geer v. Ouray County School District*, 97 Fed. Rep. 732; *Burlington Sav. Bank v. Clinton*, 111 Fed. Rep. 439; *Corbet v. Rocksbury*, 94 Minn. 397; *Nat. Life Ins. Co. v. Mead*, 13 S. Dak. 37, 342.

In *Nesbit v. Riverside Ind. Dist.*, 144 U. S. 610, the facts were that under the Constitution the debt-limit of the district at the date of the issue of the bonds was \$2071.30. The plaintiff bought in the market at one time five bonds of same tenor, issue, and date, of \$500 each, amounting to \$2500 or "nearly \$500 more than the amount of debt the district could lawfully create; these bonds alone were an over-issue and beyond the power of the district; for the plaintiff was bound to take notice of the value of the taxable property in the district, as shown by the tax list" (citing the cases on this point). The bonds contained this recital: "This bond is issued under the provisions of Chapter 98 (citing the enabling act) and in conformity with a resolution of the said board dated the 26th day of March, 1873." The plaintiff purchased the five bonds, paying full value, and "had no other knowledge concerning the bonds or of the facts connected with their issuance than she was chargeable with from the bonds themselves and from the provisions of the Constitution and laws of the State of Iowa." The court held that the district was not

5. If the legislature requires, by statute, that a fact affecting the power of the municipality to incur indebtedness under the Constitution shall be *made a matter of record, e. g.*, if a statute requires that the amount of the existing debt shall be ascertained and made a matter of record as a test or rule for determining the amount of debt in bond issues, all persons, including *bona fide* purchasers for value, dealing in such bonds are in such case chargeable with notice of the facts which will be disclosed by an examination of such record, and no recital in the bonds can in such case conclude the municipality to the contrary.¹ But the usual or general requirement in the charter or legislation as to the municipality making financial statements and entering them of record not contained in the enabling act and having no connection with the express power to issue bonds, and which financial statements are not declared to be constructive notice of the amount of indebtedness, will not preclude a municipality from being estopped in favor of a *bona fide* holder by an express recital that the debt-limit prescribed by the Constitution has not been exceeded in the issue of the bond containing such recital. This is the exact principle decided in the *Gunnison County Case*.² An important difference should, we think, be pointed out. It is easy or practicable to ascertain the total assessed value of taxable property as shown on the assessment rolls for a given year. But it is practically impossible for an investor in municipal

liable, Mr. Justice Brewer saying: "So when the plaintiff purchased these bonds she knew, or at least was chargeable with knowledge of the fact, that they were unlawfully issued, and created no obligation against the district. She could not, therefore, claim to be a *bona fide* purchaser, no matter what recitals appeared on the face of the instrument" (p. 618). But *quære* whether this last statement may not, under other circumstances, be too broad? Suppose the bonds had recited specifically as in the subsequent *Gunnison County Case* (173 U. S. 255), that they did not exceed the constitutional limitation, would the purchaser in that event, acting in good faith, without actual notice, be bound to take notice of the amount of the official assessment or the valuation of taxable property within the district and that the debt exceeded the constitutional limit? See *Evansville v. Dennett*, 161 U. S. 434; *Hackett v. Ottawa*, 99 U. S. 86, 90, 91, 95, 96; *Graves v. Saline County*, 161 U. S. 359.

Under the provision of the Con-

stitution of *Texas*, limiting taxes to two per cent on the assessed valuation and prohibiting the issuing of bonds until an annual tax sufficient to pay the interest and a portion of the principal should have been levied, which operates as a limitation upon the amount of the bonded indebtedness which may be incurred, a purchaser of the bonds is chargeable with notice of such facts as are disclosed by an examination of the assessment rolls. *Morrill v. Smith County*, 89 Tex. 529. It has also been held that under the positive language of his constitutional provision a purchaser of the bonds is required to take notice that the limit of taxation has been reached when that is the fact. *Peck v. Hempstead*, 27 Tex. Civ. App. 80.

¹ *Sutliff v. Lake County*, 147 U. S. 230; but see *Gunnison County v. Rollins*, 173 U. S. 255, referred to *supra*, § 922; *Nat. Life Ins. Co. v. Mead*, 13 S. Dak. 37, 342.

² *Gunnison County v. Rollins*, 173 U. S. 255; s. c. *supra*, § 922.

bonds to ascertain by an independent inquiry *en pais* what is the amount of the indebtedness of a municipality at any given date unless some specific record is provided to be made which shall be in bond issues the criterion or measure of such indebtedness. Where no such record is provided for, any rule that requires the investor to ascertain at his peril the amount of the debt of the municipality at the date of the issue or sale or delivery of the bonds, notwithstanding a recital therein expressly or by necessary implication that the debt-limit has not been exceeded, imposes a condition which will greatly clog the negotiation and sale and depreciate the marketable value if it does not destroy the marketability of such bonds.¹

6. If there is *nothing on the face of the bonds* to show that the constitutional limit of indebtedness has been exceeded, — *e. g.*, a statement of a total issue exceeding the constitutional limit — and if the Constitution or statute has not prescribed any rule or test for determining whether the constitutional limit is being exceeded or has not declared that the records of the municipality as to the amount of its indebtedness shall be constructive notice, a *recital expressly or by necessary implication that the issue is within the constitutional limit* absolves *bona fide* purchasers for value from making inquiry to ascertain the amount of the existing debt of the municipality, and they are entitled to rely upon such recital as an adjudication by the proper municipal authority that the constitutional limit has not been exceeded.²

7. But if the *total amount* of an issue of bonds *is shown upon the face* thereof, and if such issue exceeds in fact the limit placed upon the municipality by the Constitution, as ascertained by an examination of the appropriate assessment roll, the bonds are invalid in the hands of *bona fide* purchasers, although they may contain general recitals importing compliance with constitutional requirements.³

¹ If the municipal authorities have neglected their duty to keep a statutory record of indebtedness and no such record is in existence as required and contemplated by the statute, the purchaser is in any event excused from the duty, if it otherwise exists, of examining the record or making inquiry as to the indebtedness, and is entitled to rely on recitals in the bonds that the constitutional limit of indebtedness has not been exceeded. *Dudley v. Lake County Com'rs*, 80 Fed. Rep. 672; *Lake County v. Sutliff*, 97 Fed. Rep. 270. In the absence of such record as is required by the statute to be kept, a buyer of the bonds is not required to search the proceedings of the municipal authorities and the books of the clerk to ascertain the indebtedness of the county. *Lake County v. Sutliff*, 97 Fed. Rep. 270, 278.

² *Chaffee County v. Potter*, 142 U. S. 355; *Gunnison County v. Rollins*, 173 U. S. 255. See also *Second Ward Sav. Bank v. Huron*, 80 Fed. Rep. 660.

³ *Dixon County v. Field*, 111 U. S. 83; *Lake County v. Graham*, 130 U. S.

8. And if a reference to the *assessment roll* and to a *record of debt* required by statute to be made and kept as a test or rule to determine the amount of bonds that may be issued, shows that at the time of the issue the municipality had exceeded the constitutional limit, *no estoppel can operate*, even by express recitals importing compliance with constitutional requirements, and the municipality is not precluded from attacking the bonds on the ground that they exceed the constitutional limit if such be the fact.¹

9. If, however, the bonds contain a recital stating or fairly importing that they do not exceed the constitutional limit, and if the *total amount of the issue* is not recited on the *face of the bonds*, or if it does not otherwise appear on the face of the bonds or by a statutory test of indebtedness, if one has been prescribed by the Constitution or statute, that the constitutional limit has been exceeded, the municipality is estopped as against a *bona fide* holder for value from asserting the defence that the issue is void as exceeding the constitutional limit of indebtedness.²

§ 925. **Estoppel by Recitals; Constitutional Requirement of Levy of Tax to pay Interest and Principal.** — The exact legal effect of a provision in a Constitution that any city or other municipality incurring indebtedness shall at or before the time of so doing provide for the levy and collection of an annual tax sufficient to pay the interest and also the principal of the debt when due, has not yet been fully developed and ascertained by judicial decisions. The general construction placed upon such a provision has been heretofore stated.³ The purpose of the provision is plain — to insure punctual payment when due of the interest and principal of the debt. It also in some measure operates to check the creation of debt by requiring the levy of sufficient taxes year by year from the date of incurring the liability. The view has been taken that such a provision is merely a regulation of the manner of exercising the debt-creating powers conferred upon the municipality; that it does not destroy the power which otherwise exists on the part of the municipality to incur debt and issue bonds therefor, but merely directs and regulates the manner in which

674; *Nesbit v. Riverside Ind. Dist.*, 144 U. S. 610, aff'g 25 Fed. Rep. 635; *Sutliff v. Lake County*, 147 U. S. 230. ¹ *Sutliff v. Lake County*, 147 U. S. 230. ² *Rollins*, 173 U. S. 255, *supra*, § 922. ³ See on this point, *Gunnison County v. Rollins*, 173 U. S. 255, *supra*, § 922; *Chaffee County v. Potter*, 142 U. S. 355; *Gunnison County v. Rollins*, 173 U. S. 255. ⁴ *Ante*, chapter vi. § 211.

that power shall be exercised. If, therefore, in this view bonds are issued without a compliance with this constitutional provision, the irregularity in the issue does not arise from lack of power on the part of the municipality, but from a failure on its part to exercise the power with which it was vested in the manner provided by the Constitution. This constitutional requirement can usually be complied with by the passage of a proper ordinance or resolution on the part of the body authorizing the issue of the bonds, and it will usually be found that the Constitution, and the statutes enacted to carry the constitutional provision into effect, entrust to that body the power, and impose upon it the duty, to ascertain and determine whether or not this condition has been performed. This body has special means of knowledge regarding the performance of the condition, for it alone can perform the condition; and when it certifies, by recital in the bonds, that the condition has been complied with, — or what in this case would amount to the same thing, that *all* the acts, conditions, and things required to be done precedent to and in the issuing of the bonds have duly happened and been performed in regular and due form as required by law, — it certifies that the requirement of the Constitution has been met; and the municipality is estopped by its action from attacking the validity of the bonds in innocent hands upon the ground that the issue was made without providing for the levy and collection of the tax.¹

¹ *Montpelier Nat. Life Ins. Co. v. Huron Board of Education*, 62 Fed. Rep. 778; *King v. Superior*, 117 Fed. Rep. 113; *Beatrice v. Edminson*, 117 Fed. Rep. 427; *Howland v. San Joaquin Board of Supervisors*, 109 Cal. 152. The opinion in the case last cited with respect to the requirement of a collection of an annual tax for a sinking fund is as follows: "It is insisted that the entire proceeding is void, upon the ground that the board of supervisors, neither at the time of incurring said indebtedness nor at any time prior thereto, made any provision for the collection of an annual tax sufficient to pay the interest on said indebtedness as it falls due, or to constitute a sinking fund for the payment of the principal within twenty years from the time when the indebtedness was contracted. The section of the Constitution, a part of which we have already quoted, in speaking as to this question of indebtedness, provides: 'Nor unless before or at the time of incurring such indebtedness, provision

shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void.' [Article xi. § 18.] This provision of the Constitution does not require that at the time of the sale or issuance of bonds, or the incurring of the bonded indebtedness, a sinking fund or interest tax be levied. It only requires that before or at such time provision must be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal. These bonds were issued by express terms under the provisions of an act of the legislature found in the statutes of 1891, p. 295. The notices so prescribed, and the bonds themselves upon their face so recite. That

the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, a recital that it has been, made in the bonds issued by them, and held by a *bona fide* purchaser, is conclusive of the fact and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal.¹ But it is apparent that this rule does not

¹ Knox County v. Aspinwall, 21 How. (U. S.) 539; Bissell v. Jeffersonville, 24 How. (U. S.) 287; Moran v. Miami County, 2 Black (U. S.), 722; Mercer County v. Hackett, 1 Wall. (U. S.) 83; Marshall County v. Schenck, 5 Wall. (U. S.) 772, 783; Pendleton County v. Amy, 13 Wall. (U. S.) 297; Grand Chute v. Winegar, 15 Wall. (U. S.) 355, 371; Kenicott v. Jefferson County, 16 Wall. (U. S.) 452, 464; Lynde v. Winnebago County, 16 Wall. (U. S.) 6; St. Joseph Township v. Rogers, 16 Wall. (U. S.) 644, 659; Coloma v. Eaves, 92 U. S. 484, 491; Venice v. Murdock, 92 U. S. 494; Moultrie v. Rockingham T. C. Sav. Bank, 92 U. S. 631; Marcy v. Oswego, 92 U. S. 637; Humboldt Township v. Long, 92 U. S. 642; Douglas County v. Bolles, 94 U. S. 202; Johnson County v. January, 94 U. S. 202; San Antonio v. Mehaffy, 96 U. S. 312; Warren County v. Marcy, 97 U. S. 96; Macon County v. Shores, 97 U. S. 272; Nauvoo v. Ritter, 97 U. S. 389; Daviess County v. Huidekoper, 98 U. S. 93; Hackett v. Ottawa, 99 U. S. 86; Calhoun County v. Galbraith, 99 U. S. 214; Wilson v. Salamanca, 99 U. S. 499; Orleans v. Platt, 99 U. S. 76, 682; Pompton v. Cooper Union, 101 U. S. 196, 204; Buchanan v. Litchfield, 102 U. S. 278; Clay County v. Society for Savings, 104 U. S. 579; American L. Ins. Co. v. Bruce, 105 U. S. 328; Moultrie County v. Fairfield, 105 U. S. 370, 374; Pana v. Bowler, 107 U. S. 529, 539; Sherman County v. Lyons, 109 U. S. 735; Toledo North-Bank v. Porter Township, 110 U. S. 98; Dallas County v. McKenzie, 110 U. S. 686; Grenada County v. Brogden, 111 U. S. 261; Anderson County v. Kings, 113 U. S. 227, 239; Oregon v. Livingstone, 119 U. S. 74; Portsmouth First Nat. Bank v. Morrison, 123 U. S. 523; Comanche County v. Lewis, 133 U. S. 128 U. S. 102, 127; Bernards County v. Harper County v. Rose, 140 U. S. 1, 76; Chaffee County v. Potter, 141 U. S. 355; Cairo v. Zane, 149 U. S. 115; Citizens Sav. & Loan Assoc. v. Perry County, 156 U. S. 692; Andes v. Ely, 158 U. S. 312; Evansville v. Dennett, 161 U. S. 434, 442; Philadelphia Provident Life & Trust Co. v. Mercer County, 170 U. S. 593; Tulare Irrig. Dist. v. Shepard, 185 U. S. 1, 19; Stanley County v. Coler, 190 U. S. 437; Moulton v. Evansville, 25 Fed. Rep. 382, 388; Kingham County v. Cornell University, 57 Fed. Rep. 149; Cadillac v. Woonsocket Inst. for Sav., 58 Fed. Rep. 935; Montpelier Nat. Life Ins. Co. v. Huron Board of Education, 62 Fed. Rep. 778; Columbus v. Dennison, 69 Fed. Rep. 58; West Plains Tp. v. Sage, 69 Fed. Rep. 943; Mercer County v. Philadelphia Provident Life & Trust Co., 72 Fed. Rep. 623, 631; Wesson v. Saline County, 73 Fed. Rep. 917; Second Ward Sav. Bank v. Huron, 80 Fed. Rep. 660; Heed v. Cowley County, 82 Fed. Rep. 716; Kiowa County v. Howard, 83 Fed. Rep. 296; Brown v. Ingalls Tp., 86 Fed. Rep. 261, rev'g 81 Fed. Rep. 485; Huron v. Second Ward Sav. Bank, 86 Fed. Rep. 272; Tp. of Ninety-Six v. Folsom, 87 Fed. Rep. 304; So. St. Paul v. Lamprecht Bros. Co., 88 Fed. Rep. 449; Haskell County, v. Nat. Life Ins. Co., 90 Fed. Rep. 228; Grattan Township v. Chilton, 97 Fed. Rep. 145, aff'g 82 Fed. Rep. 873; Geer v. Ouray County, Sch. Dist., 97 Fed. Rep. 732; Brattleboro Sav. Bank v. Hardy Tp., 98 Fed. Rep. 524; Wesson v. Mt. Vernon, 98 Fed. Rep. 804; Miller v. Perris Irr. Dist., 99 Fed. Rep. 143; Rondot v. Rogers Township, 99 Fed. Rep. 202; Pickens Township v. Post, 99 Fed. Rep. 659; Kent v. Dana, 100 Fed. Rep. 56; Lyon County v. Keene Sav. Bank, 100 Fed. Rep. 337, aff'g 90 Fed. Rep. 523; Barber County v. Soc. for Sav., 101 Fed. Rep. 767; Hughes County v. Livingston, 104 Fed. Rep. 306, 318; Sioux City Independent School Dist. v. Rew, 111 Fed. Rep. 1; Clapp v. Marice City, 111 Fed. Rep. 103; Stanley County v. Coler, 113 Fed. Rep. 705; Wilkes County v. Coler, 113 Fed. Rep. 725; Kearney v. Woodruff, 115 Fed. Rep. 90; Kearney County v.

absolutely preclude all questions as to the validity of municipal bonds and the efficacy of recitals therein. The adjudged cases, examined in the light of their special circumstances, show that the facts which a municipal corporation issuing bonds for money borrowed or in aid of the construction of a railroad, is not permitted, against a *bona fide* holder, to question in the face of a recital in the bonds of their existence, are those connected with or growing out of the discharge of the ordinary or authorized duties of such of its officers as were invested with authority to execute them, and which the statute conferring the power made it their duty to ascertain and determine before the bonds were issued, — not merely for themselves as the ground of their own action in issuing the bonds, but equally as authentic and final evidence of their existence for the information and action of all others dealing with them in reference to it.¹ Hence, if the fact necessary to the existence of the authority is by the Constitution or by statute provision to be ascertained, not officially by the officers charged with the execution of the power, but by reference to some express and definite record of a public character, such as the assessment roll heretofore referred to, then the true meaning of the law in such case is that the authority to act at all depends upon the actual positive existence of the requisite fact as shown by such record and not upon its ascertainment and determination by any one.² The general rule is, that unless

Vandriess, 115 Fed. Rep. 866; Municipal Trust Co. v. Johnson City, 116 Fed. Rep. 458; Fairfield v. Rural Independent Dist., 116 Fed. Rep. 838, rev'g 111 Fed. Rep. 453; Beatrice v. Edminson, 117 Fed. Rep. 427; Wetzell v. Paducah, 117 Fed. Rep. 647; Defiance v. Schmidt, 123 Fed. Rep. 1, aff'g 117 Fed. Rep. 702; Gamble v. Rural Ind. Dist., 132 Fed. Rep. 514; Henderson County v. Traveler's Inc. Co., 128 Fed. Rep. 817; Rees v. Olmstead, 135 Fed. Rep. 296.

In *St. Joseph Township v. Rogers*, 16 Wall. (U. S.) 644, the rule is stated thus: "Power to issue bonds to aid in the construction of a railroad is frequently conferred upon a municipality in a special manner, or subject to certain regulations, conditions, or qualifications; but if it appears by their recitals that the bonds were issued in conformity with these regulations, and pursuant to those conditions and qualifications, proof that any or all of these recitals were incorrect will not constitute a defence for the corporation

in a suit on the bonds or coupons [by a *bona fide* holder] if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition, or qualification, which it is alleged was not fulfilled." In *Flagg v. Barnes School Dist.*, 4 N. Dak. 30, it is said that the right of a *bona fide* purchaser of municipal bonds to rely upon a recital or certificate as to facts which the person making had authority to determine, does not depend upon the bond being a negotiable instrument. It exists in the case of a *bona fide* purchaser of a non-negotiable bond as well.

¹ *Toledo Northern Bank v. Porter Township*, 110 U. S. 608, 616; *Sutliff v. Lake County Com'rs*, 147 U. S. 230, 235.

² *Dixon County v. Field*, 111 U. S. 83, 93; *Sutliff v. Lake County*, 147 U. S. 230. Compare *Gunnison County v. Rollins*, 173 U. S. 255, commented on *supra*, § 924. See also *Coffin v. Kearney*

otherwise specially provided by law, an innocent holder of municipal bonds is not bound to take notice of matters appearing of public record contrary to the recitals in the bonds.¹ Nor is a *bona fide* purchaser of municipal bonds affected by constructive notice of pending litigation, or by constructive notice of adverse judgments.² It has also been said that when the recitals are made, not by regular officers of the municipality, but by commissioners specially appointed to issue the bonds on its behalf, the municipality cannot be concluded by the recitals until it appears that the commissioners were duly appointed, and thus had authority to act. This distinction is not without significance; but if the commissioners exercised the powers conferred upon them by statute and their authority to act was recognized by the municipal officers, and if back of that it be found that the records of the appointing power disclose an order making the appointment in due form and which re-

County, 57 Fed. Rep. 137. The principle laid down in the last sentence of the text is of limited range and does not extend generally to all records of the municipality unless so prescribed by statute. See *supra*, §§ 923, 924.

When the Constitution of a State declares that the power of a municipality to incur debt shall be limited to a certain percentage of the assessed value of the property within the municipality, as shown by the assessment roll, the assessment roll is a public record which is equally accessible to all intending purchasers of bonds as well as to the county officers, and no recital involving the amount of the assessed taxation of the property to be taxed for the payment of the bond can take the place of the assessment itself, for it is the amount, as fixed by reference to that record, that is made by the Constitution the standard for measuring the limit of municipal power, and nothing in the way of inquiry, ascertainment, or determination as to that fact is submitted to the county officers. *Dixon County v. Field*, 111 U. S. 83, 95. The principle of this decision is to be limited to its special facts, and the case read in connection with the later *Gunnison County Case*. *Supra*, §§ 923, 924. Similarly, if the statute under which the bonds are issued requires periodical records of the indebtedness of the municipality to be made which should be open to the inspection of the public at all times, a purchaser of the bonds for value and before maturity is charged with the

duty of examining that record in order to ascertain whether the bonds increase the indebtedness of the municipality beyond the constitutional limit, and recitals in the bonds do not estop the municipality to prove by the records of the assessment and the indebtedness that the bonds were issued in violation of the Constitution. *Sutliff v. Lake County Com'rs*, 147 U. S. 230, 235. There was in this case no connection shown in the statute between the power to issue the bonds and the entirely independent provisions as to financial statements, and the case itself is limited and distinguished, if not in effect overruled on the point of taking notice of the financial statements, by the later *Gunnison County Case*, 173 U. S. 255. *Supra*, § 924.

¹ *Waite v. City of Santa Cruz*, 184 U. S. 302; *Gunnison County v. Rollins*, 173 U. S. 256; *supra*, § 923; *Evansville v. Dennett*, 161 U. S. 434; *Weason v. Saline Co.*, 73 Fed. Rep. 917; 20 C. C. A. 229.

² *Warren County v. Marcy*, 97 U. S. 96; *Ritchie v. Franklin Co.*, 22 Wall. (U. S.) 67; *Lee Co. v. Rogers*, 74 U. S. 181; *Campbell v. Kenosha*, 72 U. S. 194; *Otoe Co. v. Baldwin*, 111 U. S. 1; *Quincy v. Cooke*, 107 U. S. 549; *Thompson v. Perrine*, 103 U. S. 806; *Jonesboro v. Cairo & St. L. R. Co.*, 110 U. S. 192; *Thomson v. Lee County*, 3 Wall. (U. S.) 327; *Carroll County v. Smith*, 111 U. S. 556; *Orleans v. Platt*, 99 U. S. 676; *Cass County v. Gillett*, 100 U. S. 585; *ante*, § 896.

cites a prior adjudication of all the facts, the point is reached beyond which the purchaser of the bonds is not obliged to go. Giving full force to the distinction between the action of the general and special officers, there must be, even in respect to the latter, some point in the line of inquiry beyond which a party dealing in the bonds is not bound to go in his investigations as to their authority to represent the municipality, and that point is reached when an appointment in due form is found made by the appointing tribunal named by the statute.¹

Although the principles of estoppel laid down by the Supreme Court of the United States have not been uniformly adhered to or followed by the courts of the States, decisions are to be found in many States showing the acquiescence and assent of the local judiciaries to the rule adopted by the Federal courts.²

§ 927. **When Officer will be deemed to have Authority to make Recital.** — It would seem that the criterion by which to determine whether a recital is made by a person having authority to bind the municipality is that the officers executing the bonds containing the recital should by statute be vested with authority connected with or growing out of the discharge of the ordinary duties in the execution and issuance of the bonds, to ascertain and determine the facts recited to have occurred before the bonds were issued; — not

¹ *Andes v. Ely*, 158 U. S. 312, 325; *son County*, 56 Miss. 115, 123; *Aberdeen v. Sykes*, 59 Miss. 236; *Coler v. Santa Fe County*, 6 N. Mex. 88; *Coler v. Dwight School Township*, 3 N. Dak. 249; *Flagg v. Barnes School Dist.*, 4 N. Dak. 30; *Klamath Falls v. Sachs*, 35 Oreg. 325; *Coler v. Rhoda School Township*, 6 S. Dak. 640; *Johnson City v. Charleston, C. & C. R. Co.*, 100 Tenn. 138; *Nolan County v. State*, 83 Tex. 182, 195; *Tyler v. Tyler Building Assoc.*, 99 Tex. 6; 86 S. W. Rep. 750, rev'g (Tex. Civ. App.) 82 S. W. Rep. 1066; *Cass County v. Wilbarger County*, 25 Tex. Civ. App. 52, 57; *Lynchburg v. Slaughter*, 75 Va. 57, 63. In *Alabama*, if by statute the bonds of a corporation are declared to "have all the properties and protection of commercial paper," recitals on the face of the bonds that they are issued in accordance with and by virtue of acts of the legislature estop the municipality from setting up as a defence as against a *bona fide* purchaser for value that such bonds were in fact issued for an unauthorized purpose and were therefore void. *Brewton v. Spira*, 106 Ala. 229.

² The principles of estoppel as laid down by the Supreme Court of the United States are approved and followed by State courts in the following cases: *Meyer v. Brown*, 65 Cal. 583; *Cripple Creek v. Adams*, 36 Colo. 320; *Slutts v. Dana* (Iowa), 109 N. W. Rep. 794; *State v. Wichita County*, 62 Kans. 494; *South Hutchinson v. Barnum*, 63 Kan. 872; *School Dist. No. 40 v. Cushing*, 8 Kan. App. 728; *Augusta Bank v. Augusta*, 49 Me. 507; *Deming v. Houlton*, 64 Me. 254; *Lane v. Embden*, 72 Me. 354; *Shurtleff v. Wiscasset*, 74 Me. 130, 137; *Cedar Springs v. Schlich*, 81 Mich. 405; *Gibbs v. School District No. 10*, 88 Mich. 334; *Grant v. Reno*, 107 Mich. 409, 414; *Thompson v. Mecosta*, 127 Mich. 522; *Schmid v. Frankfort*, 131 Mich. 197; *Fulton v. Riverton*, 42 Minn. 395; *Vicksburg v. Lombard*, 51 Miss. 125; *Cutler v. Madi-*

merely for themselves, as the ground of their own action in issuing the bonds, but equally as authentic and final evidence of their existence for the information and action of all others dealing with them in reference to it.¹ Although this criterion would seem to imply that some express or specific power to decide the fact recited in the bonds is essential to the authority of the officers making the recital, yet the decisions of the Supreme Court of the United States have never required any statutory enactment of this nature. It is sufficient if the duty is placed upon the municipal officers to issue the bonds in the event of a compliance with the condition precedent without any other authority being conferred upon them to decide the fact recited than such as is contained in a proviso or condition attached or annexed to their power to act. Thus, in the first case which came before the Supreme Court,² the statute imposed the duty on the county commissioners to subscribe to the stock of a railroad and issue county bonds in payment thereof, if a majority of the qualified voters of the county should vote for the same. It does not appear that any other authority was conferred upon the county commissioners to determine whether the vote had been had, yet the court held that the decision of the question whether or not the election had been properly held, and a majority of the votes of the county had been cast in favor of the subscription, was not to be determined by the court collaterally in an action upon bonds or coupons, but by the board of commissioners as a duty imposed upon it before making the subscription. The court pointed out that the statute made it the duty of the sheriff to give the notices of election for the day mentioned, and then declared that if a majority of the votes given should be in favor of the subscription,

¹ *Toledo Northern Bank v. Porter Township Trs.*, 110 U. S. 608, 616; *Sutliff v. Lake County*, 147 U. S. 230, 235; s. c. *supra*, §§ 923, 924. In *Dixon County v. Field*, 111 U. S. 83, 93, Justice *Matthews* said with reference to the authority of an officer to decide a fact and recite his decision: "But it still remains that there must be authority vested in the officers, by law, as to each necessary fact, whether enumerated or non-enumerated, to ascertain and determine its existence, and to guarantee to those dealing with them the truth and conclusiveness of their admissions. In such a case the meaning of the law granting power to issue bonds is that they may be issued, not upon the existence of certain facts, to be ascertained and determined when-

ever disputed, but upon the ascertainment and determination of their existence by the officers or body designated by law to issue the bonds upon such a contingency. This becomes very plain when we suppose the case of such a power granted to issue bonds, upon the existence of a state of facts to be ascertained and determined by some persons or tribunal other than those authorized to issue the bonds. In that case, it would not be contended that a recital of the facts in the instrument itself, contrary to the finding of those charged by law with that duty, would have any legal effect."

² *Knox County v. Aspinwall*, 21 How. (U. S.) 539. As to this case, see *supra*, §§ 905, 906, 907.

the county board should subscribe for the stock. The right of the board to act in the execution of the authority was based upon the fact that a majority of the votes had been cast in favor of the subscription, and to have acted without first ascertaining it would have been a clear violation of duty, and the ascertainment of the fact was necessarily left to the inquiry and judgment of the board itself, as no other tribunal was provided for the purpose. The board was one from its organization and general duties fit and competent to be the depository of the trust confided to it. The persons composing it were elected by the county, and it was fully invested with the highest functions concerning its police and fiscal interests. Hence, although the decision of the board might not be conclusive in a direct proceeding to inquire into the facts preceding the execution of the power and before the rights and interests of third parties had attached; yet, if the authority had been executed, the stock subscribed, and the bonds issued, and in the hands of innocent holders, it was too late, even in a direct proceeding, to call it in question. Much less could it be called in question to the prejudice of a *bona fide* holder of the bonds collaterally in an action upon the bonds or coupons. The principles of this decision have been steadily adhered to and applied by the Supreme Court of the United States and must be accepted as the settled rule of law of that court.¹ The

¹ *Bissell v. Jeffersonville*, 24 How. 212; *Sioux City Independent School Dist. v. Rew*, 111 Fed. Rep. 1; *Wetzell v. Paducah*, 117 Fed. Rep. 647; *Rees v. Olmsted*, 135 Fed. Rep. 296; *Platt v. Hitchcock County*, 139 Fed. Rep. 929.

In order that officers or boards of municipalities may have power to make findings and recitals in bonds it is not necessary that the statutes expressly confer upon such officers or boards power to make such findings and recitals. The fact is, as stated by the Supreme Court of the United States, that "such express direction and authority are seldom found in acts providing for the issuing of bonds." On this point the Supreme Court in *Bernards Township v. Morrison*, 133 U. S. 523, 527, says:

"It were useless to refer to the long list of cases in which recitals, like these, have been held sufficient to sustain bonds in the hands of *bona fide* holders. It is urged that these commissioners were not elected by the people; that they were not the general officers of the township, but were special officers appointed by the Circuit Court —

U. S.) 287; *Grand Chute v. Winegar*, 15 Wall. (U. S.) 355, 371; *St. Joseph Township v. Rogers*, 16 Wall. (U. S.) 644, 665; *Coloma v. Eaves*, 92 U. S. 484; *Venice v. Murdock*, 92 U. S. 494; *Marcy v. Oswego*, 92 U. S. 637; *Douglas County Com'rs v. Bolles*, 94 U. S. 202; *Johnson County v. January*, 94 U. S. 202; *Daviess County v. Huidekoper*, 98 U. S. 98; *Grenada County v. Brogden*, 112 U. S. 261; *Oregon v. Jennings*, 119 U. S. 74, 92; *Livingston County v. First Nat. Bank*, 128 U. S. 102, 127; *Bernards Township v. Morrison*, 133 U. S. 523; *Philadelphia Provident Life & Trust Co. v. Mercer County*, 170 U. S. 593, 601; *Tulare Irrig. Dist. v. Shepard*, 185 U. S. 1, 21; *Stanly County v. Coler*, 190 U. S. 437, 447; *Cadillac v. Woonsocket Inst. for Sav.*, 58 Fed. Rep. 935; *Montpelier Nat. Life Ins. Co. v. Huron Board of Education*, 62 Fed. Rep. 778; *West Plains Tp. v. Sage*, 69 Fed. Rep. 943; *Brattleboro Sav. Bank v. Hardy Tp.*, 98 Fed. Rep. 524; *Miller v. Perris Irr. Dist.*, 99 Fed. Rep. 143; *Rondot v. Rogers Township*, 99 Fed. Rep. 202,

tribunal authorized to decide the question of fact upon which an estoppel is claimed necessarily has authority to recite its decision

special agents, as it were, for the specific purpose; *that the statute does not in terms give them authority to determine whether the preliminary conditions have been complied with*; and that this case is, therefore, to be distinguished in these respects from those cases where similar recitals have been held conclusive. But though not the ordinary officers of the township, they were the ones to whom by legislative direction was given full authority in the matter of issuing bonds. The organization of townships, the number, character, and duties of their various officers, are matters of legislative control; and it is not doubtful that officers appointed represent the municipality as fully as officers elected. When the legislature has declared how an officer is to be selected, and the officer is selected in accordance with that declaration, his acts, within the scope of the powers given him by the legislature, bind the municipality. But these special commissioners were not the only officers of the township whose acts gave currency to these bonds. If inquiry had been directed to the county and township records, the affidavit of the township assessor to the consent required would have been found; and on the face of the bonds it appears that the county clerk of the county has added his official certificate to their validity; so that the acts of general as well as of special officers and agents of the township are the foundation upon which rests the validity of these bonds.

"While it is true that the act does not in terms say that these commissioners are to decide that all preliminary conditions have been complied with, yet such express direction and authority is seldom found in acts providing for the issuing of bonds. It is enough that full control in the matter is given to the officers named. In the case of *Oregon v. Jennings*, 119 U. S. 74, 92, the rule is thus stated by Mr. Justice *Blatchford*: 'Within the numerous decisions by this court on the subject, the supervisor and the town clerk, they being named in the statute as the officers to sign the bonds, and the "corporate authorities" to act for the town in issuing them to the company, were the persons entrusted with the duty of deciding, before issuing the bonds,

whether the conditions determined at the election existed. If they have certified to that effect in the bonds, the town is estopped from asserting, as against a *bona fide* holder, that the conditions prescribed by the popular vote were not complied with.' Whatever may be the hardships of this particular case, to sustain the defences pressed would go far towards destroying the market value of municipal securities. We see no error in the ruling of the Circuit Court, and its judgment is therefore affirmed."

The rule adopted by the Federal courts appears also to be followed in *Gibbs v. School Dist.*, 88 Mich. 334; *Flagg v. Barnes School Dist.*, 4 N. Dak. 30; *Coler v. Santa Fe County*, 6 N. Mex. 88. In *Coloma v. Eaves*, 92 U. S. 484, s. c. *supra*, § 909, a statute authorized a subscription in aid of a railroad and an issue of bonds in payment thereof, but provided that the subscription should not be made until the question had been submitted to the voters of the municipality, and the clerk of the municipality was required upon presentation of a petition to post notices of an election, and "if it shall appear that a majority of all the legal voters" of the municipality had voted for a subscription "it shall be the duty of . . . the supervisor in townships to subscribe" to the capital stock of the company and also to "execute to said company" bonds of the township which should be signed by the supervisor and attested by the clerk. The statute also provided that the clerk should, within ten days after a vote, transmit to the county clerk a transcript or statement of the vote given, and the amount so voted to be subscribed, and the interest to be paid. In discussing the question upon whom the statute devolved the duty of determining whether an election had been had and certifying to that fact, *Strong, J.*, said: "At some time or other, it is to be ascertained whether the directions of the act have been followed: whether there was any popular vote; or whether a majority of the legal voters present at the election did, in fact, vote in favor of the subscription. The duty of ascertaining was plainly intended to be vested somewhere, and once for all; and the only persons spoken of who

on the face of the bonds.¹ If the fact against which an estoppel by recital is claimed is one the determination of which is not en-

have any duties to perform respecting the election, and action consequent upon it, are the town clerk and the supervisor or other executive officer of the city or town. It is a fair presumption, therefore, that the legislature intended that those officers, or one of them at least, should determine whether the requirements of the act prior to a subscription to the stock of a railroad company had been met. This presumption is strengthened by the provisions of the twelfth section, which make it the duty of the clerk to transmit to the county clerk a transcript or statement, verified by his oath, of the vote given, with other particulars, in case a subscription has been voted. How is he to perform this duty if he is not to conduct the election, and to determine what the voters have decided? If, therefore, there could be any obligation resting on persons proposing to purchase the bonds purporting to be issued under such legislative authority, and in accordance with a popular vote, to inquire whether the provisions of the statute had been followed, or whether the conditions precedent to their lawful issue had been complied with, the inquiry must be addressed to the town clerk or executive officer of the municipality, — to the very person whose duty it was to ascertain and decide what were the facts. The more the statute is examined, the more evident does this become. The eleventh section declared, that if it should appear that a majority of the legal voters of the city, town, or township voting, had voted 'for the subscription,' the executive officer and clerk should subscribe and execute bonds. 'If it should appear,' said the act. Appear when? Why, plainly, before the subscription was made and the bonds were executed; not afterwards. Appear to whom? In regard to this, there can be no doubt. Manifestly not to a court, after the bonds have been put on the market and sold, and when payment is called for, but if it shall appear to the persons whose province it was made to ascertain what had been done preparatory to their own action, and whose duty it was to

issue the bonds if the vote appeared to them to justify such action under the law. These persons were the supervisor and town clerk. Their right to issue the bonds was made dependent upon the appearance to them of the performance of the conditions precedent. It certainly devolved upon some person or persons to decide this preliminary question; and there can be no doubt who was intended by the law to be the arbiter."

In *Rondot v. Rogers Township*, 99 Fed. Rep. 202, 212, the validity of an issue of township bonds was involved. The statute authorized the township, through the township board, to issue bonds provided the question be submitted to a vote and the issue be approved by a majority vote. No express authority was conferred on the board to decide any question, but it was held that the board had implied authority to make the decision. *Taft, J.*, said: "The board under the special act was given authority to issue the bonds. It was its duty to order the special township meeting in accordance with the written application of the ten legal voters who were freeholders within such township. It was, therefore, within its implied authority to pass upon the validity of such application. Before issuing the bonds it must decide whether the proper vote had been taken at the township meeting upon a notice properly issued. As it was the tribunal to decide these questions, it necessarily had authority to recite its decision in the face of the bonds."

A statute vested the power to issue township bonds in the township board when the conditions precedent had been complied with, but did not specify the manner in which the township board should exercise its authority. It was held that the township board might act in issuing the bonds either by all of its members, or by one of its members, or by some township officer, whose duties made it natural and proper for him to act in such capacity. The bonds were signed by the supervisor and the township treasurer. The court declared that, assuming that the

¹ *Rondot v. Rogers Township*, 99 Fed. Rep. 202, 212.

trusted to the officers making the bonds, but to other officers or to a different tribunal, a recital importing compliance with the law does not estop the municipality from taking advantage of the defence.¹

§ 928. **Sufficiency of Recital to import Compliance with the Law.**

—It is not necessary that the recital should enumerate each particular fact essential to the existence of the obligation. A *general statement* that the bonds have been issued in conformity with the law will suffice to embrace every fact which the officers making the statement are authorized to determine and certify. A *determination and statement as to the whole series of facts*, where more than one is involved, is a determination and certificate as to each essential particular.² A strict rather than a liberal yet not unfair construction is to be applied to the language of the recitals, and such construction ought to be the rule when it is proposed by mere recitals upon the part of the officers of the municipal corporation to exclude inquiry as to whether bonds issued in its name were made in violation of the Constitution and of substantial provisions of statute of which all must take notice. Numerous cases

supervisor and treasurer had the authority of the board to execute the bonds, the board was bound by the recitals contained therein. *Rondot v. Rogers Township*, 99 Fed. Rep. 202, 212. *Taft, J.*, said: "If the fact was that the board directed the executive officers to sign the bonds on its behalf and they did so, the binding effect of the bonds and their recitals on the township board is none the less because the agency of the supervisor and treasurer for the board, is not as fully set forth as might be on the face of the bonds. . . . If the fact be that the board directed the execution of the bonds as they were executed, the recitals on the face of the bond are to be given as full effect as if made in terms by the board itself."

¹ In *Northern Bank v. Porter Township*, 110 U. S. 608, the towns of a county were authorized to subscribe in aid of railroads and to issue bonds in payment of the subscription only in the event that the commissioners of the county had not been authorized by vote to subscribe to the capital stock of the company on behalf of their respective counties. An issue of bonds was made by county commissioners pursuant to vote. Thereafter, and notwithstanding such

issue, the authorities of a town within the county made an issue of bonds pursuant to the statute. It was held that the question whether the county commissioners had been authorized by vote to subscribe to the stock of the company was not entrusted to the determination of the officers of the town, and that the recitals in the township bonds importing compliance with the law did not estop the township from contesting the bonds upon the ground that inasmuch as the county commissioners had subscribed the township authorities had no power to make a subscription.

² *Dixon County v. Field*, 111 U. S. 83, 93. See also *Comanche County v. Lewis*, 133 U. S. 198, 206, 207. General recitations covering particular facts have been given like effect as a special enumeration of such facts. *Dixon County v. Field*, 111 U. S. 83, 92, 94; *King v. Superior*, 117 Fed. Rep. 113, 118; *Municipal Tr. Co. v. Johnson City*, 116 Fed. Rep. 458, 466; *Marcy v. Oswego*, 92 U. S. 637; *Humboldt Tp. v. Long*, 92 U. S. 642. But specific or special recitals as to constitutional debt-limit given an effect not given to general recitals. *Gunnison County v. Rollins*, 173 U. S. 255; *s. c. supra*, § 924.

have been determined by the Supreme Court of the United States in which it has been said that where a statute confers power upon a municipal corporation upon the performance of certain precedent conditions to execute bonds in aid of the construction of a railroad or for other like purposes and imposes upon certain officers — invested with authority to determine whether such conditions have been performed — the responsibility of issuing them when such conditions have been complied with, recitals by such officers that the bonds have been issued “*in pursuance of*” or “*in conformity with*” or “*by virtue of*” or “*by authority of*” the statute, have been held in favor of *bona fide* purchasers for value to import full compliance with the statute and to preclude inquiry as to whether the precedent conditions had been performed before the bonds were issued. But it has been pointed out that in all such cases the recitals fairly imported a compliance in all substantial respects with the statute giving authority to issue the bonds, and the court has declared that it is unwilling to enlarge or extend the rule, — that sound policy forbids it. Where the holder of a bond relies for protection on mere recitals, they should at least be clear and unambiguous in order to estop a municipal corporation, in whose names such bonds have been made, from showing that they were issued in violation of or without authority of law.¹ The recitals found in the bonds are usually to the effect that the bond is issued “*in pursuance of*” or “*by virtue of*” or “*by authority of*” or “*in conformity with*” the provisions of a statute, and there seems to be no difference in the effect of recitals in any of these forms. They are all deemed to imply that all the provisions and requirements of the

¹ *Steamboat-Rock School Dist. v. Mississippi*, specifying the statutes. Stone, 106 U. S. 183, 186. In this case the bond recited that it was issued “*by authority of an election of voters . . . in conformity with the provisions*” of a specified statute. The court held that this recital necessarily implied nothing more than that the bonds were issued by authority of the electors, and that the election was held in conformity with the statute, and that it did not necessarily import a compliance with the statute in other respects or the fundamental law of the State. In *Carroll County v. Smith*, 111 U. S. 556, bonds in aid of a railroad company were issued, each bond containing the following recital: “The above mentioned sum being part of a subscription to the capital stock of the G. C. and B. R. Co. authorized by the following styled acts of the State of Mississippi,” specifying the statutes. The statutes, as well as the Constitution of the State, required a vote of two-thirds of the qualified voters as a condition precedent to the exercise of the power. It was held that this limited recital did not estop the county from denying the validity of the bonds on the ground that the issue had not been authorized by the requisite vote. The court declared that this recital did not even embody a general statement that the bonds were issued in pursuance of statutes referred to, that the utmost effect that can be given to the recital is that of a statement that a subscription to the capital stock of the railroad company was authorized by the statutes mentioned and that the sum mentioned in the bonds was part of it.

recited act have been met and satisfied, and they import a compliance with the statute, which they recite as authority for making the issue.¹ If a recital imports compliance with a specified statute,

¹ *Steamboat-Rock School Dist. v. Stone*, 106 U. S. 183, 186.

"*In pursuance of*" a recited statute is held to import a compliance with the law under which the bonds were issued. *Knox County v. Aspinwall*, 21 How. (U. S.) 539, 545; *Moran v. Miami County*, 2 Black (U. S.), 722; *Mercer County v. Hackett*, 1 Wall. (U. S.) 83; *Monclair v. Ramsdell*, 107 U. S. 147, 158; *Bernards Township v. Morrison*, 133 U. S. 523.

"*In accordance with*" a vote of the electors at an election "*in accordance with*" a specified statute, held to be a sufficient recital to show that the proper election was held and the proper vote given. *Coloma v. Eaves*, 92 U. S. 484; s. c. *supra*, § 909. "*By virtue of and in accordance with* an act of the legislature" and "*in pursuance of and in accordance with* a vote of a majority of the qualified electors" held to import compliance with the law. *Johnson County v. January*, 94 U. S. 202; *Comanche County v. Lewis*, 133 U. S. 198, 206. "*In pursuance of and in accordance with*" an act of the legislature, held to import compliance with the requirements of the statute with reference to the regularity and sufficiency of an election thereunder. *Humboldt Township v. Long*, 92 U. S. 642. "*By virtue of and in accordance with*" an act of the legislature, and in "*pursuance of and in accordance with* the vote of three-fifths of the legal voters of the township" held to be a determination not only of the result of the popular vote, but that all the facts existed which the statute required in order to justify the issue of the bonds. *Marcy v. Oswego*, 92 U. S. 637. "*In conformity with the vote* of the electors of said county cast at an election" held to be sufficient authentication of the holding of an election to protect a *bona fide* holder for value. *Warren County v. Marcy*, 97 U. S. 96.

"*By virtue of*" specified statutes followed by a statement certifying that a special election was held at which a majority of the legal voters voted for a subscription to a railroad "and to issue bonds of said township therefor," held, to be representations and to import to the public that the bonds were issued in all respects in conformity to

law, and that nothing remained to be done which was essential to the liability of the town thereon. *American Life Ins. Co. v. Bruce*, 105 U. S. 328. See also *Platt v. Hitchcock County*, 139 Fed. Rep. 929. "*In pursuance to the vote of the electors of Anderson Sept. 13, 1869,*" held, to be equivalent to a statement that the vote was lawful and regular in form and such as the law then in force required in respect to prior notice. *Anderson County v. Beal*, 113 U. S. 227. "*Under authority of*" a recited statute held to estop a town from denying the validity of its bonds on the ground that they were issued prior to the completion of a portion of the railroad which was required to be constructed and completed before their issue. *Oregon v. Jennings*, 119 U. S. 74. "*In pursuance of an act of the legislature and ordinances of the city council passed in pursuance thereof*" imports not only compliance with the act of the legislature, but that the ordinances of the city council are in conformity with the statute. *Evansville v. Dennett*, 161 U. S. 434, 442. In giving its opinion in the *Evansville Case* the court also says (p. 443):

"As, therefore, the recitals in the bonds import compliance with the city's charter, purchasers for value, having no notice of the non-performance of the conditions precedent, were not bound to go behind the statute conferring the power to subscribe, and to ascertain, by an examination of the ordinances and records of the city council, whether those conditions had, in fact, been performed. With such recitals before them they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the legislature."

This decision of the Supreme Court of the United States, made upon great deliberation, and overruling prior decisions of the Circuit Court of Appeals of the Seventh Circuit, is specially important as showing that the *bona fide* holder was protected by the recitals in the bonds, and was not bound to take notice of or consult the ordinances and records of the city council even though these were specifically mentioned in the bonds.

In *Tulare Irr. Dist. v. Shepard*,

and such statute declares that the subscription shall be made and the bonds issued in every respect subject to the provisions of an earlier statute, the recital of the later statute also imports compliance with the provisions of the earlier act.¹

§ 929. **Of Recital as Essential to Estoppel.** — It has been urged that municipal bonds, negotiable in form, having been executed and issued by those whose duty it was to execute and issue them, whenever that could be rightfully done, the municipality is estopped by the mere fact of their negotiability and their issuance by the proper authorities from pleading their invalidity as between it and a *bona fide* purchaser for value without regard to the existence of any recital. Some of the earlier decisions have used language which appears to support this view, as, for instance, cases in which it has been declared that a recovery on municipal bonds is justified under the rule that when a corporation has power under any circumstances to issue negotiable securities, the *bona fide* holder has a right to presume that they were issued under the circumstances which gave the requisite authority, and that they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper.² Although this language

185 U. S. 1, 19, Mr. Justice *Peckham*, speaking of the sufficiency of recitals, said: "A recital as directed by the statute that the bond was issued by the authority of the statute, and also pursuant to the provisions thereof, and in accordance with the vote of the qualified electors, was a statement upon which a purchaser would have the right to rely, and to assume therefrom that all prior acts necessary to be done to give the bond validity had been done, because otherwise the bond would not be issued under the authority and pursuant to the provisions of an act which provided for certain things to be done when they were not done in the particular case in hand."

"To say that a thing is done 'under and by the authority' of a statute referred to is equivalent to saying that it is done in conformity with it and authorized by it." Per *Severens*, D. J., in *Risley v. Howell*, 64 Fed. Rep. 453, 457, citing *Stoddard v. Chambers*, 2 How. (U. S.) 284, 317.

¹ In *Citizens' Sav. & Loan Assoc. v. Perry County*, 156 U. S. 692, 697, railroad aid bonds issued in 1870 recited that they were issued under the authority and in accordance with the re-

quirements of an act of 1857. The act of 1857 declared that subscriptions in aid of railroads should be made in every respect subject to the provisions and restrictions of an act of 1849. It was held that the recital of the act of 1857 necessarily imported compliance with the provisions of the act of 1849.

² *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175, 203; *Marshall County v. Schenck*, 5 Wall. (U. S.) 772, 784; *Lexington v. Butler*, 14 Wall. (U. S.) 282, 296; *Huron v. Second Ward Sav. Bank*, 86 Fed. Rep. 272, 279; 30 C. C. A. 38, 46; *Rollins v. Gunnison County*, 26 C. C. A. 91, 98; 80 Fed. Rep. 692, 699; 49 U. S. App. 399; s. c. 173 U. S. 255; *Evansville v. Dennett*, 161 U. S. 434, 443, 446; *Chaffee County v. Potter*, 142 U. S. 355, 363, 364; *Pierre v. Duncombe*, 106 Fed. Rep. 611, 617; 45 C. C. A. 499; *Quinlan v. Green County*, 157 Fed. Rep. 33. In *Lexington v. Butler*, 14 Wall. (U. S.) 282, 296, Mr. Justice *Clifford* said: "Admitted, as it is, that the corporation defendants (the city of Lexington) possessed the power to subscribe for the stock and to issue the bonds, it is clear that the plaintiff is entitled to recover upon the merits,

is to be found in decisions of the Supreme Court, the contention that an estoppel exists *irrespective of any recital* in the bonds has been denied by the court, at least in cases where there was no general power to issue negotiable bonds, and where the bonds were issued under a special power to be exercised only upon certain specified conditions precedent. In such cases the mere fact that the bonds have been issued and are in form negotiable securities, in the absence of recitals, only raises at most a presumption that they have been made and delivered in compliance with the terms of law; such presumption, where there is no recital, is not conclusive, and the municipality is not estopped from attacking the validity of the bonds even as against one who bought in actual ignorance of the true facts.¹

§ 930. Estoppel by Recital Available only to Bona Fide Purchasers.

—The estoppel which arises from the fact that the person appointed by law to certify that the preliminary requisites to an issue of municipal bonds have been complied with, have so certified, only operates in favor of the holder who, on the strength of the certificate contained in the recital, pays his money for the bonds without notice of the defect or irregularity. It is *only a bona fide purchaser for value* who is entitled to take advantage of the estoppel. The Supreme Court of the United States has never held that the

as the repeated decisions of this court have established the rule that when a corporation has power under any circumstances to issue negotiable securities, the *bona fide* holder has a right to presume that they were issued under the circumstances which gave the requisite authority, and that they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper." See also remarks of Mr. Justice *Bradley*, as to necessity of recital, and true meaning of previous decisions in *Coloma v. Eaves*, 92 U. S. 484, 493; s. c. *supra*, § 924.

¹ *Buchanan v. Litchfield*, 102 U. S. 278; *Merchants' Exch. Nat. Bank v. Bergen County*, 115 U. S. 384; *Daviess County v. Dickinson*, 117 U. S. 657; *German Savings Bank v. Franklin County*, 128 U. S. 526; *Citizens Sav. & Loan Assoc. v. Perry County*, 156 U. S. 692, 701; *Quinlan v. Green County*, 205 U. S. 410, 419; *Mercer County v. Provident Life & Tr. Co.*, 72 Fed. Rep. 623, 632; *Green County v. Shortell*, 116 Ky. 108. In *Marsh v.*

Fulton Co., 10 Wall. 676, the bonds contained no recitals, and the court held that the county's defence was available to it. But if general or full power to issue negotiable bonds has been conferred, as, for example, power to issue such bonds "for municipal purposes," and bonds have been authorized to be issued and sold by the proper authorities, and they are duly executed under the corporate seal by the proper officers, and sold and delivered, so that the *factum* of the bonds is complete, why should not the innocent purchaser for value be protected like any other holder of commercial paper, and why should such purchaser be denied protection as against defences of which he had no notice because, and only because, his bonds contain no recital? The subject requires further consideration before affirming that the cases actually establish that in such case such a purchaser is not entitled to immunity against defences of which he is ignorant, as, for example, want or failure of consideration or the like.

defect or irregularity, if it is such as to constitute a defence, could not be set up by the maker of the bonds, where the suit upon them was brought by one who had not paid value for them, or who had notice of the defect or irregularity, whether the bonds contained a recital or not.¹ The effect of recitals in municipal bonds is like that given to words of negotiability in a promissory note. They simply relieve the paper in the hands of a *bona fide* holder from the burden of defences other than the lack of power growing out of the original issue of the paper and available as against the immediate payee.² As a correlative to the rule that recitals in municipal bonds are conclusive in favor of a *bona fide* holder that conditions precedent to their issue required by statute and subject to the determination of the municipal officers have been fully complied with, a purchaser of municipal bonds is *charged with notice of the terms of the recitals* contained therein, and if these recitals disclose any illegality in the issue of the bonds, he takes the bonds subject to defences of the municipality based thereon.³

§ 931. **Who are Bona Fide Holders.** — The question, Who are *bona fide* holders of municipal bonds, and entitled to invoke the protection of the law merchant? is to be determined by the principles which are applied in the case of other negotiable instruments, and an extended discussion of the subject is inappropriate and unnecessary here. Some mention, however, may be made of the decisions which have been rendered in actions upon municipal bonds. That the holder of a municipal bond is entitled to the protection, which is afforded by its negotiability, is established *prima facie* by the *production* of the bond itself, on the principle that the holder of a negotiable instrument is presumed to have taken it before maturity for value and without notice of defence.⁴ If, however, it is shown that the instrument produced was fraudulently or illegally issued, the general rule applies, and the person claiming thereunder then has the *burden of proving* that he purchased it for value before maturity, or that the person from whom

¹ Chambers County v. Clews, 21 Meagher County School Dist., 94 Fed. Wall. (U. S.) 317; Salmon v. Rural Ind. Rep. 705; Wilber v. Wyatt, 63 Neb. School Dist., 125 Fed. Rep. 235. 261; Horton v. Thompson, 71 N. Y.

² Nesbit v. Riverside Independent Dist., 144 U. S. 610, 619. 513.

⁴ Marion County v. Clark, 94 U. S. 278, 285; Pickens Township v. Post, S. 569; McClure v. Oxford, 94 U. S. 99 Fed. Rep. 659; School Dist. v. 429; Scipio v. Wright, 101 U. S. Chapman, 152 Fed. Rep. 887. 665; Helena Merchants Nat. Bank v.

he purchased so acquired title.¹ A *bona fide* holder of municipal bonds is entitled to transfer to a third party all the rights with which he is vested, and the title acquired by his transferee is not affected by the fact that the transferee had knowledge of defences existing against the paper.² It is immaterial whether the transferee of the *bona fide* holder pays a consideration therefor or not,³ and his rights are not affected by the fact that he acquired the bonds as a gift or advancement after maturity.⁴ One who purchases without notice the bonds for value before maturity is a *bona fide* holder.⁵ A person taking them before maturity, as collateral for a loan, is entitled to the rights of a *bona fide* holder.⁶ The fact that the consideration for the purchase is legal services rendered and to be rendered, and which were thereafter rendered to the full value of

¹ *Smith v. Sac County*, 11 Wall. (U. S.) 139; *Marion County v. Clark*, 94 U. S. 278, 285; *Stewart v. Lansing*, 104 U. S. 505; *Montclair v. Ramsdell*, 107 U. S. 147; *Pana v. Bowler*, 107 U. S. 529, 542; *Salmon v. Rural Independent School Dist.*, 125 Fed. Rep. 235; *Gamble v. Rural Independent School Dist.*, 132 Fed. Rep. 514; *Schmid v. Frankfort*, 141 Mich. 291; *Montpelier Sav. Bank, &c. Co. v. School Dist.*, 115 Wis. 622.

² *Douglas Co. Commissioners v. Bolles*, 94 U. S. 202; *Marion County v. Clark*, 94 U. S. 278, 286; *Cromwell v. County of Sac*, 96 U. S. 51; *Scotland County v. Hill*, 132 U. S. 107; *Gunnison County Com'rs v. Rollins*, 173 U. S. 255; s. c. 49 U. S. App. 399, 413; 80 Fed. Rep. 692, 700; *Hill v. Scotland County*, 34 Fed. Rep. 208; *Rathbone v. Kiowa County*, 83 Fed. Rep. 125, 130; *Lake County v. Sutliff*, 97 Fed. Rep. 270; *Rondot v. Rogers Township*, 99 Fed. Rep. 202; *Pickens Township v. Post*, 99 Fed. Rep. 659; *Onslow County v. Tollman*, 145 Fed. Rep. 753; *Gamble v. Rural Ind. School Dist.*, 146 Fed. Rep. 113; *Jefferson v. Jennings Banking & Trust Co.*, 35 Tex. Civ. App. 74.

³ *Rondot v. Rogers Township*, 99 Fed. Rep. 202.

⁴ *Lake County v. Sutliff*, 97 Fed. Rep. 270.

⁵ That the person who first takes bonds from a municipal corporation for value, as well as any subsequent taker, may be a *bona fide* purchaser for value, is settled by the decisions in *Douglas County v. Bolles*, 94 U. S. 104, and *Montclair v. Ramsdell*, 107 U. S. 147. In this latter case the court said, Mr.

Justice Harlan giving the opinion (p. 160):

"This question was directly adjudged in *Douglas County v. Bolles*, 94 U. S. 202. One of the issues there was whether the plaintiff was a *bona fide* holder of certain municipal bonds. After stating that the legal presumption was that they were, the court, speaking by Mr. Justice Strong, said: 'But the plaintiffs are not forced to rest upon mere presumption to support their claim to be considered as having the rights of purchasers without notice of any defence. They can call to their aid the fact that their predecessors in ownership were such purchasers. To the rights of those predecessors they have succeeded. Certainly the railroad company paid for the bonds and coupons by paying an equal amount of their stock, which the county now holds; and nothing in the special facts found shows that the company knew of any irregularity or fraud in their issue.' The court proceeded: 'And still more, the contractor for building the railroad received the bonds from the county in payment for his work, either in whole or in part, after his work had been completed. There is no pretence that he had notice of anything that should have made him doubt their validity. Why was he not a *bona fide* purchaser for value? The law is undoubted, that every person succeeding him in the ownership of the bonds is entitled to stand upon his rights.'" See also *Onslow County v. Tollman*, 145 Fed. Rep. 753.

⁶ *D'Esterre v. Brooklyn*, 90 Fed. Rep. 586; *St. Paul Gas Light Co. v. Sandstone*, 73 Minn. 225.

the bonds, does not deprive the purchaser of the protection of an innocent holder for value.¹ A purchaser *after maturity* is not entitled to protection as a *bona fide* holder unless he can establish that a prior holder through whom he acquired title purchased the bonds before maturity and without notice of any defect;² *lack of knowledge* of any defence either on the part of the present holder of the instruments or on the part of some prior purchaser thereof for value, through whom the present holder claims, is essential.³ A person may be deprived of the protection of a *bona fide* holder although he had no actual knowledge of the defence, if he had knowledge of such facts and circumstances as required him to make proper inquiry as to the validity of the bonds in any respect; but the test whether the holder had notice of facts and circumstances requiring inquiry is not whether they were such as would naturally or reasonably lead an ordinarily careful and prudent man to make inquiry as to what the bonds were given for, but whether they were such as *to make it bad faith* not to do so.⁴ But in the absence of notice of facts and circumstances rendering inquiry necessary, the good faith of a purchaser or pledgee of mu-

¹ *Gamble v. Independent Rural School Dist.*, 132 Fed. Rep. 514.

² *Edwards v. Bates County*, 117 Fed. Rep. 526.

³ *Montpelier, &c. Trust Co. v. School Dist.*, 115 Wis. 622. Question whether plaintiff was a *bona fide* purchaser of invalid town bonds held on the evidence to be one for the jury. *Schmid v. Frankfort*, 141 Mich. 291.

⁴ *Thompson v. Mecosta*, 141 Mich. 175. Where it is sought to affect a *bona fide* purchaser of commercial paper, for value, with notice, the question is not whether he had the means of obtaining or might have obtained by prudent caution the knowledge in question, but whether in obtaining the paper he acted *mala fide*. *Murray v. Lardner*, 2 Wall. 110; *Goodman v. Simonds*, 20 How. 343; *Goetz v. Bank of Kansas City*, 119 U. S. 551, 560; *Kneeland v. Lawrence*, 140 U. S. 209; *Marion County Com'rs v. Clark*, 94 U. S. 278. So also in *Swift v. Smith*, 102 U. S. 442. Mr. Justice *Strong*, giving the opinion, says, regarding the purchase of a negotiable note (p. 444): "There is nothing in the case to show that Smith's purchase was not in good faith. There was nothing upon the note, nor anything in the indorsement thereon, to notify him that it did not belong to

Jackson, both legally and equitably. It was mercantile paper, and not due. One who purchases such paper from another, who is apparently the owner, giving a consideration for it, obtains a good title, though he may know facts and circumstances that cause him to suspect, or would cause one of ordinary prudence to suspect, that the person from whom he obtained it had no interest in it, or authority to use it for his own benefit, and though by ordinary diligence he could have ascertained those facts. *Goodman v. Simonds*, 20 How. 343. *He can lose his right only by actual notice or bad faith.*"

Purchase of bonds of an irrigation district from the president of the district held not to be sufficient to impeach the good faith of the holders' title, when the president was not prohibited by law from purchasing or owning the bonds, and there was no other evidence to charge the holder with notice of invalidity. *Perris Irrig. Dist. v. Thompson*, 116 Fed. Rep. 832. Invalid bonds were sold by the holder to his brother for full value before maturity. The purchaser denied the knowledge of any infirmity. It was held that he was a *bona fide* holder. *Briggs v. Phelps*, 70 Fed. Rep. 29.

nicipal bonds is not destroyed by the fact that he made inquiry into the regularity of the proceedings for their issue and took a guarantee of payment from the person negotiating them or other steps for his protection in addition to relying upon the terms of the bonds themselves.¹

§ 932. **Estoppel; Genuineness of Official Signature.** — Purchasers of municipal securities must always take the risk of the *genuineness of the official signature* of those who execute the paper they buy. This includes not only the genuineness of the signature itself, but the *official character* of him who makes it. Estoppels do not obviate any defect in this regard, and it is always open to the municipality to attack the validity of negotiable securities purporting to have been issued in its name, but in fact not signed by its officers or signed by a person who did not bear any official relation to it.² The municipality has no power to bind itself by an

¹ In *Schmid v. Frankfort*, 141 Mich. 291, it was held that the question of how the taking of such a guarantee affected the *bona fides* of the purchaser was a question of fact for the jury. See also *Ontario v. Rochester Union Bank*, 21 N. Y. Misc. 770, where the holder sent one of its employees to the attorney for the town, who informed him that the bonds were legally issued.

² *Anthony v. Jasper County*, 101 U. S. 693, 699; s. c. *ante*, § 888, *post*, § 947; *Merchant's Bank v. Bergen County*, 115 U. S. 384, 390; *Coler v. Cleburne*, 131 U. S. 162; *Lehman v. San Diego*, 83 Fed. Rep. 669, 674; *Wright v. East Riverside Irr. Dist.*, 138 Fed. Rep. 313; see also *Young v. Clarendon Township*, 132 U. S. 340.

In *Anthony v. Jasper County*, 101 U. S. 693, *aff'g* 4 Dillon C. C. R. 136, a township in Missouri voted to subscribe for stock in a railroad company. The subscription was made by the county court March 28, 1872, and on June 4, 1872, it was ordered that bonds in payment thereof be issued. They were issued in October following, but bore date March 28, 1872, the date of the subscription. They were sealed with the seal of the court and signed by the clerk and by one Merwin, as presiding justice, although Merwin did not become such until October, 1872. On March 30, 1872, a statute was passed which declared that municipal bonds thereafter issued should not be valid or be negotiated until first reg-

istered by the State auditor, who was required to indorse a certificate thereon. The bonds were not registered as required by this statute, nor was the certificate of registration indorsed thereon. In an action by a *bona fide* holder of the bonds, it was held that by reason of the failure to register the bonds as required by the statute the execution of the instrument never became complete; that the plaintiff, although a *bona fide* holder, was charged with knowledge that Merwin was not presiding justice at the apparent date of the bonds; and that the fact that Merwin did not become presiding justice until after the registration act took effect, was equivalent to notice to the purchaser that they were consequently invalid. *Waite*, C. J., said: "The public can act only through its authorized agents, and it is not bound until all who are to participate in what is to be done have performed their respective duties. The authority of a public agent depends on the law as it is when he acts. He has only such powers as are positively granted, and he cannot bind his principal under powers that have been taken away by simply antedating his contracts. Under such circumstances, a false date is equivalent to a false signature; and the public, in the absence of any ratification of its own, is no more estopped by the one than it would be by the other. . . . Purchasers of municipal securities must always take the risk of the genuineness of the offi-

issue of bonds to pay for a subscription to the capital stock of a railroad for the purpose of aiding in its construction, or for any other purpose, except as authorized by statute, and the persons em-

cial signature of those who execute the paper they buy. This includes not only the genuineness of the signature itself, but the official character of him who makes it."

In *Coler v. Cleburne*, 131 U. S. 162, the statute provided that municipal bonds should be signed by the mayor and countersigned by the secretary of the municipality, and that it should be the duty of the mayor, whenever any bonds were issued, to forward the same to the comptroller of public accounts of the State, whose duty it should be to register such bonds in a book kept for that purpose and indorse his certificate thereon. Bonds were issued by a city which bore date January 1, 1884, but were not signed until July 3, 1884. They were signed by one Hodge, who had been mayor on January 1, 1884, the apparent date of the bonds, but who had gone out of office in April, 1884, and had then been succeeded by one Odell. Hodge signed the bonds under a resolution of the city council authorizing and requesting him to sign them as and upon the date January 1, 1884, when he was actually the mayor of the city. Odell, the mayor, had refused to sign more than a part of the entire issue. He did not forward the bonds to the comptroller for registration or furnish the statement to the comptroller required by the statute. The court held that *under the statute* no person could lawfully sign the bonds except the person who was the mayor of the city when they were signed; that the city council had no power to authorize their signature by any other person, and that the city was not estopped as against the plaintiff, a *bona fide* purchaser, by recitals that the bonds were authorized by statute and by an ordinance adopted by the city, from showing that the bonds were not signed by the mayor of the city; and that they were therefore invalid in the hands of the plaintiff.

Weyauwega v. Ayling, 99 U. S. 112, does not appear to have been overruled by the later cases cited *supra*, but it has been distinguished and its authority limited to the peculiar facts of the case. In that case, bonds purporting to have been executed by the

chairman of the board of supervisors and the clerk of a town board were dated June 1, 1871, but were not actually signed until July 13, 1871. One Verke signed the bonds as clerk, although he had resigned his office on June 17, 1871, when he ceased to be a resident of the town. The bonds were signed in another town where he then resided. At the time of the signature one Sackett was the duly and legally qualified clerk of the town. After the bonds were so signed they were issued and delivered by the chairman of the board of supervisors with the assent of Sackett, the clerk of the town. It was held that the town was estopped from proving that Verke in fact signed the bonds after he went out of office; and that they were not executed by the clerk. In *Anthony v. Jasper County*, 101 U. S. 693, *supra*, the court distinguished that case from *Weyauwega v. Ayling*; *supra*, and said that in the latter case the town was estopped from proving that the bonds were actually signed by a former clerk after he went out of office because the clerk in office adopted the signature as his own when he united with the chairman in delivering the bonds to the railroad company. In *Coler v. Cleburne*, *supra*, this distinction was also adopted and followed. In *Lehman v. San Diego*, 83 Fed. Rep. 669, the bonds bore date January 1, 1873, in pursuance of resolutions authorizing their issue. The proofs showed that they were not in fact issued, until 1877, after the legislature of the State had passed a statute repealing the act which authorized the issue. The persons who signed the bonds as president and clerk held office at the time when they signed the bonds, but not at the date the bonds bore. It was held that as an examination of the records of the city would have disclosed the fact that the officers of the boards who signed the bonds bearing date January 1, 1873, were not officers of the board at that time and would have revealed the fact that the bonds were antedated and signed after the repeal of the statute authorizing their issue, they were invalid in the hands of a *bona fide* purchaser.

powered to issue the bonds cannot execute their power in that regard by instruments not conforming to the substantial requirements of law. If the statute requires the bonds to be executed in a particular manner, and the signature of a particular officer is essential to the valid execution of the bonds, bonds lacking that signature are invalid, although he may have had no discretion to withhold it. Without such signature, the bonds are not the act and deed of the municipality, and they cannot be made obligatory on the municipality by recitals contained in them.¹ It has also been held that, notwithstanding their negotiability, municipal bonds, signed and sealed by proper authority, but *issued and delivered* without the authority of the municipality, are void even in the hands of a *bona fide* holder. In other words, there cannot be a recovery on a bond which is invalid because of lack of power on the part of the officer delivering it.²

§ 933 (546). **Lack of Power may be shown notwithstanding Recitals.** — Recitals are only available for the protection of *bona fide* holders in so far as they are recitals of matters of fact. A recital cannot extend to or cover *matters of law*. All parties are equally bound to know the law, and a certificate reciting the actual facts, and that thereby the bonds are conformable to the law when judicially speaking they are not, will not make them so, nor can it work an estoppel upon the municipality to claim the protection of the law. Otherwise it would always be in the power of a municipal body to which power was denied to assert the forbidden authority by declaring that its assumption was within the law. This would be a pure exercise of legislative power and would suppose such corporate body to be superior to the law itself.³ Hence, a recital in a municipal bond that is issued pursuant to statute does not estop the municipality from attacking the existence of the law which is claimed to authorize the issue. The *constitutional validity* of such a statute may always be called in question, even as against a *bona fide* holder for value. No recitals or conduct can cure such a defect as an *absolute want of power* in the municipality to execute it.⁴

¹ Bissell v. Spring Valley Township, 110 U. S. 162. Aspinwall v. Daviess County, 22 How. (U. S.) 364; Avery v. Springport, 14

² Portsmouth Sav. Bank v. Ashley, 91 Mich. 670. Blatchf. (Ind.) 272; Coloma v. Eaves, 92 U. S. 484, 490; South Ottawa v. Perkins, 94 U. S. 360; McClure v. Oxford, 94 U. S. 429; United States v. Macon County Ct., 99 U. S. 582; Anthony v. Jasper County, 101 U. S. 676; St. Joseph v. Rogers, 16 Wall. 644; Citizens' Sav. & Loan Assoc. v. Topeka, 20 Wall. (U. S.) 655; U. S. 634; Post v. Supervisors, 105 U.

³ Per Matthews, J., in Dixon County v. Field, 111 U. S. 83, 92.

⁴ Marsh v. Fulton County, 10 Wall. (U. S.) 676; St. Joseph v. Rogers, 16 Wall. 644; Citizens' Sav. & Loan Assoc. v. Topeka, 20 Wall. (U. S.) 655; U. S. 634; Post v. Supervisors, 105 U.

If such bonds are issued without legislative authority, they are void, and the levy of taxes and payment of interest will not

S. 667; *Ottawa v. Carey*, 108 U. S. 110; *Toledo Northern Bank v. Porter Township Trs.*, 110 U. S. 608; *Dixon County v. Field*, 111 U. S. 83; *Hayes v. Holly Springs*, 114 U. S. 120; *Katzenberger v. Aberdeen*, 121 U. S. 172; *German Sav. Bank v. Franklin County*, 128 U. S. 526; *Purdy v. Lansing*, 128 U. S. 557; *Brenham v. German American Bank*, 144 U. S. 173; *Graves v. Saline County*, 161 U. S. 359, 373; *Wilkes County v. Coler*, 180 U. S. 506, 519; *Wilkes County v. Coler*, 190 U. S. 107, 113; *Lehman v. San Diego*, 83 Fed. Rep. 669; *Rathbone v. Kiowa County*, 73 Fed. Rep. 395; *Manhattan Company v. Ironwood*, 74 Fed. Rep. 535; *D'Esterre v. Brooklyn*, 90 Fed. Rep. 586; *Oxford Com'rs v. Union Bank of Richmond*, 96 Fed. Rep. 293; *Clagett v. Duluth Township*, 143 Fed. Rep. 824; *Hughson v. Crane*, 115 Cal. 404; *Sauer v. Gillett*, 20 Colo. App. 365; *Force v. Batavia*, 61 Ill. 99; *Williams v. Roberts*, 88 Ill. 13; *Lippincott v. Pana*, 92 Ill. 24; *Eddy v. People*, 127 Ill. 428; *Williamson v. Keokuk*, 44 Iowa, 88; *Swanson v. Ottumwa*, 131 Iowa, 540; *Johnson City v. Charleston, C. & C. R. Co.*, 100 Tenn. 138; *Agawam National Bank v. South Hadley*, 128 Mass. 503; *Bogart v. Lamotte*, 79 Mich. 294; *Spitzer v. Blanchard*, 82 Mich. 234; *Sykes v. Columbus*, 55 Miss. 115; *Woodruff v. Okolona*, 57 Miss. 806; *Morton v. Carlin*, 51 Neb. 202; *Oswego County Sav. Bank v. Genoa*, 66 N. Y. App. Div. 330, aff'd 172 N. Y. 635; *Duke v. Brown*, 96 N. Car. 127; *Richmond v. Oxford*, 119 N. Car. 214; *Wilkes County v. Call*, 123 N. Car. 308; *Debnam v. Chitty*, 131 N. Car. 657; *Millerstown v. Frederick*, 114 Pa. St. 435.

In *South Ottawa v. Perkins*, 94 U. S. 360, 268, which was an action upon municipal bonds, the question was whether any such statute ever existed as that under the authority of which the bonds there in suit purported to have been issued. It was contended that as the bonds were held by a *bona fide* purchaser for value, and as the town sued had paid the first instalment of interest, it was estopped from offering any evidence that the act under the authority of which the bonds purported to have been issued was not legally passed, the same having been

duly published among the printed statutes as a law, and being therefore *prima facie* a valid law; in other words, that although the act might not have been duly passed, the town, under the circumstances of the case, was estopped from denying its passage. The court said: "We cannot assent to this view. There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a State is a law, or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an act of the legislature could thus be a law in one case and for one party, and not a law in another case for another party; a law to-day, and not a law to-morrow; a law in one place, and not a law in another in the same State. And whether it be a law, or not a law, is a judicial question, to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissible in the case. It would be a very unseemly state of things, after the courts of Illinois have determined that a pretended statute of that State is not such, having never been constitutionally passed, for the courts of the United States, with the same evidence before them, to hold otherwise." See *Wilkes County v. Coler*, 180 U. S. 506; *Wilkes County v. Coler*, 190 U. S. 107.

A statute of Kansas for the organization of counties declared that counties should be deemed duly organized under the act from and after the qualification of county officers appointed by the statute. This act also contained a proviso that no bonds, except for the erection and furnishing of schoolhouses, should be voted for and issued by any county or township within one year after the organization of such county. Bonds were issued within one year after the organization of a county which contained a recital that they were issued to refund outstanding indebtedness of the county in conformity with and in full compliance with the provisions of another statute. It was held that until the expiration of one year after organization the county was absolutely without power to issue bonds for purposes other than those excepted

render them valid.¹ So where *there is want of power*, the mere silence of the taxpayer in permitting the issue of bonds will not create an estoppel even in favor of an innocent holder for value.² It is the duty of purchasers to examine into the *power* of the municipality to issue the bonds, and if no power exists, there can be no recital which will protect even *bona fide* holders for value.³

§ 934. **Bona Fide Holders not affected by Illegal Disposition of Consideration for Issue.** — It may be laid down as a general rule that the manner in which the municipality disposes of the consideration which it receives for an issue of bonds, does not affect the rights of *bona fide* purchasers for value in any way. The *consideration* received may not only be *diverted from the purpose* for which the bonds were issued, but it may be squandered or dissipated by the officers of the municipality in such a way as to prevent the municipality receiving any benefit from the transaction, and yet the rights of *bona fide* holders are not affected thereby.⁴ There are,

from the proviso, and that the recitals did not estop the county from setting up this lack of power. *Coffin v. Kearney County*, 57 Fed. Rep. 137. See also *Rathbone v. Kiowa County*, 73 Fed. Rep. 395; rev'd on another point, 83 Fed. Rep. 125. In *Johnson City v. Charleston, C. & C. R. Co.*, 100 Tenn. 138, it was held that, as municipalities in Tennessee had no power to make subscriptions in aid of and issue bonds to a foreign corporation, a recital on the face of the bonds that they were issued pursuant to and in accordance with the provisions of a statute authorizing an issuance of bonds to aid a domestic corporation only, did not preclude the city from showing that the company receiving the subscription and bonds was a foreign and not a domestic corporation. *Quære?*

¹ *Citizens' Savings & Loan Assoc. v. Topeka*, 20 Wall. (U. S.) 655; *Schuyler Co. Sup. v. Farwell*, 25 Ill. 181; *Marshall Co. Sup. v. Cook*, 38 Ill. 44; *Lippincott v. Pana*, 92 Ill. 24. In *Loan Association v. Topeka*, the court says: "We do not attach any importance to the fact that the town authorities paid one instalment of interest on these bonds. Such a payment works no estoppel. If the legislature was without power to authorize the issue of these bonds, and its statute attempting to confer such authority is void, the mere payment of interest, which was equally unauthorized, cannot create of itself a

power to levy taxes, resting on no other foundation than the fact that they have once been illegally levied for that purpose."

So where a county court was empowered to issue bonds to the amount of \$250,000, bonds issued in excess of that sum were declared void in the hands of a purchaser before maturity, for value and without notice of the overissue. *Davies County v. Dickinson*, 117 U. S. 657. See *supra*, § 922.

² *McPherson v. Foster*, 43 Iowa, 48.

³ One who purchased bonds from a railroad company, which had been issued by a town in its aid, was held, after the bonds had been declared void, *not to be subrogated* to the rights of the company, if it had any, to enforce collection of the appropriation voted by the town. *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534.

⁴ *Montpelier Nat. Life Ins. Co. v. Huron Board of Education*, 62 Fed. Rep. 778; *Risley v. Howell*, 64 Fed. Rep. 453, rev'g 57 Fed. Rep. 544; *West Plains Tp. v. Sage*, 69 Fed. Rep. 943; *Uvalde v. Spier*, 91 Fed. Rep. 594; *Miller v. Perris Irr. Dist.*, 99 Fed. Rep. 143; *Sioux City Independent School Dist. v. Rew*, 111 Fed. Rep. 1; *Kearney v. Woodruff*, 115 Fed. Rep. 90; *Kearny County v. Vandriss*, 115 Fed. Rep. 866; *Jones v. Camden*, 44 S. Car. 319; *Clifton Forge v. Alleghany Bank*, 92 Va. 283; *Clifton Forge v. Brush El. Co.*, 92 Va. 289; *Citizens'*

however, cases in which the nature of the consideration is closely connected with the power to issue the bonds, and these cases are apt to cause considerable doubt and difficulty. It may, however, still be laid down as the general rule that if it appears that the acts of the municipality in such cases had relation, not to the exercise of the power to issue the bonds, but merely to the disposition of the proceeds, and if the proceedings for the issuance of the bonds disclose on their face a fair exercise of the power to issue the bonds, complying with the terms of the statute in all material matters, the municipality cannot plead its ulterior motive or wrongful disposition of the proceeds for the purpose of attacking the validity of the bonds in the hands of a *bona fide* holder. Hence, for example, if proceedings for an issue of bonds purporting to be issued in payment of a subscription to the stock of a railroad company fairly disclose that the purpose was to subscribe for the stock and not to make a gift or donation to the railroad company, a *bona fide* holder for value is not affected by the fact that the ulterior motive of the officers of the municipality was to make a donation to the railroad company and that they effected their purpose under the guise of a subscription to the stock.¹

Sav. Bank v. Greenburgh, 173 N. Y. 215; *infra*, § 956.

¹ In *Anderson County v. Beal*, 113 U. S. 227, after bonds had been voted by the county at an election held September 13, 1869, the county board on November 5, 1869, passed an order directing a subscription in accordance with the terms of the vote and also "that the stock above subscribed for by this board in behalf of Anderson County is hereby sold and transferred for and in consideration of One Dollar, the receipt whereof is hereby acknowledged, to James F. Joy, president of said railroad company, and the chairman of this board is authorized to sign a transfer of said stock to said James F. Joy and to assign the certificate for said stock issued to Anderson County by said railroad company and to authorize in such assignment the necessary transfer of said stock upon the books of said company." In an action brought upon coupons detached from the bonds, it was held that the manner in which the board dealt with the stock did not affect the rights of a *bona fide* holder of the coupons and bonds. Mr. Justice *Blatchford* said: "When the bonds were delivered to the company the transaction was complete, and the

bonds, if they afterwards passed to *bona fide* holders, passed free from any impairment by reason of any dealing by the board with the stocks subscribed for to which the county became entitled by the issue and delivery of the bonds. The board may have committed an improper act in parting with the stock, but that is no concern of a *bona fide* holder of the bonds or coupons."

In *Cairo v. Zane*, 149 U. S. 122, bonds for \$100,000 were, pursuant to vote, issued by a city and received by the company in payment of a subscription and stock for an equal amount was issued by the company to the city. The stock thus received was immediately thereafter sold to the company for \$5000 of city bonds, a portion of the bonds thus issued, and there was evidence that this sale was pursuant to an agreement made by the city prior to the execution of the bonds. It was urged that the form of the transaction must be ignored, and that the resultant fact was that the company had \$95,000 of the city bonds and the city nothing, and that there was substantially a donation of \$95,000 of bonds contrary to a constitutional prohibition against donations. Mr. Justice *Brewer* said: "But the result does not determine the

§ 935. **How far Bona Fide Holder is Chargeable with Notice of Terms of Recited Ordinances.** — Bonds issued by cities frequently recite that they are issued under and in pursuance of and in conformity with a statute and ordinances of the city as well as other facts. The question has on several occasions arisen as to how far a *bona fide* holder of the bonds is chargeable with notice of the terms of the ordinance, and facts disclosed thereby, which would render the issue *ultra vires* and illegal. The result of the decisions would seem to be that when a city issues bonds containing recitals that they are issued under and in pursuance of and in conformity with its

true nature of the transaction. The same result would have followed if the city had given away the stock to a third party. The fact is that the city issued its \$100,000 of bonds and received its \$100,000 of the stock; and the wrong, if any there were, on the part of the council, was not in carrying out a subscription as directed by the vote of the people, but in wrongfully disposing of the stock received. But surely a wrong in that matter does not affect the question of the validity of the bonds, nor can it be presented as a defence against one who has purchased in good faith the bonds thus issued."

In *Maxey v. Williamson County*, 72 Ill. 207, it appeared that after an election authorizing the subscription of \$100,000 to the stock of a railroad company payable in bonds, the county court entered into an agreement to sell \$100,000 of stock to the railroad company for \$5000. The validity of the bonds thus issued in payment of the subscription was questioned in a suit by taxpayers to restrain the collection of taxes levied to pay the interest thereon. Their validity was sustained, and in respect to this transfer of the stock the court says: "We fail to perceive how the sale of the certificate of stock to the company for \$5000 can in any manner affect the rights of holders of the bonds of the company. It surely is not intended to insist that because the county has by any means lost the consideration it received for the bonds, innocent holders who had nothing to do with the sale of the certificate must lose their bonds." In *Cairo v. Zane*, 149 U. S. 122, 138, the cases of *Choisser v. People*, 140 Ill. 21, and *Post v. Pulaski County*, 49 Fed. Rep. 628, are distinguished. In *Choisser v. People*, *supra*, the vote to subscribe \$100,000 of stock was on October 5,

1867, and on November 28, following, an agreement was entered into between the company and the county court acting in behalf of the county that \$100,000 in stock should be issued, but that the stock should be returned back to the company for the sum of \$5000 payable by the redelivery to the city of that amount of county bonds. When the bonds came to be issued the record made by the county court recited that \$100,000 of the capital stock should be sold back to the company for \$5000 of county bonds, "thereby making a payment of \$95,000 of Saline County bonds to said company as a donation." No stock was in fact issued by the company or received by the county, and only \$95,000 of bonds were issued by the county and delivered to the company. In short, the parties to the transaction treated it as though it was a donation of \$95,000 of bonds, and it was this transaction which was condemned as contrary to the Constitution, but the court was careful to limit its decision to a case in which only the rights of the railroad company, the party receiving this \$95,000 of bonds, were concerned. It said: "The only presumption arising from these facts is that said bonds are still in the hands of the railroad company, and no question therefore is presented as to how far the alleged invalidity of said bonds would be affected by those conclusive presumptions which the law raises for the protection of *bona fide* holders of commercial paper. . . . Nothing is before us except the mere question of the legality of these bonds, as between the county and the railroad company, the original parties thereto." *Post v. Pulaski County*, 49 Fed. Rep. 628; 9 U. S. App. 1, *supra*, is a counterpart of the case of *Choisser v. People*, *supra*.

charter, or with a special statute, and the ordinances of the city, a *bona fide* holder of the bonds is *not chargeable with knowledge or notice of the terms and contents of the ordinances*, although the ordinances in question may be recited in the bonds by title and date, and that the bonds, in his hands, are not affected with any illegality which would be disclosed by examination of the terms of the ordinances. In other words, the recital of compliance with the statute imports that the bond is in all respects a valid obligation of the city, issued under the authority contained in the statute, and a purchaser of the bonds for value is absolved from any duty to examine the ordinances for the purpose of ascertaining their terms and seeing that the bonds are in fact issued for authorized purposes.¹

¹ *Hackett v. Ottawa*, 99 U. S. 86, 95; *Ottawa v. Portsmouth National Bank*, 105 U. S. 342, 343; *Evansville v. Dennett*, 161 U. S. 434, 443; see s. c. *ante*, § 928; *Waite v. Santa Cruz*, 184 U. S. 302, 315; *Risley v. Howell*, 64 Fed. Rep. 453, rev'g 57 Fed. Rep. 544; *Wesson v. Saline County*, 73 Fed. Rep. 917; *Rathbone v. Kiowa County*, 83 Fed. Rep. 125; *Haskell County v. Nat'l Life Ins. Co.*, 90 Fed. Rep. 228; *Kearney v. Woodruff*, 115 Fed. Rep. 90; *Fairfield v. Rural Independent Dist.*, 116 Fed. Rep. 738, rev'g 111 Fed. Rep. 108, 453; *Defiance v. Schmidt*, 123 Fed. Rep. 1, aff'g 117 Fed. Rep. 702; *Northwestern Sav. Bank v. Centreville Station*, 143 Fed. Rep. 81; *Brewton v. Spira*, 106 Ala. 229. See also *Schmid v. Mecosta*, 131 Mich. 197.

In *Hackett v. Ottawa*, 99 U. S. 86, 95, bonds were issued by a city containing recitals to the effect that they were issued by virtue of its charter power to borrow money, issue bonds therefor, and pledge its credit for the payment and in accordance with certain ordinances, of which the titles and dates were given. The bonds stated upon their face that one of these ordinances, passed June 15, 1869, was entitled "An ordinance to provide for a loan for municipal purposes," and the other, "An ordinance to carry into effect the ordinance of June 15, 1869, entitled 'An ordinance for a loan for municipal purposes.'" The principal defence was that the *recital as to a loan for municipal purposes was untrue*; that the bonds were not issued for municipal or corporate purposes, but as a simple donation to a private corporation whose business was in no wise connected with or under the control of the city, which facts it was contended appeared upon the face of the ordinances themselves. The court held that the purchaser was entitled to rely upon the terms of the recitals in the bonds and need not examine the terms of the ordinances themselves, saying: "The bonds in suit by their recitals of the titles of the ordinances under which they were issued, in effect, assured the purchaser that they were to be used for municipal purposes with the previous sanction duly given of a majority of the legally qualified voters of the city. If he would have been bound, under some circumstances, to take notice at his peril of the provisions of the ordinances, he was relieved of any responsibility or duty in that regard by reason of the representation upon the face of the bonds that the ordinances under which they were issued were ordinances 'providing for a loan for municipal purposes.' Such a representation by the constituted authorities of the city under its corporate seal would naturally avert suspicion of bad faith on their part and induce the purchaser to omit an examination of the ordinances themselves. It was substantially a declaration by the city, with the consent of a majority of its legal voters, that purchasers need not examine the ordinances since their title indicated a loan for municipal purposes. The city is therefore estopped by its own representations to say as against a *bona fide* holder of the bonds that they were not issued or used for municipal or corporate purposes."

Evansville v. Dennett, 161 U. S. 434, 443, was an action on negotiable bonds issued by a city in payment of a sub

§ 936. **Recital of Wrong Statute.** — A city may exercise all the powers conferred by two or more acts where the statutes do not in and of themselves involve substantial contradictions.¹ A recital

scription of stock in a railroad company. Each bond recited that it was issued in payment of such subscription "made in pursuance of an act of the legislature of the State of Indiana, and ordinances of the city council of said city passed in pursuance thereof." It was contended that the ordinances of the city, if examined, would show that the election held in the city upon the question of issuing bonds was not legally held, and therefore that the bonds were issued without authority and were void. The court held that the city was estopped by the recitals, and that a purchaser need not examine the ordinances to ascertain their terms, saying: "As therefore the recitals in the bonds import compliance with the city's charter, purchasers for value having no notice of the non-performance of the conditions precedent were not bound to go behind the statute conferring the power to subscribe and to ascertain by an examination of the ordinances and records of the city council whether those conditions had in fact been performed. With such recitals before them they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the legislature." See *supra*, § 928.

Where an issue of bonds recited that it was made under an ordinance of the city, it was held that the recital did not estop the city from showing that the ordinance was never recorded or published as required by statute, and consequently never took effect. The reason assigned for this decision was that neither the mayor nor clerk who signed the bonds was entrusted with any duty in relation to publishing the ordinance or in determining whether it had been published according to law. *Nat. Bank of Commerce v. Granada*, 54 Fed. Rep. 100, aff'g 48 Fed. Rep. 278. Where it was expressly provided by statute that before any bonds should be issued an ordinance of the city should be passed providing therefor, it was held that a recital in the bonds that all the requirements of the statute had been strictly complied with, did not estop the city from denying their validity on the ground that no ordinance

had ever been passed. *Swan v. Arkansas City*, 61 Fed. Rep. 478. See also *Hinkley v. Arkansas City*, 69 Fed. Rep. 768, 773. To the same effect, *Edminson v. Abilene*, 7 Kan. App. 305. In *Haskell County v. Nat. Life Ins. Co.*, 90 Fed. Rep. 228, it is said that these decisions have now been overruled by the decision of the Supreme Court of the United States in *Evansville v. Dennett*, 161 U. S. 434, *supra*. In *Peck v. Hempstead*, 27 Tex. Civ. App. 80, it was held that where negotiable city bonds were issued by the mayor and city secretary reciting on the face and having printed on the backs thereof an order purporting to be an order of the city council authorizing their issue, but no such order was in fact ever passed, and there was no other recital importing compliance with the law, the city was not estopped to deny the validity of the bonds even as against a *bona fide* purchaser for value. The court considered and distinguished the case of *Evansville v. Dennett*, *supra*, on the ground that in that case, and the other cases to the same effect, ordinances had in fact been passed by the municipalities.

In *Texas*, the commissioner's court of any county can only authorize the issue of bonds by order entered of record, and it has been held that a purchaser of county bonds must look to the order of the commissioners' court by authority of which they were issued, to see if they were issued for a purpose authorized by the statute and in accordance therewith, whether the act and the order are referred to on the face of the bonds or not. *Mitchell County v. City National Bank*, 91 Tex. 361; *Ball v. Presidio County*, 88 Tex. 60; *Young Bond & Stock Co. v. Mitchell County*, 21 Tex. Civ. App. 638. But *quære* in the Federal courts? In *Klamath Falls v. Sachs*, 35 Oreg. 325, it is held, contrary to the doctrine of the United States Supreme Court, that the municipality may show the invalidity of a recited ordinance as against a *bona fide* purchaser of bonds although the bonds also recite that they are issued pursuant to and in conformity with a statute.

¹ *Cairo v. Zane*, 146 U. S. 122, 143.

in a municipal bond of an invalid statute, or of a statute which in fact does not confer authority to issue the bond, does not preclude inquiry as to whether there is in existence any other valid legislative authority under which power to issue the bond can be upheld; and if such valid legislative authority be found, the validity of the bond will be sustained, *notwithstanding the erroneous recital*.¹ While such a recital may be invoked by the holder of the bonds as an estoppel against the municipality, it is not conclusive in its favor as to the act under which the bonds were in fact issued.²

§ 937. **Estoppel to deny Compliance with Conditions to be performed subsequent to Making but before Delivery.** — Sometimes the statute authorizing the issuance of the bonds provides that after a vote shall be had in favor of the issue and various other conditions precedent shall have been complied with, bonds in aid of a railroad company shall be executed, but shall only be delivered upon compliance with some condition which by its terms is intended to be fulfilled between the time of the execution of the bonds and the time of their delivery. If in furtherance of a condition of this nature, municipal bonds are *deposited in escrow* with a trustee to await compliance with the condition upon which the delivery is to be made, they are subject to the general rule that a delivery of negotiable paper left in escrow, contrary to the terms upon which it was to have been delivered, will pass a good title to a *bona fide* transferee for value and before maturity.³ Hence, when bonds are entrusted to a trustee, to be held by him until the completion of a railroad through a county, and upon such completion to be by him delivered to the railroad company, the trustee is the agent of the county

¹ *Johnson Co. v. January*, 94 U. S. 202; *Anderson County v. Beal*, 113 U. S. 227; *Knox County v. Ninth Nat. Bank*, 147 U. S. 91; *Evansville v. Dennett*, 161 U. S. 434, 443; *Wilkes County v. Coler*, 180 U. S. 506, 524; *Wilkes County v. Coler*, 190 U. S. 107, 109; *Board of Commissioners v. Coler*, 113 Fed. Rep. 725; *Beatrice v. Edmison*, 117 Fed. Rep. 427; *Defiance v. Schmidt*, 123 Fed. Rep. 1, aff'g 117 Fed. Rep. 702; *Fernald v. Gilman*, 123 Fed. Rep. 797; *Allen v. Davenport*, 107 Iowa, 90. *Contra*, *Wilkes County v. Call*, 123 N. Car. 308, 319. Error in reciting the title of the statute does not affect the validity of the bond, nor necessarily the recital. *Atchison Board of Education v. DeKay*, 148 U. S. 591, 595. When the recital refers to an invalid act in conjunction with a valid statute, the holder is entitled to rely upon the recital of the valid act. *Evansville v. Dennett*, 161 U. S. 434, 442.

² *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 95, per *Brewer, J.* *Contra*, *Wilkes County v. Call*, 123 N. Car. 308, 319.

³ *Provident Life & Trust Co. v. Mercer County*, 170 U. S. 593, 604, rev'g 72 Fed. Rep. 623, citing: *Long Island Trust Co. v. Columbus, C. & I. C. R. Co.*, 65 Fed. Rep. 455, 458; *Fearing v. Clark*, 16 Gray (Mass.), 74, 76; *Burson v. Huntington*, 21 Mich. 415, 433; *Vallett v. Parker*, 6 Wend. (N. Y.) 615, 620; *Chase National Bank of New York, v. Faurot*, 149 N. Y. 532; *Graff v. Logue*, 61 Iowa, 704.

and responsible to it for the manner in which he discharges his duty; and if he determines that the condition has been complied with and thereupon delivers the bonds to the railroad company which has sold and disposed of them, a *bona fide* holder has such title to the bonds as enables him to recover against the county, although the condition has not in fact been performed.¹ A municipality may waive self-imposed conditions to a subscription in aid of a railroad when the statute leaves it discretionary with it to impose such conditions, but the waiver must be by the municipality acting as the principal and not by mere agents or official persons.² If the condition which is to be performed is *not* prescribed by the statute authorizing the issue of the bonds, but is *voluntarily imposed* by the municipality as a condition of a subscription, and the bonds are issued without compliance with the condition, although it is intended to be performed prior to the issue or delivery, but the bonds contain a recital which imports compliance with all the provisions of the statute, the municipality is estopped from denying the validity of the bonds on the ground that they were issued and delivered by its officers without performance of the condition precedent, and therefore without authority on their part.³ If the

¹ *Provident Life & Trust Co. v. Mercer County*, 170 U. S. 593, rev'g 72 Fed. Rep. 623. See also *Schmid v. Frankfort*, 131 Mich. 197; *Estill County v. Embry*, 144 Fed. Rep. 913. Of the case first cited, Mr. Justice Peckham says, in *Tulare Irr. Dist. v. Shepard*, 185 U. S. 1, 24: "In *Provident Life & Trust Co. v. Mercer County*, 170 U. S. 593, where the fact whether a condition precedent had been performed before issuing of the bonds was confided for decision to a trustee, it was held that his decision that the condition precedent had been complied with was conclusive in favor of a *bona fide* holder, even though the condition in fact had not been performed."

² *Graves v. Saline County*, 161 U. S. 359.

³ *American Life Ins. Co. v. Bruce*, 105 U. S. 328; *Oregon v. Jennings*, 119 U. S. 74. See also *Brooklyn v. Aetna Life Ins. Co.*, 99 U. S. 362. In *American Life Ins. Co. v. Bruce*, 105 U. S. 328, the statute authorizing the issue of the bonds declared that the municipality should have the right when making any subscription or donation to any railroad company, to prescribe the conditions upon which the bonds and subscription or donations should

be made, "and such bonds, subscription, or donation shall not be valid and binding until such conditions precedent shall have been complied with." A subscription was made pursuant to a vote, the notice of election prescribing certain conditions which were alleged to have been assented to by the railroad company, viz.: that the railroad should be constructed through the town in a certain direction; that a depot should be located and maintained in the town; that the bonds should be delivered in instalments for each mile of ties laid, and the balance when the roadbed was ready for use; and that the subscription should be void unless the railroad company had within one year from the time of election made an agreement for iron and rolling stock and for a connection with an eastern terminus. The bonds were delivered without compliance with these conditions, and recited that they were "issued by virtue of the laws of the State of Illinois" specifying the statutes, and certified that an election was duly had. It was held that, as the statute did not make the imposition of conditions obligatory on the town, but left the town at liberty to prescribe them or to make an unconditional subscription as it deemed

condition which is to be fulfilled between the execution and deposit of the bonds in escrow and the time of their delivery is not con-

best, the town could, consistently with the statute, issue and deliver bonds for the subscription in advance of the construction of any part of the railroad; and that the recitals, importing, as they did, compliance with the statute, estopped the town from contesting the validity of the bonds on the ground that the conditions imposed upon the railroad company had not been complied with. In the earlier case of *Brooklyn v. Aetna Life Ins. Co.*, 99 U. S. 362, the facts were similar, but the condition in that case was imposed voluntarily by the town without any provision in the statute expressly authorizing the imposition of any condition. A similar decision was rendered. In *Lewis v. Barbour County*, 105 U. S. 739, a statute authorized the board of county commissioners of any county to issue bonds to aid in the construction of railroads, &c., upon being authorized so to do by a vote of the electors. In the case of subscriptions in aid of the construction of a railroad, the statute provided that the commissioners should at once subscribe upon the books of the railroad company specifically setting forth the conditions upon which the subscription was made, the amount, &c., &c. The statute also provided that if the purpose for which bonds were voted be to aid in the construction of a railroad either by a donation thereto or the taking of stock therein, then upon the subscription being made, the officers of the municipality should thereupon issue bonds of the county, &c., for the amount of the subscription and should forthwith deliver the same, together with the original or a copy of the subscription, to the treasurer of State, who should hold the bonds in escrow until the conditions and the terms of the subscription should be in all things fully complied with. Upon the conditions of the subscription being in all things fully complied with, then the treasurer was authorized to deliver the bonds to the parties entitled thereto, who should have the same registered by the State auditor as otherwise provided in the act. In the case of a failure to comply with the conditions and the terms of subscription, the treasurer of State was required to cancel the bonds and redeliver them to the municipality.

It was, however, declared that these provisions with reference to the deposit of the bonds with the treasurer of State should not apply where the people might have named some party as trustee in their vote on the proposition and the company might thereafter agree to the same. The provision of the statute for registration in the office of the treasurer of State directed that within thirty days after delivery of bonds the holder should present the same to the auditor of State, who upon being satisfied that such bonds had been issued according to the provisions of the act and of their genuineness should register the same in his office, and under his seal certify upon the bonds the fact that they had been regularly and legally issued. Bonds were issued in aid of a railroad, each of which recited that it was "issued for the purpose of aiding in the construction of" the railroad "under and in pursuance of an act of the legislature of the State of Kansas" naming the title of the statute. There was nothing on the bonds indicating that the donation was otherwise than absolute and unconditional. In point of fact, the vote was on condition that one-half should only be delivered upon completion of the railroad to a certain point within the county, and the remainder when it should be completed through the county. The bonds were left by the county officers with a third party to be deposited with the treasurer of State as required by the terms of the proposition upon which the people voted. They were never so deposited, but that third party procured them to be registered by the auditor of State, and then fraudulently put them in circulation. The court held that, in view of the provision of the statute declaring that the requirement for the deposit of the bonds in escrow should not apply where the people named another trustee, and in view of the fact that the county might make a subscription to stock to be paid in bonds deliverable at once without any conditions or terms whatever, it was within the power of the county to issue the bonds without delivering them to the treasurer of the State; that the statute entrusted to the State auditor the duty of certifying upon each that it had been regularly and legally issued, and he was therefore

tained in the statute authorizing the issue, but is found in the proceedings or agreement for the issuance of the bonds, and if the bonds contain a provision that they shall be valid only when it is certified thereon that the conditions upon which they were voted, issued, and deposited by the municipality have been performed, a *certificate by the person or depository designated* in the proceedings to make the same, that the condition has been performed, indorsed on the bonds, makes the bonds completely executed instruments and in a condition to be put upon the market as commercial paper free from any condition. Having on them the necessary certificate of performance, the purchaser need not inquire whether the facts were as certified. With the certificate indorsed thereon, the bonds are, in legal effect, the same as if they had been issued by the proper officers under full authority without the condition which appeared on their face.¹

necessarily authorized to determine whether the law had been in all respects obeyed; that purchasers were entitled to rely upon his determination; and that the county was liable on the bonds.

¹ In *Menasha v. Hazard*, 102 U. S. 81, a town in Wisconsin, pursuant to statutory authority, subscribed for stock in a railroad company and issued its bonds in payment thereof. The proposition submitted by the railroad company was for the issuance of the bonds in consideration of the construction of a railroad between two designated points. Upon the making of the bonds they were to be deposited with a bank, to be held by the bank until such time as there should be filed in the bank a properly authenticated certificate signed by the chief officer of the company and the chairman of the board of supervisors of the town, that the iron had been laid upon the track of the road and cars had been run over the same, between the designated termini of the railroad, when the bonds should become the absolute property of and be held by the bank subject to the order of the company. It was stipulated that this certificate should authorize and require the president of the bank to certify upon the back of each of the bonds that the conditions upon which the bonds were voted, issued, and deposited by the town had been performed. In case the company failed to comply with the conditions the bonds were to be returned to the town on demand of the authorities. Pursuant to the terms of the proposition, each bond

contained a provision that "this bond shall be valid only when it is thereon duly certified that it has been duly certified that the conditions upon which it was voted, issued, and deposited by said town have been performed." The appropriate certificates were made and filed with the bank, and thereupon the president of the bank made the stipulated indorsement on the bonds. The bonds were attacked on the ground that the railroad company had never constructed its railroad between the designated termini, but on the contrary for a distance of a mile had obtained trackage rights over another railroad, thereby dispensing with a bridge over a narrow lake. The Circuit Court were divided in opinion upon the question whether the court should have instructed the jury that the construction of the railroad without constructing the same across the lake, but by securing the right to cross the lake on the bridge and track of another railroad, was not a performance of the conditions of the proposition to construct a railroad between the designated termini. The Supreme Court held that it was unnecessary to consider this question, saying: "When the bonds were 'duly certified' and were delivered to the railroad company by the bank, they became, under the agreement of the parties, valid instruments completely executed in form and in a condition to be put upon the market as commercial paper. Having on them the necessary certificate, the purchaser need not inquire whether the facts were as certified. With the certificate indorsed, the bonds were in

But if a vote to subscribe to the stock of a railroad company to be paid by an issue of municipal bonds, or if a subscription to such stock payable in such bonds be made upon a condition which is to be performed subsequently to the vote or subscription, — such as the condition that the railroad be constructed between specified points and within a specified time, — and if the bonds are issued without compliance with such condition, they are invalid in the hands even of a *bona fide* purchaser for value, if the statute authorizing the issue declares that the bonds *shall not be binding and valid until conditions precedent, which may have been imposed, shall have been complied with*, and that provision is, either expressly or by judicial construction adopted prior to the issue of the bonds, declared to be binding upon innocent holders without notice. The fact that the bonds contain a recital which would otherwise import compliance with the law does not under such circumstances estop the municipality from taking advantage of a defence founded on the breach of the condition.¹

legal effect the same as if they had been issued by the proper officers under full authority without the condition which appeared on their face. Under these circumstances, the condition did not destroy their negotiability."

¹ *Citizens' Sav. & Loan Assoc. v. Perry County*, 156 U. S. 692, 702. In *German Sav. Bank v. Franklin County*, 128 U. S. 526, an election to determine whether an issue of bonds should be made in payment of a subscription in aid of a railroad company, was held September 11, 1869. One of the conditions upon which the prescription was to be made was that the railroad should be commenced in the county within nine months from the date of the election and completed through the county by June 1, 1872. At the time of the election, the statute provided that any municipality should have the right, upon making any subscription or donation to any railroad company, to prescribe the conditions upon which such bonds, subscription, or donation should be made, "and such bonds, subscriptions, or donations *shall not be valid and binding until such conditions precedent shall have been complied with*." Prior to the purchase of the bonds by the plaintiff, the Supreme Court of the State held that, although this statute did not declare that the bonds should be void, its declaration that they should not be valid and binding until the con-

ditions precedent should be complied with was an imperative and peremptory declaration that the bonds should not be valid and binding until the conditions named should have been complied with even in the hands of innocent holders without notice. The bonds before the Supreme Court of the United States contained a recital that they were issued under the provisions of the act, describing it, "and authorized by a majority of the qualified voters of said county of Franklin at an election held . . . in accordance with the provisions of said act." The Supreme Court of the United States held that inasmuch as the plaintiff purchased the bonds *after* the judicial construction of the statute by the State court, plaintiff was charged with notice of, and bound not only by the terms of the statute, but also by the judicial construction thereof by the State court, and that the bonds were invalid in plaintiff's hands although it was a *bona fide* holder for value, by reason of a failure to comply with the conditions upon which the vote was made. It also held that the recitals did not estop the county from taking advantage of the failure of the railroad company to comply with the conditions of the subscription. This case distinguishes *American Life Ins. Co. v. Bruce*, 105 U. S. 328; *Pana v. Bowler*, 107 U. S. 529; and *Oregon v. Jennings*, 119 U. S. 74.

§ 938. **Judgment or Determination as to Right to issue Bonds.**

— Under schemes adopted for the issue of bonds by or on behalf of municipalities, — particularly in the case of railroad aid bonds and bonds of irrigation or other local districts, — provision is frequently made for the presentation of a petition or application by taxpayers to a judge, board, or other specified tribunal initiating proceedings for an issue of bonds, and thereupon the judge, board, or tribunal upon whom the duty devolves by the statute of passing upon the petition, makes the necessary order and appoints commissioners to issue the bonds or otherwise provides for their issue pursuant to the statute. Under any scheme of this nature, the final judgment or decision (where there is jurisdiction to act and decide), that all the preliminary conditions have been complied with and embodying in effect such judgment or decision in a recital in a negotiable bond, estops or concludes the municipality, in an action on the bond or coupons by a *bona fide* holder, from contesting the facts thus decided and recited, or necessarily involved in such decision and recital.¹ The determination of the judge, board, or tribunal authorized to act can only be attacked collaterally upon

¹ *Knox County v. Aspinwall*, 21 How. (U. S.) 539; s. c. *supra*, §§ 905, 906, 907; *Bissell v. Jeffersonville*, 24 How. (U. S.) 287; *Lynde v. Winnebago County*, 16 Wall. (U. S.) 6; *Rock Creek v. Strong*, 96 U. S. 271; *Orleans v. Platt*, 99 U. S. 676; *Lyons v. Munson*, 99 U. S. 684; *Andes v. Ely*, 158 U. S. 312; *Quinlan v. Green County*, 205 U. S. 410, 422; s. c. 157 Fed. Rep. 33; *Hutchinson & S. R. Co. v. Kingman County*, 42 Kan. 70. See also *Tulare Irr. Dist. v. Shepard*, 185 U. S. 1, 20; *infra*, §§ 956, 957. In *Knox County v. Aspinwall*, 21 How. (U. S.) 539, the court held that the board of county commissioners was necessarily clothed by statute with power and authority to determine whether or not an election had been properly held and a majority of the votes of the county cast in favor of the subscription in payment of which the bonds were issued. The court declared that while it was not prepared to say that the decision of the board would be conclusive in a direct proceeding to inquire into the facts previously to the execution of the power and before the rights and interests of third parties had attached, yet as the authority had been executed, the stock subscribed, and the bonds issued, and in the hands of innocent persons, it would be too late even in a direct proceeding to call it in question. It is to be observed that in this case the decision of the Supreme Court proceeded upon the two-fold ground of power on the part of the county commissioners to decide the fact and the effect of a recital importing compliance with the statute. The intention of the court apparently was to support its decision upon both of these grounds separately, and this case would therefore seem to be authority for the proposition that if a board of commissioners or other tribunal duly authorized to act decides that all the condition precedent to an issue of the bonds had been complied with, its decision is binding if the rights of third parties have attached before the decision is attacked. When, pursuant to statute, the minutes of the city council or board of aldermen recite that the board canvassed the returns of an election authorizing an issue of bonds and found that due notice had been given and that the election had been legally and formally held, parol evidence is not admissible as against a *bona fide* holder for value of the bonds to show that no notice of the election was given. *Clarksdale v. Pacific Imp. Co.*, 81 Fed. Rep. 329.

some ground which goes to the jurisdiction, and if jurisdiction exists, all other questions rightly before him or the tribunal are concluded by the decision.¹

Within a like principle, a judgment in favor of a creditor is a final and binding adjudication that a debt exists and is a valid and subsisting obligation, notwithstanding any constitutional limitation upon the power of a municipal corporation to contract a debt. If bonds be issued for the purpose of funding such judgment, the municipality is estopped by the judgment from contesting the validity of the debt for which the bonds are issued.² The conclusive or binding effect of the determination of the judge, board, or other authorized tribunal under such circumstances is not dependent upon a recital, although it usually comes before the court in connection therewith. The principle underlying these decisions is, however, the foundation upon which the doctrine of estoppel by recital rests, and the conclusive or binding effect of a judgment or determination by a person or body clothed with the power and duty of deciding the question should not be overlooked.

§ 939. **Refunding Bonds.** — Although there is authority in support of the proposition that where a municipality has created a debt and issued bonds in evidence thereof, the municipality, like any other debtor, may, in virtue of its general powers, enter into negotiations and *cancel or exchange* its bonds without special legislative authority,³ yet it would seem that an issue of negotiable refund-

¹ *Andes v. Ely*, 158 U. S. 312; s. c. *supra*, § 926. See this case as to sufficiency of petition to confer jurisdiction.

² *Lake County v. Platt*, 79 Fed. Rep. 567, 569; *Geer v. Ouray County Com'rs*, 97 Fed. Rep. 435. Such judgments are beyond collateral attack, even though rendered through fraud and by collusion; only by a direct attack within the period named in the statute of limitations can such fraudulent or collusive judgments be set aside. *Lake County v. Platt*, 79 Fed. Rep. 567, 573; 25 C. C. A. 87, 92.

³ In *Rogan v. Watertown*, 30 Wis. 259, — an action upon interest coupons, — one of the counts was upon a coupon on a bond which was a reissue in substitution for a prior bond of the same number and amount and corresponding in all particulars with the original bond, the original having been surrendered and cancelled under authority of a resolution of the common

council authorizing the mayor and city clerk to cancel any of the bonds of the issue and to execute in lieu of such cancelled bonds duplicates of the same number and amount and payable at the same time. It was objected to this bond that the power of the mayor and council was exhausted when the bonds were issued, and that the proceeding for cancellation and reissue was without authority, but the court said: "By the issue and delivery of the bonds, a debt had been created by the city, and with respect to such debt and the security given, it was competent for the city, as for any other debtor, to enter into negotiations and to cancel or exchange its bonds without special legislative authority." In *Hyde v. Ewert*, 16 S. Dak. 133, statutory authority to refund bonds existed, and the court held that such authority was sufficient to justify the issue of refunding bonds, sought to be enjoined by a taxpayer.

ing bonds payable in the future comes within the general principle which has been laid down that negotiable bonds can only be issued by a municipality *pursuant to statutory authority*, and that in the absence of statutory authority an issue of refunding bonds is *ultra vires*, so far at least as negotiability under the law merchant is concerned.¹ Thus in *Illinois*, it is held that although the power to settle and pay the debts of a municipality, which it had been authorized to create, and to take up and cancel its bonds, which it had been authorized to issue, cannot be doubted, it does not necessarily follow that the power to issue new or refunding negotiable bonds in the place of and to take up the old, can also be implied. If it can,

The court added: "There is another view which effectually avoids all possible objections to the issue of these proposed bonds. It is this: where a municipal corporation has created a valid debt against itself, it has power, like any other debtor, to enter into negotiations concerning such debt and to reduce its amount by payment or the exchange of other bonds without any special grant of legislative authority. *Rogan v. Watertown*, 30 Wis. 259. If the corporation or its creditors consent to a reduction of its legal indebtedness, who can be heard to complain? Certainly not a taxpayer. It would be an obviously anomalous proceeding for a court of equity to forbid the consummation of such a compromise as is disclosed by the record in this case at the instance of any one so substantially benefited thereby as the plaintiff." Similar language was also used by the same court in *Ewert v. Mallory*, 16 S. Dak. 151, where there was also express authority to refund the bonds.

In *Solon v. Williamsburgh Savings Bank*, 114 N. Y. 122, the validity of certain railroad aid bonds was involved. About three months after the last of the original issue of the bonds were delivered by the commissioners to the railroad company, the latter surrendered up to the commissioners a number of the bonds amounting to twenty-four thousand dollars, and they issued and delivered to him in their place a like amount, of which those held by the defendant were a part. The substituted bonds were of larger denomination and were made payable at a different place, and the change was made with a view to their availability for sale and transfer in the city of New York. In an action brought by the

municipality to have the bonds held by defendant adjudged void and ordered to be surrendered and cancelled, the court assumed that the power of commissioners to issue bonds of the town ceased when they had originally issued the amount mentioned in the petition of the taxpayers. But the court pointed out that the returned bonds had not been sold by the railroad company and that they were destroyed by the commissioners, so that the substituted bonds did not increase the entire amount outstanding beyond the authorized limit. It was held that there was no equity in favor of the municipality as against the defendant to support an action for the cancellation of the bonds arising from the substitution; that the defendant was, not only by the apparent situation at the time of its purchase of the bonds, but by continued recognition of the obligation of the bonds for several years thereafter by payment of interest thereon, induced to understand that they were in all respects legally created; and that inasmuch as the substitution was effected by the agents of the municipality, and the change was only one of form and not of substance, it did not prejudice the municipality, and it was not entitled to have the bonds cancelled.

¹ The legislature may, by mandatory enactment, compel a county to issue bonds to fund its floating debt incurred for necessary expenses. *Jones v. Madison County*, 137 N. Car. 579 (overruling on rehearing, s. c. 135 N. Car. 218; and *Battery Park Bank v. Madison County*, 135 N. Car. 230). See also *Jefferson County v. People*, 5 Neb. 127; *President, &c. v. State*, 45 Ala. 399.

then against the policy of the Constitution and laws requiring such debts to be paid at or before maturity and without legislative authority, a municipal debt may forever be kept alive and the municipality be subjected to the many disabilities and hardships which the law imposes on the makers of negotiable instruments when such instruments are held by innocent holders for value before maturity. Hence, the mere fact that a municipal corporation is in debt does not authorize it, as of course, to issue renewal or refunding negotiable bonds.¹ The power to issue new negotiable bonds having the incidents of commercial paper, to take the place of a former issue, cannot be implied merely from power to make the original issue.² But under the decisions, it is not necessary that *express authority* should be conferred to issue refunding bonds, *eo nomine*. A *general power*, continuing in its nature, to *borrow money* for corporate purposes and to issue bonds, which is not

¹ *Oquawka v. Graves*, 82 Fed. Rep. 568; *Hardin County v. McFarlan*, 82 Ill. 139; *Locke v. Davison*, 111 Ill. 19; *Coquard v. Oquawka*, 192 Ill. 355.

² *Coquard v. Oquawka*, 192 Ill. 355; *Merrill v. Monticello*, 138 U. S. 673, 685; s. c. *supra*, § 874. In *Merrill v. Monticello*, 138 U. S. 673, a township had, pursuant to statutory authority, issued its bonds for the purpose of building a schoolhouse. It had authority to issue bonds for the purchase and erection of lands and buildings for school purposes only. The Supreme Court of the United States held that authority to issue bonds for these purposes did not imply authority to issue bonds to refund the original issue. Justice *Lamar* said: "The bonds in suit were not issued for either of the purposes named (for the purchase and erection of lands and buildings for school purposes), but to retire and pay off the bonds of 1869. The town had no power to pay off these bonds in this way, viz., by the issue of new bonds, or it could perpetuate a debt forever. Bonds once issued for a lawful purpose must be paid by taxation. . . . When bonds are once issued for a lawful purpose, the town is *functus officio* as to that matter. To argue that the old bonds are a debt for school purposes, which may be liquidated by new bonds, is a refinement of construction which the sound sense of the law refuses." *Coquard v. Oquawka*, 192 Ill. 355, *supra*, distinguishes *Quincy v. Warfield*, 25 Ill. 317, on the ground that in that case, while no express power was granted

to issue a bond for and in lieu of an overdue bond, the general power to issue bonds within certain fixed limits was expressly given by the charter of the city and without regard to the purpose, and it therefore appeared in that case that the charter authorized the issue of the bonds sued on. It also distinguishes the case of *Galena v. Corwith*, 48 Ill. 423, on the ground that the city in that case was authorized by its charter to borrow money as might be necessary, not exceeding \$20,000 in any one year, and to issue bonds, scrip, or certificates therefor to be used in liquidation of the debts of the city and for permanent and useful improvements. The city therefore was authorized by its charter to issue the bonds sued on, and although language was used in the opinion which tended to support the general right to refund existing bonds, the case was not one where a recovery was had on refunding bonds issued without authority given for that purpose. In *Hardin County v. McFarlan*, 82 Ill. 138, the court held that under the principle that where a statute pointed out the particular course to be pursued to effect a particular purpose, no other course can lawfully be pursued, a county authorized by statute to levy a special tax to liquidate its debts can only discharge those debts by the levy of such tax, and the county authorities have no general or implied power to take up its outstanding bonds and give bonds in lieu thereof bearing interest. See also *Locke v. Davison*, 111 Ill. 19.

limited to specified purposes, includes the power to borrow money and issue bonds to fund or refund the existing indebtedness of the municipality on the principle that the whole is greater than any of its parts, and refunding bonds issued pursuant to such authority are within the powers of the municipality.¹ The fact that a constitutional or statutory provision required the municipal authorities at the time of issuing bonds to *provide for the collection of a tax* sufficient to pay the interest on bonds issued, and also to pay and discharge the principal thereof at or before maturity, does not preclude the municipality, under statute authority, from refunding bonds issued under this constitutional or statutory requirement at the expiration of their original term, when such bonds for any cause remain unpaid or unsatisfied from taxation or from

¹ Portsmouth Sav. Bank v. Springfield, 4 Fed. Rep. 276; Portland Savings Bank v. Evansville, 25 Fed. Rep. 389; Huron v. Second Ward Savings Bank, 86 Fed. Rep. 272, 280, aff'd 80 Fed. Rep. 660; Quincy v. Warfield, 25 Ill. 317; Galena v. Corwith, 48 Ill. 423; Hyde Park v. Ingalls, 87 Ill. 11; Stone v. Chicago, 207 Ill. 492; Morris & Whitehead v. Taylor, 31 Oreg. 62; Montpelier Nat. Life Ins. Co. v. Mead, 13 S. Dak. 37; Richmond & W. P. Land, &c. Co. v. West Point, 94 Va. 668; Rogan v. Watertown, 30 Wis. 259, 268. See also Jones v. Camden, 44 S. Car. 319.

The fact that a city has power to raise money by taxation for the purpose of paying judgments on past due warrants for current expenses, does not by implication exclude the power to fund such warrants by an issue of negotiable bonds when the express power to issue negotiable bonds therefor is also granted by the charter. Stone v. Chicago, 207 Ill. 492, 504; Huron v. Second Ward Sav. Bank, 30 C. C. A. 38; 86 Fed. Rep. 272; Jones v. Camden, 44 S. Car. 319, 323. When express power to raise money by tax to pay debts and to issue bonds to refund existing indebtedness are conferred, the choice of the method by which the indebtedness should be paid is left to the discretion of the city. Huron v. Second Ward Sav. Bank, 30 C. C. A. 38; 86 Fed. Rep. 272, 281. Statutory authority which provides that wherever it shall become necessary to fund a bonded indebtedness, it shall be lawful for the public corporation to issue bonds, and it is authorized and empowered to sell them at not less than par,

is sufficient to authorize an issue of bonds in exchange for existing obligations. There is no substantial difference between exchanging bonds at par for outstanding obligations and selling them at par for the purpose of paying the old debt. Either method of procedure results in refunding the old debt by issuing new bonds. Ewert v. Mallore, 16 S. Dak. 151. See also Montpelier Nat. Life Ins. Co. v. Mead, 13 S. Dak. 37. A different question might arise if the statute required the refunding bonds to be sold at public sale to the highest bidder. See *Index, Highest Bidder*.

A city had authority "to borrow money on the credit of the corporation for corporate purposes and to issue bonds therefor in such amounts and sums and on such conditions as it shall prescribe." It was held that, under this general authority to borrow money for corporate purposes and to issue bonds, it had the power to borrow money in the same manner to pay an indebtedness incurred for municipal purposes, and that it might issue its bonds for the purpose of funding its indebtedness. Montpelier Nat. Life Ins. Co. v. Mead, 13 S. Dak. 37. Statutory authority to issue renewal or refunding bonds of "like tenor" with the old bonds, is to be taken in the sense in which the words are popularly understood. They mean simply of the same nature or character, and the fact that the refunding bonds vary from the old in their denominational amount to suit the convenience of the parties to the contract, does not affect their validity. Lexington v. Union Nat. Bank, 75 Miss. 1.

the proceeds of the sinking fund.¹ If, however, refunding bonds are issued pursuant to express statutory authority, the indebtedness refunded must come within the terms of the statute. For example, if the purport of the statute shows that the legislature intended only to authorize refunding bonds in the place of existing bonded indebtedness, such bonds cannot rightfully be issued to liquidate floating indebtedness, or debts evidenced by other forms of obligation than bonds.²

When a judgment has been rendered for indebtedness against a municipality, such judgment is a conclusive adjudication that the debt is valid and is not affected by the constitutional provision as to debt-limit, and is not open to collateral attack in a suit on bonds issued to refund such judgment debt.³ If the only authority con-

¹ Kane v. Charleston, 161 Ill. 179; Heins v. Lincoln, 102 Iowa, 69; State v. Walker, 193 Mo. 693.

But the rule is otherwise in Georgia under the provisions of the Constitution of that State as construed by the courts. In the case of debts created subsequently to the adoption of the Constitution of 1877, the policy is that they shall be paid as they mature, from the collection of an annual tax to be provided for at the time of issue, and they cannot be refunded. Epping v. Columbus, 117 Ga. 263, 281; Mason v. Jones, 122 Ga. 455. *Quare?*

² It has been held that when a refunding statute authorizes an issue of "new bonds" in place of the indebtedness refunded, the term "new bonds" imports that the new bonds are to be used in place of the old, and the operation of the refunding act is to be limited to the refunding of bonded indebtedness, and does not include or apply to indebtedness in other forms, *e. g.*, warrants. Thurston County v. Moore, 45 Neb. 12. Under statutory authority to refund bonds "matured or subject to call," it has been held that a county may agree with the bondholder that the latter should waive the right to postpone payment, and immediately issue refunding bonds, although the original bonds are not yet payable according to their terms. Smith v. Mercer County, 104 Ky. 596.

³ Hamilton County v. Montpelier Sav. Bank, 157 Fed. Rep. 19, 26; *s. c.* *certiorari* refused to the county, 208 U. S. 617; Geer v. Ouray County, 97 Fed. Rep. 435; 38 C. C. A. 250; Board v. Platt, 79 Fed. Rep. 567, 572. The plaintiffs in these actions sued to re-

cover upon bonds which had been issued to fund judgments, and the defendants urged the invalidity of the debt upon which the judgments were founded. The United States Circuit Court of Appeals for the Seventh Circuit gave no weight whatever to this defence, holding that judgments are beyond collateral attack, even though rendered through fraud and by collusion as averred in the Platt Case, and that even fraudulent and collusive judgments could be set aside only by a direct attack brought within the period prescribed by the statute of limitations. On this point see also: Edmundson v. Jackson Independent School Dist., 98 Iowa, 639; Aetna Life Ins. Co. v. Lyon County, 44 Fed. Rep. 329, 344 (before Shiras, J.); State v. Gloyd, 14 Wash. 5; Howard v. Huron, 5 S. Dak. 539; *s. c.* 6 S. Dak. 180; Helena v. United States, 104 Fed. Rep. 113; County v. Platt, 79 Fed. Rep. 567 (Caldwell, Thayer, and Lochren, JJ.); Geer v. Ouray County, 97 Fed. Rep. 435 (Caldwell, Sanborn, and Thayer, JJ.); Smith v. Ormsby, 20 Wash. 396; People v. May, 9 Colo. 81, 404; Grand Island & N. W. R. Co. v. Baker, 6 Wyo. 369.

In Davenport v. Lord, 9 Wall. 409, which was a mandamus to require the city to levy a tax to pay a judgment on certain bonds, the court said (page 413): "To the proposition that the bonds issued by the city for improvement purposes were not sanctioned by the requisite popular vote there are two answers: (1) The respondents are concluded by the judgment at law. They cannot go behind it and raise any question touching the sufficiency of

ferred upon a city to issue refunding bonds is "in order to raise money to take up any outstanding bonds of such city or to ex-

either of the causes of action upon which it was rendered. (2) It is not denied that the relator was an innocent purchaser. In that event, if the bonds could have been properly issued under any circumstances, he had a right to presume that they were so issued, and against him the city is estopped to deny their validity." In *Ralls County v. United States*, 105 U. S. 733, which was a mandamus to compel the levy of a tax to pay a judgment rendered on some bonds, the court said (page 734): "In the return to the alternative writ many defences were set up which related to the validity of the coupons on which the judgment had been obtained, as obligations of the county. As to all these defences it is sufficient to say it was conclusively settled by the judgment which lies at the foundation of the present suit, that the coupons were binding obligations of the county." See *Knox County v. Harshman*, 133 U. S. 152; *Brown v. County of Buena Vista*, 95 U. S. 157; *Embry v. Palmer*, 107 U. S. 3, and quotations from opinions of Mr. Chief Justice *Marshall* and Mr. Justice *Curtis*, there cited, p. 11. In *Ballance v. Forsyth*, 24 How. 183, Mr. Justice *Campbell*, giving the opinion of the court, said (page 184): "This is a bill filed by the plaintiff to enjoin the execution of a judgment in the Circuit Court upon which a writ of error had been taken to this court and affirmed. . . . It is not allowable to him (the plaintiff) to appeal from a judgment of the Circuit Court and Supreme Court to a court of chancery upon the relative merit of the legal titles involved in the controversy they had adjudicated."

Conclusiveness of judgments generally: *Davis v. Brown*, 94 U. S. 423; *Peck v. Jenness*, 7 How. 612, and remarks of *Grier*, Justice, p. 624; *Austin v. Hamilton County*, 76 Fed. Rep. 208, 211; *Dimock v. Revere Cooper Co.*, 117 U. S. 559, and observations of *Miller*, Justice, p. 566; *Dickson v. Wilkinson*, 3 How. 57, 61; *Biddle v. Wilkins*, 1 Pet. 686, 691; *Stout v. Lye*, 103 U. S. 66, 68.

Consent judgment held conclusive: *Helena v. United States*, 104 Fed. Rep. 113. Before *Gilbert*, *Ross*, and *Morrow*, JJ. It was contended, where a judgment was rendered by consent contained in an ordinance of the city, that the judg-

ment thus rendered by consent did not bind the municipality. The court overruled the objection. See also *Holt County v. National Life Ins. Co.*, 80 Fed. Rep. 686.

A judgment recovered against a city falls within the designation "other evidences of indebtedness issued for money" in a refunding statute, and under such designation funding or refunding bonds may be issued therefor. *Stone v. Chicago*, 207 Ill. 492; *Port Huron v. McCall*, 46 Mich. 565.

Under a statute authorizing a city to issue refunding bonds for its "outstanding indebtedness evidenced by bonds and warrants," refunding bonds were issued to retire the bonds of a water company secured by mortgage on the waterworks which had been purchased by the city subject to the mortgage, and which the city had assumed by the deed of conveyance. Each bond recited that "This bond is one of a series of bonds of like date, tenor, and effect, issued by the said city of Santa Cruz, for the purpose of refunding the bonded indebtedness of said city and issuing bonds therefor, and providing for the payment of the same under and in pursuance of and in conformity with the provisions of an act of the legislature of the State of California, entitled." &c. Construing these recitals, the court held that the innocent holder of bonds containing such recitals is under no obligation to inquire concerning the validity of the debt funded, and that the city is estopped to set up that a part of the bonds funded were invalid or that they were not bonds of the city at all, but bonds of a local water company. *Waite v. Santa Cruz*, 184 U. S. 302, 314, rev'g 98 Fed. Rep. 387; s. c. 89 Fed. Rep. 619. Under a statute declaring that the indebtedness of a school board existing when the statute took effect should continue unimpaired and "said board may refund any debt by the issuance of bonds," debts contracted subsequently to the enactment of the statute, as well as debts contracted previously, may be refunded. *Woods v. Board of Education of Covington*, 21 Ky. Law Rep. 941; 53 S. W. Rep. 517.

A charter authorized the city to provide "for funding or compromising

change with the holders of such bonds" the city has no authority to make an issue of refunding bonds for the purpose of restoring to the treasury moneys which it has already expended in the payment and satisfaction of a previous issue of bonds. The payment of the previous issue extinguished the debt or obligation thereof, and no debt or obligation existed thereafter which could be refunded under the authority conferred.¹ If, however, a statute expressly empowers a city to refund its debt evidenced by bonds, and does not undertake to limit such right or power, the power to refund bonds is not limited to bonds which have not already been refunded, and bonds which themselves were originally issued as refunding bonds can again be refunded under the provisions of the act.²

the whole or any part of the existing debt of the city." By the Constitution of Texas it is provided that "no debt" shall be created by any city without making provision for levying and collecting a tax to pay interest and create a sinking fund. It was held that the meaning of the words "existing debt" was not limited to the species of debt referred to in the Constitution, and that the power to issue bonds might be exercised for the purpose of settling an outstanding indebtedness consisting of arrears for past expenses. *Conklin v. El Paso* (Tex. Civ. App.), 44 S. W. Rep. 879. A statute which provides that "in all cases where counties or cities have *heretofore*" issued bonds or securities which remain outstanding, the city or county may, upon the surrender thereof, issue in place thereof new bonds, only applies to cities and counties in existence at the time of the enactment of the statute, and does not authorize a city incorporated thereafter to issue refunding bonds in lieu of bonds issued by a town or village afterwards incorporated as a city. *Oquawka v. Graves*, 82 Fed. Rep. 568; *Coquard v. Oquawka*, 192 Ill. 355; *People v. Lippincott*, 81 Ill. 193. The funding of municipal indebtedness is peculiarly a matter pertaining to municipal organizations, and still more peculiarly a matter as to which cities of large population require different provision from that suitable to cities or towns of small population. Hence, a statute relating thereto may be made applicable to cities of a certain class without violating a constitutional provision against local or special legislation. *Waite v. Santa Cruz*, 184 U. S. 302; *Los Angeles v. Teed*, 112 Cal.

319, 328. After a sale of refunding bonds issued pursuant to statutory authority the municipality cannot question their validity on the ground that the proceeds of the bonds were used for illegal purposes. *Keene Five Cent Savings Bank v. Lyon County*, 97 Fed. Rep. 159, aff'd 100 Fed. Rep. 337. See *supra*, § 937.

¹ *Coffin v. Indianapolis*, 59 Fed. Rep. 221.

² *Heins v. Lincoln*, 102 Iowa, 69. It has been held that when, by its charter, a city is required to pay the interest on its bonded debt, it cannot add the accrued interest to the bonded debt, and refund both principal and interest, nor can it purchase outstanding bonds at a premium to be paid in new bonds, the result of which will be to increase the principal of the funded indebtedness of the city by adding to it the premium paid for the purchase or exchange of the outstanding bonds. *Cincinnati v. Guckenberger*, 60 Ohio St. 353. It has been held that when bonds are issued under an authority to refund existing bonds, the city cannot sell more than sufficient bonds to pay the existing indebtedness, and if it sells bonds equal at par to the existing indebtedness, but realizes therefrom a premium, it is, to the extent of the premium, an act in excess of the authority authorizing the refunding of the indebtedness. *Com'rs of Sinking Fund of Louisville v. Zimmerman*, 19 Ky. Law Rep. 689; 41 S. W. Rep. 428. An issue of bonds to extend the time for the payment of an outstanding indebtedness does not come within a statutory provision that no contract or other obligation involving the expenditure of money shall be entered into unless the auditor of the

§ 940. **Refunding Bonds; Estoppel to deny Validity of Original Debt.** — The power to issue refunding bonds implies the existence of a valid debt or obligation on the part of the municipality, and such bonds cannot rightfully be issued by the municipality for the purpose of funding a debt or obligation which is void for lack of power on the part of the municipality to incur it.¹ But if there is a *bona fide question as to the validity* of the bonds, and if the bonds proposed to be refunded are fairly within the terms of the refunding act, refunding bonds issued by the municipality under the authority of the refunding act in place of the original bonds are founded upon a sufficient consideration; when the act makes it discretionary with the municipality to refund the original issue, the municipality, by issuing the refunding bonds, *in effect makes a compromise as to an existing obligation, and the refunding bonds are valid.*²

city shall first certify that the money required for the contract or to pay the appropriation is in the treasury to the credit of the fund from which it is drawn. *Clapp v. Marice City*, 111 Fed. Rep. 103.

¹ *Myers v. Jeffersonville*, 145 Ind. 431.

² *Jasper County v. Ballou*, 103 U. S. 745, 752; *Utter v. Franklin*, 172 U. S. 416; *Graves v. Saline County*, 161 U. S. 359; *Hills v. Peekskill Saving Bank*, 101 N. Y. 490.

In *Jasper County v. Ballou*, *supra*, Mr. Chief Justice *Waite*, giving the unanimous opinion of the court, there said (p. 751): "When, therefore, the people were called on to vote whether the old bonds should be funded, the facts they had to consider were these: A valid law authorizing the subscription and an issue of the bonds had been passed. The people, at an election which had been irregularly called, had voted to make the subscription and issue bonds bearing ten per cent interest, and all payable within six years. An act had been passed to legalize the election, and under it the subscription which had been voted was made, and bonds such as were contemplated had been issued and were then outstanding in the hands of various parties. Whether these bonds were valid was, so far as any direct decisions were concerned, an open question, and certainly not free from doubt. Under these circumstances the question was directly put to the people of the county, in a manner authorized by law, whether they would recognize these bonds as 'binding and

subsisting legal obligations,' and issue in lieu of them other bonds having twenty years to run and bearing seven per cent interest instead of ten; and they, by their vote, said they would. There is no complaint of any illegality in this election, or of fraud or imposition. So far as the record shows, the proposition to fund went from the county authorities to the bondholders, and not from the bondholders to the county. The facts were as well known to one party as the other. If the people intended to rely on their defences to the old bonds, then was the time for them to speak and by their vote say they would not recognize them as binding obligations. By voting the other way, they, in effect, accepted them as legal and subsisting for the purposes of the proposed extension of time at reduced interest, and said to the holders, if the proposition was accepted, no question of illegality would be raised. Their offer having been accepted, they are now estopped from insisting upon an irregularity which they have by their votes voluntarily waived, with a full knowledge of the facts. The case is clearly, as we think, within the principle acted on by the Supreme Court of the State in *Keithsburg Trs. v. Frick*, 34 Ill. 405. As was very properly said below, by the learned Circuit Judge: '*There must be an end to these contests and defences some time or other.*' There must be a time when the people in their political capacity are concluded by their contracts as much as individuals, and we think that where the people of a county at an election held according

Sometimes the statute authorizing the issue of refunding bonds provides that if they have been sold and disposed of they shall not be

to law authorize their corporate or political representatives to treat certain outstanding county obligations as 'properly authorized by law' for the purpose of negotiating a settlement with the holders, and the settlement which was contemplated has been made, all of the contests as to the validity of the obligation must be considered as ended. This disposes of all questions as to the excessive issue of bonds. For the purposes of this case the original bonds must be taken as binding. The issue of the funding bonds did not increase the aggregate indebtedness of the corporation, but only changed its form."

The case of *Graves v. Saline County*, 161 U. S. 359, involved the validity of *refundng bonds*, which stand upon a favored footing. The bonds which were refunded in that case had been decided by the Supreme Court of Illinois, 84 Ill. 292, and were admitted by the Supreme Court of the United States, *German Sav. Bank v. Franklin County*, 128 U. S. 526, 538, as stated in *Graves v. Saline County*, 161 U. S. 359, 372, to have been void and uncollectible even in the hands of *bona fide* holders. The recitals in the bonds which were held valid in *Graves v. Saline County* were that they were issued "for the purpose of funding and retiring certain binding, subsisting, legal obligations of said county," &c. The statute under which the Saline County refunding bonds were issued required a record to be kept containing matters which if the bondholder was bound to notice would have shown the invalidity of the bonds which were refunded in that case. In that case the facts were that the County of Saline, Illinois, had issued \$195,000 funding bonds under an act of February 13, 1865, and acts amendatory thereof, approved April 27, 1877, and June 4, 1879. These \$195,000 of bonds were issued to fund one set of bonds formerly issued by the county in payment of the subscription to stock of the St. Louis and South-eastern Railway Company, and another set of bonds issued by the county to the Belleville and Eldorado Railroad Company. The Supreme Court of the United States held and stated that the set of bonds issued to the Belleville and Eldorado Railroad Company were abso-

lutely void even in the hands of *bona fide* holders, the court stating (p. 373): "If the present case stood only on the footing of the original conditional contract of subscription, we would be compelled to follow the holding of the Supreme Court of Illinois, and to hold that the original bonds were uncollectible even by innocent holders." The Supreme Court then proceeded to state and consider the fact that the said void bonds had been funded under the said statutes and by authority of a vote of the people of the county, and expressly held and decided that the funding bonds so issued with such recitals were valid bonds in the hands of *bona fide* holders. It is important to notice that in this case of *Graves v. Saline County*, the statutes of Illinois, following the universal rule, required that the action of the county officers in issuing the funding bonds, like all other proceedings of the county, be entered upon the records of the county; and, if any one had examined those records and proceedings, he would have seen that those bonds were issued to fund other bonds issued to the Belleville and Eldorado Railroad Company, which last mentioned bonds were absolutely void. Not only so, but the statute under which these Saline County bonds were issued (S. L. Ill. 1879, p. 229, § 4) expressly provided, among other things, as follows: "Upon the issuing of any new bond, or evidence of indebtedness, the clerk, or other officer having custody of the records of the fiscal matters of such county, city, town, township, school district or other municipal corporation, as the case may be, shall make registration thereof, in a book to be kept in his office for that purpose, showing the date, amount, number, class, date of maturity, rate of interest, and place of payment of such new bond, or other evidence of indebtedness, and the description of the bond or evidence of indebtedness, for which, or for the purchasing or retiring of which, the same was given, as nearly as practicable." An examination of this record and register kept of these Saline County funding bonds would have shown that these funding bonds were issued to take up the void bonds issued to the Belleville and Eldorado Railroad Company. Mr. Justice Shiras, giving the unanimous opinion of the court, there says

open to attack by the city or by any other person. When the statute contains such a provision, the validity of the bonds is of course

with regard to *certain refunding bonds* of Saline County (in that case refunding void bonds, p. 374): "But when, in pursuance of the funding laws, the question whether the outstanding original bonds issued to the Belleville and Eldorado Railroad Company should be refunded in new bonds was submitted to the same constituent body that authorized the original issue, and when, in accordance with the vote so taken, and in formal compliance with the other directions of the funding laws, negotiable securities were issued, and delivered in payment of the outstanding bonds, we know of no principle of law which forbids the county of Saline from such honorable discharge of its liabilities in the hands of innocent holders."

Respecting refunding bonds, *Sanborn, J.*, in *Sioux City Independent School Dist. v. Rew*, 111 Fed. Rep. 1, 8, says: "Chapter 51 of the Acts of the 18th General Assembly of Iowa empowered the board to adopt a resolution that its district township should issue bonds to pay any unsatisfied judgments rendered against it before the passage of the act, and authorized the president and secretary of the board to sign and issue these bonds upon the adoption of such a resolution. . . . *The existence of judgments fundable under Chapter 51 was the primary fact intrusted to them to ascertain, determine, and certify*, without which no bond could be lawfully issued; and, when they certified that these bonds were issued under the provisions of that chapter, they acted far within the limits of the power and in the discharge of the duty thrust upon them by the legislature of the State, and the necessary effect of their certificate was conclusively to estop the township from denying its truth for the purpose of defeating its coupons in the hands of a *bona fide* purchaser." In the same case the *effect of recitals in funding bonds* is concisely stated by this learned judge as follows: "A municipal corporation is estopped from defeating an action by an innocent purchaser to collect its negotiable bonds, which recite that they were issued for the purpose of funding the judgments, bonds, warrants, or floating debt of the corporation, on the ground that the apparent debt they

were issued to satisfy was invalid or fictitious. . . . The truth is that when an innocent purchaser buys of others than the municipality or its agents municipal bonds, or the coupons of such bonds, which recite that they were issued to fund the debt of the municipality, the question of excessive indebtedness does not arise, and the purchaser is not required to consider or inquire concerning it."

The later case of *Waite v. Santa Cruz*, 184 U. S. 302, cited *infra*, fully confirms the foregoing principles.

In *Hills v. Peekskill Savings Bank*, 101 N. Y. 490, under a statute passed in 1869, a town issued railroad aid bonds. By the statute a petition of a majority of the taxpayers of the town was required to be presented to the court. The validity of the bonds was disputed by the town on the ground that the court never obtained any jurisdiction of the proceeding to authorize them by reason of defects in the petition. In 1879, an action was begun in the Federal court against the town by a holder of the original bonds. In 1880, a special act was passed authorizing the town to issue new bonds "to the amount and extent of the bonded indebtedness," including interest accrued and unpaid, in the manner provided by a general law passed in 1878. The town had no bonded indebtedness except the original bonds, whose validity was questioned. The act of 1878 contained a provision that the act should not be construed to authorize the issuance of bonds in place of bonds which had been adjudged to be invalid. It was held that the statute necessarily contemplated the refunding of the disputed issue; that the issue of the refunding bonds was in the nature of a compromise and adjustment of the indebtedness; and that the refunding bonds were valid. *Finch, J.*, said: "Three kinds or descriptions of 'bonded indebtedness,' properly so-called, existed when the laws of 1878 were passed. There were, perhaps, municipal bonds as to which no question had ever been raised, and probably secure against legal assault; bonds which had been questioned, and occasionally even resisted, and which might or might not prove valid, according as one court or another should con-

beyond dispute.¹ In the issuance of refunding bonds the question whether the indebtedness for the extension of which the bonds are issued is a valid obligation of the municipality, is one to be settled by the officers or council of the municipality which is entrusted with the issuance of the bonds. If no other board or officer for this purpose is provided, that question is necessarily referred to the council of the municipality which represents the municipality in its transactions.²

The doctrine of *estoppel by recital* is also applicable to *refunding obligations* to the fullest extent. Power to refund the debts and obligations of a municipality implies power on the part of the proper board or officer to determine that debts or obligations on the part of the municipality exist, and power to issue bonds to refund such debts or obligations carries with it the power to insert

clude; and bonds which by some competent court had been adjudged invalid. The first two classes were covered and intended to be covered by the terms of the funding act, and the last only was excluded. This construction fully protects every right of the municipal corporations affected by the act. It takes from them no privilege of resistance to unauthorized proceedings; it leaves them to determine whether they will stand upon the law and take its award at the end; or whether, doubtful of the legal result and unwilling to face its peril, or impressed with the justice and wisdom of preserving untainted the municipal credit, they will avail themselves of the statutory provision, and, by a convenient compromise, lessen the interest burden, and perhaps extend the period of credit. They cannot do both. The statute never contemplated both a compromise and a fight. No town could accept the provision without a consequent admission involved in the acceptance, that the old bonds were valid, for the new are permitted to be issued only to pay the old; and the fact of their issue by the town admits that liability when it provides for it. It was to this class of cases especially that the statute could have its intended and effective operation. Undisputed bonds, drawing high rates of interest, and having long time to run, would be held firmly, since no possible motive could exist for their surrender. As to these, the statute would be ineffective until their maturity. But bonds ques-

tioned, and over whose ultimate validity there hung a doubt, would be readily surrendered in a way of compromise under the statutory permission." Whilst an action was pending upon certain coupons a city made an agreement with its bondholders whereby the bonds from which the coupons had been detached were surrendered to the city and new bonds issued by it in lieu thereof. It was held that by accepting such surrender and issuing refunding bonds in lieu of the original bonds, the city recognized the validity of the bonds from which the coupons had been detached and was estopped from denying the validity of the coupons in controversy. *Coolidge v. General Hospital Society*, 9 Kan. App. 891.

¹ *Myers v. Jeffersonville*, 145 Ind. 431.

² *Clapp v. Marice City*, 111 Fed. Rep. 103. See also *Flagg v. Barnes County School Dist.*, 4 N. Dak. 30. Bonds issued to raise money to pay bonds of an older issue will be declared valid in equity, though the statute authorizing them required the recall and cancellation of the old bonds before their issue. *State v. Columbia*, 12 S. C. 370. Where new bonds were issued to replace old ones, a recital by the mayor and council in a proclamation submitting the question of issuing them to a vote, that they were assured the old bonds would be surrendered, was held not to be a condition for issuing the new bonds; if otherwise lawful they were valid obligations. *Sullivan v. Walton*, 20 Fla. 552.

therein appropriate recitals. When, therefore, a refunding bond recites on its face that it is issued for the purpose of refunding the debt of a city under and in pursuance of and in conformity with a statute for that purpose, such recital imports a determination by a properly constituted tribunal that the debt or obligation which is refunded is a valid subsisting debt of the municipality, and such recitals estop the municipality from denying, as against an innocent holder, the validity of the refunding bonds on the ground that the old bonds or debt for which they were issued was not a valid obligation of the municipality as well as on grounds dependent upon conformity to the method of issue prescribed by the statute.¹ When refunding bonds recite that they are issued

¹ *Sherman County v. Simons*, 109 U. S. 735; *Waite v. Santa Cruz*, 184 U. S. 302, 320; *Cadillac v. Woonsocket Inst. for Sav.*, 58 Fed. Rep. 935; *Ashley v. Presque Isle County Supervisors*, 60 Fed. Rep. 55; *Montpelier Nat. Life Ins. Co. v. Huron Board of Education*, 62 Fed. Rep. 778; *West Plains Tp. v. Sage*, 69 Fed. Rep. 943; *Howard v. Kiowa County*, 73 Fed. Rep. 406; *Brown v. Ingalls Tp.*, 81 Fed. Rep. 485; *Kiowa County v. Howard*, 83 Fed. Rep. 296; *Huron v. Second Ward Sav. Bank*, 86 Fed. Rep. 272; *Seward County v. Aetna Life Ins. Co.*, 90 Fed. Rep. 222; *Haskell County v. Montpelier Nat. Life Ins. Co.*, 90 Fed. Rep. 228; *Geer v. Ouray County Com'rs*, 97 Fed. Rep. 435, 441; *Brattleboro Sav. Bank v. Hardy Tp.*, 98 Fed. Rep. 524; *Wesson v. Mt. Vernon*, 98 Fed. Rep. 804; *Kent v. Dana*, 100 Fed. Rep. 56; *Lyon County v. Keene Sav. Bank*, 100 Fed. Rep. 337, aff'g 90 Fed. Rep. 523; *Barber County v. Soc. for Savings*, 101 Fed. Rep. 767; *Hughes County v. Livingston*, 104 Fed. Rep. 306, 318; *Independent School Dist. v. Rew*, 111 Fed. Rep. 1; *Fairfield v. Rural Independent Dist.*, 116 Fed. Rep. 838, rev'g 111 Fed. Rep. 453; *Gamble v. Rural Independent Dist.*, 132 Fed. Rep. 514; *Bradford v. Cameron*, 145 Fed. Rep. 21; *Meyer v. Brown*, 65 Cal. 583, 590; *South Hutchinson v. Barnum*, 63 Kan. 872; *State v. Wichita County Com'rs*, 62 Kan. 494; *Lexington v. Union Nat. Bank*, 75 Miss. 1; *Flagg v. Barnes County School Dist.*, 4 N. Dak., 30; *Tyler v. Tyler Building Assoc.*, 99 Tex. 6; 86 S. W. Rep. 750, rev'g (Tex. Civ. App.) 82 S. W. Rep. 1066.

The requirement of a legislative act

that the purpose of a bond issue be expressed on the face of the bond is satisfied in the case of the issue of funding or refunding bonds by a recital that the bond is issued to fund a valid subsisting indebtedness of the municipality or other recital of similar general nature, there being no necessity to recite the details and specifications of the indebtedness funded. *Graves v. Saline County*, 161 U. S. 359; *Clapp v. Marice City*, 111 Fed. Rep. 103; *Kent v. Dana*, 100 Fed. Rep. 56; 40 C. C. A. 281.

In *Sherman County v. Simons*, 109 U. S. 735, action was brought upon the coupons of county bonds issued under an act authorizing county commissioners to issue bonds for the purpose of funding the warrants and orders of the county. The statute authorized the commissioners of the counties to issue county bonds and to sell and negotiate the same, and directed that the proceeds should be used for the redemption of outstanding warrants and other evidences of indebtedness. There was a proviso in the act that no more of the bonds authorized to be issued should be issued than was necessary to pay off and redeem the warrants outstanding. The court held that the plaintiff, a *bona fide* holder for value, was not bound to go behind the law and the recital of the bonds to inquire into the amount of the county indebtedness; but that, even if it be conceded that he was required to inspect the county record to ascertain the amount of indebtedness and whether there had been an over-issue of bonds, as it appeared that the records of the commissioners contained an estimate of indebtedness, made by them for the purpose of ascer-

in exchange for a valid existing indebtedness of the municipality, the defence that they create a debt in excess of the limitation prescribed by the Constitution cannot be maintained. We have elsewhere discussed the effect of these constitutional limitations,¹ and

taining the amount of bonds to be issued and in pursuance of which they were issued, which showed that there was no over-issue, this was a decision by the officers whose duty it was under the law to fix the amount of the bonds which could be lawfully issued, and the purchaser was not required to make further inquiry, and if the finding of the commissioners was untrue, the purchaser would not be affected by its falsity.

In *Waite v. Santa Cruz*, 184 U. S. 302, it was provided by statute that if a city had "an outstanding indebtedness evidenced by bonds and warrants thereof," the governing body should have power to submit to the qualified voters the question of refunding such indebtedness, and upon a favorable vote the governing body was authorized to issue refunding bonds. Pursuant to this statute an issue of bonds was made by the city of Santa Cruz, each bond reciting that it was issued "for the purpose of refunding the bonded indebtedness of said city and issuing bonds therefor and providing for the payment of the same under and in pursuance of and in conformity with the provisions" of the statute referred to and under and in pursuance of the Constitution of the State, the ordinances of the city, and a vote of the people. It was further certified and declared that "all acts, conditions, and things required by law to be done precedent to and in" their issue had been "properly done, happened and performed in legal and due form as required by law." A part of the refunding issue was used to take up and retire an issue of bonds made by a water company whose plant had been purchased by the city subject to the lien of a mortgage to secure the water company's bonds, which the city had assumed to pay. The issue of refunding bonds was attacked upon the ground that the bonds of the water company were "not outstanding indebtedness of the city evidenced by bonds and warrants thereof," within the meaning of the refunding statute. The court sustained the validity of the refunding bonds upon the ground among others that the recitals estopped the city from showing

that the indebtedness which had been refunded was not bonded indebtedness of the city. Mr. Justice *Harlan* said: "The city of Santa Cruz had power, under the Constitution and laws of California, to refund its outstanding indebtedness evidenced by bonds and warrants. The nature and extent of such indebtedness were matters peculiarly within the knowledge of its constituted authorities. When, therefore, the refunding bonds in suit were issued with the recitals therein contained, the city thereby represented that it issued them under and in pursuance of and in conformity with the act of 1893 and the Constitution of the State. As nothing on the face of the bonds suggested that such representations were false, purchasers had the right to assume that they were true, especially in view of the broad recital that everything required by law to be done and performed before executing the bonds had been done, and performed by the city. If there was power in the city to issue refunding bonds to be used in discharging its outstanding indebtedness of a specified kind, purchasers were entitled to rely upon the truth of the recitals in the bonds that they were of the class which the act of 1893 authorized to be refunded. They were under no duty to go further and examine the ordinances of the city to ascertain whether the recitals were false. On the contrary, purchasers could assume that the ordinances would disclose nothing in conflict with the recitals in the bonds."

¹ *Ante*, chap. vi. See also *Graham v. Tuscumbia*, 146 Ala. 449. An issue of refunding bonds is not the incurring of indebtedness within the meaning of the provision of the *Kentucky* Constitution requiring the submission to popular vote of the question of incurring debt exceeding the revenue of the year. *Gaulbert v. Louisville* (Ky.), 97 S. W. Rep. 342. See also *Richmond Cemetery Co. v. Sullivan*, 104 Ky. 723. The provision of the *North Carolina* Constitution prohibiting counties, cities, &c., from contracting any debt or loan its credit, except for the necessary expenses thereof, unless by vote of a majority of the qualified voters therein,

have there shown that refunding bonds neither create any debt nor increase the debt of the municipality which issues them. They merely change the form of an existing indebtedness. We have also shown in connection with these constitutional limitations that indebtedness incurred prior to the adoption of the constitutional prohibition, or for current expenses ordinarily payable from current revenues, and certain other obligations, do not come within and are not affected by the constitutional provisions. Therefore, the fact that the aggregate indebtedness of the municipality exceeds the constitutional limit does not necessarily establish the invalidity of the debt. Hence, *a recital of an existing valid indebtedness does not import any violation of the Constitution*, although the refunding bonds issued with that recital may, with other known debt, exceed the constitutional limit; and it follows that a recital that a bond is issued for valid existing indebtedness of the municipality is sufficient to estop the municipality as against an innocent holder from pleading and taking advantage of invalidity of the original debt under the constitutional limitation.¹

It may therefore be regarded as settled that where municipal officials are authorized by statute to issue funding bonds to pay existing indebtedness, they are thereby invested with authority to ascertain whether there is an existing indebtedness, and if so the amount thereof; and being invested with such authority, a recital of their finding thereupon is authorized and may be relied upon by the purchaser of the bonds.² When an act granting the power to issue

does not apply to an issue of bonds to fund debt incurred for necessary expenses. Such issue may be made without a previous vote. *Jones v. Madison County*, 137 N. Car. 579, 598; *Chatham County v. Stafford*, 138 N. Car. 453; *Wharton v. Greensboro*, 146 N. Car. 356; 59 S. E. Rep. 1043.

¹ *Huron v. Second Ward Sav. Bank*, 86 Fed. Rep. 272, 278; *Reynolds v. Lyon County*, 97 Fed. Rep. 155; *Lyon County v. Keene Sav. Bank*, 100 Fed. Rep. 337, aff'g 90 Fed. Rep. 523; *Hughes County v. Livingston*, 104 Fed. Rep. 306, 317; *Pierre v. Dunscomb*, 106 Fed. Rep. 611; *Sioux City Independent School Dist. v. Rew*, 111 Fed. Rep. 1; *Fairfield v. Rural Independent Dist.*, 116 Fed. Rep. 838, rev'g 111 Fed. Rep. 453; *Salmon v. Rural Ind. School Dist.*, 125 Fed. Rep. 235; *Gamble v. Rural Independent Dist.*, 132 Fed. Rep. 514; *Hamilton County v. Montpelier Sav. Bank*, 157 Fed. Rep.

19; s. c. 208 U. S. 617, *certiorari* denied to the County.

² *Chaffee County v. Potter*, 142 U. S. 355; *Gunnison County v. Rollins*, 173 U. S. 256; *Sioux City School District v. Rew*, 49 C. C. A. 198; 111 Fed. Rep. 1; *Huron v. Second Ward Sav. Bank*, 86 Fed. Rep. 272, 278; *Pierre v. Dunscomb*, 45 C. C. A. 499; 106 Fed. Rep. 611, 616; *certiorari* denied, 181 U. S. 621; *Hughes County v. Livingston*, 104 Fed. Rep. 306, 315; 43 C. C. A. 541, 550; *Ashley v. Presque Isle County*, 60 Fed. Rep. 55, 66; 8 C. C. A. 455, 466; *West Plain Tp. v. Sage*, 16 C. C. A. 553, 557; 69 Fed. Rep. 943, 946; *Kiowa County v. Howard*, 83 Fed. Rep. 296; 27 C. C. A. 531; *Cadillac v. Woonsocket Sav. Institution*, 58 Fed. Rep. 935, 939; 7 C. C. A. 574, 578; *Seward Co. v. Aetna Life Ins. Co.*, 90 Fed. Rep. 222, 224; 32 C. C. A. 585, 587; *Kiowa County v. Howard*, 83 Fed. Rep. 296; 27 C. C.

funding bonds declares that that power shall exist wherever a prior indebtedness is outstanding, the actual lack of such outstanding indebtedness cannot be urged against the *bona fide* holder of funding bonds as a denial of the authority to issue such funding bonds.¹ The recital in a municipal bond that it is issued to fund a valid indebtedness is effective in the hands of an innocent holder to foreclose all questions relating to the validity of the debt thus funded, including the objection that the debt funded was issued in excess of constitutional or statutory limitations, and including the objection that it was issued without statutory authority, and including the objection that by its nature it constituted no indebtedness at all, those matters having been conclusively determined by the finding which the enabling act impliedly authorized when it entrusted the duty of funding to the local officials.² It has been said that the effect of a recital that the bonds are issued under a refunding act for the purpose of refunding indebtedness of a municipality is to estop the municipality from denying: *first*, that there were just debts of the municipality which warranted the issue of the bonds, because a municipal corporation is estopped from defending an action by an innocent purchaser to collect its negotiable bonds which recite that they were issued for the purpose of funding the judgments, bonds, warrants, or floating debt of the corporation on the ground that the apparent debt they were issued to satisfy was invalid or fictitious; *second*, that the corporation and its officers have applied the bonds to the lawful purposes for which they appear on their face to have been issued; and *third*, that the bonds were exchanged for the fundable debt in the method prescribed by the law, so that they neither increased nor diminished the indebtedness of the municipality. In other words the municipality is conclusively estopped by the recitals in the bonds from denying that they did not increase the indebtedness of the municipality and that the debts for which they were exchanged were just debts of the municipality, incurred before its indebtedness reached the constitutional limit.³

A. 531; *Haskell County v. Montpelier Nat. Life Ins. Co.*, 90 Fed. Rep. 228; 32 C. C. A. 591.

¹ *Waite v. Santa Cruz*, 184 U. S. 302, 314; *Hughes County v. Livingston*, 104 Fed. Rep. 306, 311; 43 C. C. A. 541.

² *Waite v. Santa Cruz*, 184 U. S. 302; *Gunnison County v. Rollins*, 173 U. S. 256; *Chaffee County v. Potter*, 142 U. S. 355; *Cadillac v. Woonsocket Inst. for Sav.*, 7 C. C. A. 574, and other

cases cited, *supra*. A recital in a municipal bond that it is issued for "municipal purposes" estops the municipality to set up against an innocent holder that it was issued for a contrary or illegal purpose. *Hackett v. Ottawa*, 99 U. S. 86, 95; *Northern Bank of Toledo v. Porter Tp. Trs.*, 110 U. S. 608; *Ottawa v. First Portsmouth National Bank*, 105 U. S. 342, 343.

³ *Sioux City Independent School*

§ 941 (537). **Other Grounds of Estoppel.** — In another case,¹ the authority to subscribe for the stock of the company was given *on condition that the county should so vote by a majority of real estate holders residing therein*. A subscription was made in 1853, and a certificate of stock was issued to the county, which was received by it and was still owned by it in 1869, when suit was brought. It did not appear that the bonds contained any *recitals* that conditions precedent had been complied with, or that the county had subsequently levied taxes to pay interest on the bonds. The county set up as a defence that there was no power to issue the bonds, because no vote of the people had ever been taken. The plaintiff being a *bona fide* holder, it was held that he was entitled to recover, and that the county was *estopped* to set up that no vote was had. The ground of the estoppel is thus stated by Mr. Justice Strong: "The county received in exchange for the bonds a certificate of the stock of the railroad company, which it held about seventeen years before the present suit was brought, and which it still holds. Having exchanged the bonds for the stock, we think the county cannot retain the proceeds of the exchange, and assert against a purchaser of the bonds for value that though the legislature empowered it to make them, and put them upon the market, upon certain conditions, they were issued in disregard of the conditions." It will be observed that if the court had been of opinion that in the absence of recitals the bonds were enforceable in the hands of a holder for value though *no* election had in fact ever been

Dist. v. Rew, 111 Fed. Rep. 1, 9, cited *supra*; Fairfield v. Rural Independent School Dist., 116 Fed. Rep. 838, rev'g 111 Fed. Rep. 453. The issue of bonds to pay off or refund an existing indebtedness does not *increase the debt or create a new debt*. It merely changes the form of an old debt. Powell v. Madison, 107 Ind. 106. In Huron v. Second Ward Savings Bank, 86 Fed. Rep. 272, 278; 30 C. C. A. 38, 45, the court says: "Another proposition which is zealously argued in this case is that these bonds are void, because they create a debt in excess of the limitation prescribed by the organic act of the territory of Dakota. It is conceded that, at the time these bonds were issued, the indebtedness of the city of Huron already exceeded the limitation prescribed by the act. But, as we have already shown, the warrants which these bonds refunded must, for all the purposes of this case, be deemed to have evidenced

a just debt of the city, and bonds which were issued to fund a valid indebtedness neither create any debt nor increase the debt of the municipality which issues them. They merely change the form of an existing indebtedness." Farson, L. & Co. v. Louisville Com'rs, 97 Ky. 119; Miller v. School District, &c., 5 Wyo. 217; Poughkeepsie v. Quintard, 136 N. Y. 275; Marion County v. Harvey County, 26 Kan. 181; Blanton v. McDowell County, 101 N. Car. 532; Los Angeles v. Teed, 112 Cal. 319; Sioux City v. Weare, 59 Iowa, 95; Opinion of Justices, 81 Maine, 602; County of Jasper v. Ballou, 103 U. S. 745, 752; Lake County Com'rs v. Platt, 79 Fed. Rep. 567, 569; Rollins v. Gunnison County, 80 Fed. Rep. 692, 698; Hughes Co. v. Livingston, 104 Fed. Rep. 306, 317; 43 C. C. A. 541.

¹ Pendleton County v. Amy, 13 Wall. 297.

held, the case would naturally have been put upon that ground among others.

§ 942 (538). **What constitutes Completed Subscription or Contract to subscribe.** — Interesting questions have arisen as to *what constitutes a subscription* on the part of a municipality or other public corporation, or a valid contract to subscribe, to the stock of a railroad company, and when rights are vested thereunder which cannot be legislatively impaired without the consent of the parties in interest. Where a precedent popular vote is required, and upon such vote authority is given to subscribe for the stock, the vote without more does not constitute a contract between the municipality thus authorized to subscribe and the railroad company.¹

¹ *Aspinwall v. Daviess County*, 22 How. (U. S.) 364; *Town of Concord v. Portsmouth Savings Bank*, 92 U. S. 625; *Harshman v. Bates County*, 3 Dillon C. C. R. 150, 162, note; s. c. affirmed in Supreme Court, 92 U. S. 569; *Wadsworth v. Eau Claire County*, 102 U. S. 534; *ante*, § 114, and cases cited; *German Savings Bank v. Franklin County*, 128 U. S. 526. See also *Edwards v. Bates County*, 117 Fed. Rep. 526; *Neale v. County Court of Wood County*, 43 W. Va. 90. Subscription by a county for stock held to be complete, although no actual subscription was made on the stock books of the company. *Bates County v. Winters*, 112 U. S. 325; *Quinlan v. Green County*, 157 Fed. Rep. 33. For what is necessary to complete a valid subscription, see *Nugent v. Putnam Co. Sup.*, 19 Wall. 241; *Moultrie County v. Rockingham T. C. Sav. Bank*, 92 U. S. 631; *Red River Furnace Co. v. Tennessee Central R. R. Co.*, 113 Tenn. 697, distinguishing *Nelson v. Haywood County*, 87 Tenn. 781; *infra*, §§ 943, 944.

The rights of a municipality as a stockholder in a railroad company, and whose stock has been paid for by bonds of the municipality, are no greater than the rights of other stockholders; and unless specially authorized by the legislature, the railroad company has no power, when receiving the subscription and bonds, to agree to put the municipality in a better position than other stockholders, as, for example, by agreeing to pay a fixed rate of interest on such stock, equivalent in amount to the interest on the municipal bonds issued in payment therefor. *Pittsburgh & S. R. Co. v. Allegheny County*, 79 Pa. St. 210. Instance in which there was legislative authority for such a contract, see case of the *Pittsburgh C. R. Co.*, 63 Pa. St. 126. When contract to subscribe stock is completed. *Shelby County Court v. Cumberland & C. R. Co.*, 8 Bush (Ky.), 209, 300; *Chicago, K. & W. R. R. Co. v. Osage County*, 38 Kan. 597. Where a township delivered its bonds in escrow to a State officer, to be held until the completion of the road in aid of which they were issued, and the officer returned them to the township upon an adjudication by the Supreme Court of the State that the law authorizing the issue was unconstitutional, it was held, in a suit brought by the railroad thirteen years afterwards, and after the decision of the State court had been reversed by the Supreme Court of the United States, that the return of the bonds by the State officer and their retention by the township were a conversion which entitled the railroad company to bring suit at once, but that the bill brought after such a lapse of time should be dismissed. *Young v. Clarendon Tp.*, 26 Fed. Rep. 805. A statutory provision that the bonds be delivered to the company is not complied with by selling the bonds in advance and paying the proceeds into the treasury to be paid out on the subscription. *Neale v. Wood County*, 43 W. Va. 90. An order of a county court directing its clerk to make a subscription in the terms specified in the order submitting the question to a vote is a valid delegation of the power of the county court. *Green County v. Shortell*, 116 Ky. 108.

§ 943 (539). **Same Subject. Power may be annulled by Constitutional Provision or Legislative Action before Rights become vested; Bonds in such Case are void in Everybody's Hands.** — As illustrating the necessity of a continued existence of the power to issue the bonds, and as showing what did *not* amount to a completed contract before the power was repealed by a constitutional provision, the case of the Town of Concord v. Portsmouth Savings Bank may usefully be referred to.¹ Chronologically stated, the facts were these: The bonds were issued under the act of March 7, 1867, and so recited. The act enacted that certain incorporated towns and cities, and towns acting under the township organization law (among which it was conceded the town of Concord was one), should be and were severally authorized to *appropriate* such sum of money as they might deem proper to the Chicago, Danville, and Vincennes Railroad Company, to aid in the construction of the road of said company, to be paid to the company as soon as the track of said road should have been located and constructed through said city, town, or township respectively. To this was attached the following proviso: "Provided, however, that the proposition to *appropriate* moneys to said company shall be first submitted to a vote of the legal voters of said respective townships, towns, or cities, at a regular annual or special meeting, by giving at least ten days' notice thereof; and a vote shall be taken thereon by ballot at the usual place of election and if the majority of votes cast shall be in favor of the *appropriation* then the same shall be made, otherwise not." The second section empowered and required the authorities of said municipalities to levy and collect a tax, and make such provisions as might be necessary for the prompt payment of the *appropriation* under the provisions of the law. The town voted on the 20th day of November, 1869, that it would make a donation, provided the company would run its railroad through the town. On the 20th of June, 1870, the company gave notice of its acceptance of the donation. On the 2d of July, 1870, the new Constitution of the State went into operation, by which it was ordained that "no city, town, township, or

¹ Concord v. Portsmouth Savings Bank, 92 U. S. 625; see *infra*, § 944, note. Effect of the constitutional provision of *Illinois* of July 2, 1870, quoted in the text, see German Savings Bank v. Franklin County, 128 U. S. 526, and cases there cited, in *Illinois* and in the Supreme Court of the United States, construing and applying the same. *Post*, §§ 946, 953; *ante*, § 915. See also as to the necessity of an express revocation or limitation of general power to issue bonds, Corning v. Meade County, 102 Fed. Rep. 57; and as to the effect of a saving clause in a Constitution prohibiting stock subscriptions, to validate a subscription made before its adoption, although no bonds had been issued at the time of the adoption, Pacific Improvement Co. v. Clarkdale, 74 Fed. Rep. 528.

other municipality shall ever become *subscribers* to the capital stock of any railroad or private corporation, or make *donation* to, or loan its credit in aid of, such corporation; provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such *subscriptions*, where the same have been authorized under existing laws by a vote of the people of such municipalities prior to such adoption." On the 9th day of October, 1871, the bonds in suit were executed and delivered as a donation to the railroad company; and the question was whether there was any existing authority to make the donation and issue the bonds. The Supreme Court, after pointing out that the authority given to the town of Concord by the act of March 7, 1867, was not to subscribe for stock, but to make an appropriation or donation, which distinction is also taken in the provision of the Constitution above quoted, held that no donation could be made, under the act of 1867, until after the completion of the location and construction of the road through the town; that the vote of November 20, 1869, in favor of an appropriation, was not an appropriation or donation; that the power to make such donation was annulled by the Constitution on July 2, 1870, and that there was at that date no contract *in esse* between the town and the railroad company which stood in the way of the operation of the constitutional prohibition. As to the effect of the vote of the town, of November 20, 1869, and the acceptance of the railroad company of June 20, 1870 (both of which, it will be observed, were before the Constitution went into operation), the court observed: "But the town was not empowered to make the donation until the road was located and constructed through the town. It had no authority to make a contract to give; and the acceptance was an undertaking to do nothing which the company was not bound to do before the authority of the town to make a donation, or to engage to make a donation, came into existence. What is called the acceptance of the railroad company cannot be construed as an engagement to locate and build the railroad through the town. It amounted to no more than saying, 'If we build our road through your town, we will receive your gift.' There was, therefore, no consideration for the town's promise to give, even if the popular vote can be considered a promise. There was no contract to be impaired. A contract should be clearly proved before it invokes the protection of the Federal Constitution. We conclude, then, that at the time the donation was made, there was no authority in the municipality to make a donation to the railroad company, and consequently no

authority to issue the bonds. It follows that the bonds and coupons are void."¹

§ 944 (540). **Same Subject. Mode of Subscription; when Subscription Complete.** — Power by legislative act *to the board of supervisors of a county to subscribe* an amount not exceeding a given sum to the stock of a specified railroad company, and to issue bonds in payment therefor, without requiring the sanction of a popular vote, but *with a proviso that the bonds shall not be issued until the road is open for traffic*, gives complete authority to the county to subscribe for the stock, or to make a binding agreement to subscribe therefor preparatory to a final subscription. The proviso that the payment of the subscription should be postponed until the railroad should be opened does not limit the power to subscribe, or to enter into an agreement to make the subscription before the road is completed. And it was held that a *resolution of the board of supervisors*, made when the power to subscribe existed or had arisen, *that the county subscribe a given sum* to aid in the construction of the road of the company, without any subscription on the books of the company, amounted to a subscription, or at all events, to a legal undertaking to subscribe, which, when assented to or accepted by the company, became a binding contract, which the county could not revoke, and which could not be impaired by any subsequent prohibition of the Constitution or the legislature without the assent of the railroad company.²

¹ In *Iowa* it is held that if money be expended before the repeal of a statute, upon the faith of the tax provided for by it, the repeal does not invalidate the tax and it may be collected. *Burges v. Mabin*, 70 Iowa, 633; *approved Barthel v. Meader*, 72 Iowa, 125.

² *Concord v. Portsmouth Savings Bank*, 92 U. S. 625; *Livingston County v. Portsmouth Bank*, 128 U. S. 102, 126; *Scott v. Hansheer*, 94 Ind. 1. A municipal corporation which issued its bonds to a railroad company *formed by consolidating* two other companies was held estopped to deny the validity of the consolidation. *Young v. Township of Clarendon*, 26 Fed. Rep. 805. See *infra*, § 945. In a case where a subscription was made to a railroad company by a city, payment to be made when ten miles of the railroad was completed, and the charter of the company required it to complete its line in fifteen years, it was held that an extension of

the time within which the line could be completed did not release the subscription. *Jacks v. Helena*, 41 Ark. 313. Construing an act of *North Carolina*, authorizing boards of commissioners to issue bonds "to aid in the completion" of a railroad, the Supreme Court of the United States held that the act authorized the issuance of bonds in aid of the "construction" of a railroad, although it had not yet been begun, holding the word "completion" synonymous with the word "construction." *Stanly County v. Coler*, 190 U. S. 437, *aff'g* 113 Fed. Rep. 705. But the *North Carolina* court in *Graves v. Moore County*, 135 N. Car. 49, refused to follow the ruling of the Federal courts and adhered to the doctrine of their decisions in *Stanly County v. Snuggs*, 121 N. Car. 394, and *Wilkes County v. Call*, 123 N. Car. 308, holding that the words were not synonymous.

But before any subscription is made, or before any contract to subscribe is completed, the authority to subscribe may be repealed or taken away by legislative or constitutional provision.¹ And if the authority to subscribe depends upon a precedent vote of the people, the vote, without a subscription or an agreement to subscribe, does not create a contract, or preclude the repeal of the authority to make the subscription:²

¹ For the effect upon incomplete subscriptions of the adoption of constitutional provisions forbidding or limiting the power to aid railroads, see *infra*, § 946, note; and also *Concord v. Robinson*, 121 U. S. 165, distinguished, *German Sav. Bank v. Franklin County*, 128 U. S. 526, 543; *Katzenberger v. Aberdeen*, 121 U. S. 172; *Oregon v. Jennings*, 119 U. S. 74, distinguished, *German Bank v. Franklin County*, 128 U. S. 526, 543; *Norton v. Shelby County*, 118 U. S. 425. The effect of the prohibition in the Constitution of Missouri of 1865, of municipal subscriptions in aid of railways without the previous assent of two-thirds of the qualified voters, has been considered in many cases determined in the State courts of Missouri and in the Federal courts. The State courts first held that the effect of the constitutional provision was to limit the future exercise of legislative power, but did not take away any authority granted and in existence at the time the Constitution of 1865 went into operation. Subscriptions were made and railway bonds issued when this construction prevailed; and the Federal courts held that such bonds were valid. The Supreme Court of Missouri afterwards put a different construction on the Constitution; but the Supreme Court of the United States declined to reconsider its former decisions, to the prejudice of *bona fide* holders of bonds issued prior to the change of decision in the State court. The cases on this subject are reviewed by Mr. Justice Harlan, in *Scotland County v. Hill*, 132 U. S. 107.

Illustrative of the distinction between the operation of a constitutional limitation upon the power of the legislature and of a constitutional inhibition upon a municipality, is the case of *Norton v. Brownville Com'rs*, 129 U. S. 479. Here an act of February 8, 1870, authorized Brownsville to issue bonds in aid of a railroad company on a majority vote. May 5, 1870, the amended Constitution took effect, which ordained

that "the credit of no city shall be given or loaned to or in aid of any person or corporation, except upon an election to be first held by the qualified voters, and the assent of three-fourths of the votes at said election." May 11, 1870, five days after the amended Constitution took effect, proceedings were initiated to issue bonds, and an election was held under the act of February 8, 1870, at which every vote was cast for the issue of bonds. The bonds recited that they were issued by authority of the act of February 8, 1870. It was held that the power to issue bonds under the act of 1870 not having been acted upon until after the Constitution of 1870 went into effect, such power could not be exercised without further legislation in conformity therewith; the effect of the constitutional prohibition being to annul all unexecuted powers conferred upon the corporation. Whether this would have been the effect if the terms of the act of 1870 and of the constitutional amendment had not been inconsistent, *quære*. See *Jarrolt v. Moberly*, 103 U. S. 580; *Kelley v. Milan*, 127 U. S. 139, 154; *post*, § 1509; *Norton v. Taxing District of Brownsville*, 36 Fed. Rep. 99 (U. S. Cir. Ct., W. D. Tenn. 1888); *Jefferson v. Jennings Banking & Trust Co.*, 35 Tex. Civ. App. 74; *State v. Tomahawk*, 96 Wis. 73; *Wilkes County v. Call*, 123 N. Car. 308; *Johnson City v. Charleston, C. & C. R. Co.*, 100 Tenn. 138. A subscription having been voted and the railroad engaged in constructing the road prior to an amending act limiting subscriptions in aid of railroads, is not limited by the amending act. *Ætna Life Ins. Co. v. Burrton*, 75 Fed. Rep. 962.

² *Aspinwall v. Daviess County*, 22 How. (U. S.) 364; *Union Pac. R. Co. v. Davis Co.*, 6 Kan. 256; *State v. Saline Co.*, 45 Mo. 242; *Jeffries v. Lawrence*, 42 Iowa, 498; *Bound v. Win. C. R. Co.*, 45 Wis. 543; *ante*, § 114; *post*, § 1528, note, and cases there cited; *Harshman v. Bates County*, 3 Dillon C. R. 162, note, *aff'd* 92 U. S. 569; *Ger-*

it is executory until the subscription is actually made.¹ But an actual manual subscription on the books of the company

man Sav. Bank v. Franklin County, 128 U. S. 526. The law on this subject is thus stated, and the cases referred to and distinguished, by Mr. Justice Strong, in *Concord v. Portsmouth Savings Bank*, 92 U. S. 625.

"This case [although between the same parties] differs very materially from the case of *The Town of Concord v. Portsmouth Savings Bank*, No. 43, of this term. [*Supra*, § 943.] In that, we held that the bonds were void because the legislative authority to issue them as a donation to the railroad company had been annulled by the Constitution of the State before the donation was made. . . . But a subscription on the books of the company was unnecessary, for that which amounted to a subscription had been made in December, 1869. The authorized body of a municipal corporation may bind it by an ordinance, which, in favor of private persons interested therein, may, if so intended, operate as a contract, or they may bind it by a resolution, or by vote clothe its officers with power to act for it. The former was the clear intention in this case. The board clothed no officer with power to act for it. The resolution to subscribe was its own act, its immediate subscription. *Western Savings Fund Society v. Philadelphia*, 31 Pa. St. 175; *Sacramento v. Kirk*, 7 Cal. 419; *Logansport v. Blakemore*, 17 Ind. 318. In *Clarke County Court Jus. v. Paris, W. & K. R. Turnp. Co.*, 11 Ben. Monroe (Ky.), 143, it was ruled that an order of the county court, by which it was said the court subscribed, on behalf of Clarke County, for fifty shares of stock in the turnpike company, if concurred in by a competent majority of the magistrates, was itself a subscription, and bound the county. There was no subscription on the books of the company; but the Court of Appeals said: 'We cannot, therefore, regard this order as a mere offer or pledge to subscribe the fifty shares in this particular road, but as actually taking,

and in substance and legal effect subscribing for, that number of shares.' So in *Nugent v. The Supervisors of Putnam County*, 19 Wall. 241, it was said *that to constitute a subscription by a county to stock in a railroad company, it is not necessary that there be an act of manual subscribing on the books of the company. These cases lead directly to the conclusion that the action of the board of supervisors in December, 1869, was in substance and in legal effect a subscription. And if this conclusion could not be reached, it would make but little difference to the present case, for it could not be doubted that the action of the board was at least an undertaking to subscribe, and this was assented to or accepted by the railroad company. The resolutions were entered of record by the clerk and president of the railroad company, and the company made an appropriation of the bonds to be received in payment of the subscription by a contract made on the 15th of April, 1870. In either aspect of the case, therefore, there was an authorized contract existing between the county and the railroad company when the new Constitution came into operation. No matter whether the contract was a subscription or an agreement to subscribe, it was not annulled or impaired by the prohibitions of the Constitution. The delivery of the bonds was no more than performance of the contract. For these reasons, it is in vain to appeal to the decisions made in *Aspinwall v. The County of Jo Daviess*, 22 How. 364, and *The Town of Concord v. The Savings Bank*, decided this term. In neither of those cases was there any contract made before the authority to make one was annulled. We do not assert that the constitutional provision did not abrogate the authority of the board of supervisors to make a subscription for railroad stock. On the contrary, we think it did. But we hold that contracts made under the power while it was in existence were valid contracts, and that*

¹ *Ib.*; *Cumberland & O. R. Co. v. Barren Co. Court*, 10 Bush (Ky.), 604; *Shelby Co. Court v. Cumberland & C. R. Co.*, 8 Bush (Ky.), 209. The conditions as to issuance as approved by popular vote cannot be changed. *Ra-*

venswood, &c. Ry. Co. v. Ravenswood, 41 W. Va. 732; *Neale v. Wood County*, 43 W. Va. 90; *Rathbone v. Kiowa County*, 73 Fed. Rep. 395; *Oswego County Sav. Bank v. Genoa*, 66 N. Y. App. Div. 330, *aff'd* 172 N. Y. 635.

is not necessary to entitle the county to the stock, or to bind it as a subscriber thereto.¹

§ 945 (541). **Same Subject. Completed Subscription; Effect of Consolidation of Railway Companies on Validity of Subscription.** — The authority to make a subscription and to issue bonds in payment therefor *may, if it has never been executed, be revoked by any event which has the legal effect to extinguish the power.* Thus, where the power to subscribe depends upon a precedent popular vote and the vote is had in favor of Company A, which under a general law of the State consolidated with Company B, and formed thereby a new company C, which consolidation was effected *before* any subscription or contract for subscription was made, and the only subscription made was to the consolidated company, without any new election, it was held that the subscription was unauthorized, and that the bonds which recited these facts were void, even in the hands of a *bona fide* holder for value. The ground of the decision was that the authority to make the subscription ceased with the extinction of the company in whose favor the vote was had, such extinction being the legal consequence of the consolidation.² This

the obligations assumed by them continued after the power to enter into such contracts was withdrawn. The operation of the Constitution was only prospective. Indeed, it is expressly ordained in its schedule that 'all rights, actions, prosecutions, claims, and contracts of the State, individuals, or bodies corporate, shall continue to be as valid as if this Constitution had not been adopted.' It is hardly necessary to say that, under the act of the general assembly, the authority to make a subscription was coupled with an authority and a duty to issue county bonds for the sum subscribed. No action of the board was needed after the subscription was made."

¹ Cass County v. Gillett, 100 U. S. 585.

² Harshman v. Bates County, 92 U. S. 569. The grounds of the judgment of the court on this point are thus succinctly stated by Bradley, J.:

"Another objection to the validity of the subscription for which the bonds were given in this case is, that the township voted a subscription to one company and the county court subscribed to another. This is sought to be justified on the ground that the former company became consolidated with

another, thereby forming a third, to whose stock the subscription was made. This consolidation was effected under a law of *Missouri* authorizing consolidations, and declaring that the company formed from two companies should be entitled to all the powers, rights, privileges, and immunities which belong to either; and it is contended that this provision of the law justified the county court in making the subscription without further authority from the people of the township. But did not the authority cease by the extinction of the company voted for? No subscription had been made. No vested right had accrued to the company. The case of *The State v. Linn County Court*, 44 Mo. 504, only decides that if the county court refuses to issue bonds after making a subscription, a *mandamus* will lie to compel it to issue them. There the authority had been executed and a right had become vested. But so long as it remains unexecuted, the occurrence of any event which creates a revocation in law will extinguish the power. The extinction of the company in whose favor the subscription was authorized worked such a revocation. The law authorizing the consolidation of railroad com-

case differs from *Nugent v. Putnam County*¹ in the material circumstance that in that case the subscription to one of the constituent companies was *before* the consolidation, while in this one it was *afterwards*. In this case there was nothing but a bare vote before the consolidation, which, without more, creates no contract between the municipality and the railroad company; while in the Putnam County case there was a subscription in addition to the vote, before the consolidation; and the right having become vested in the railroad company, may be transferred to another on an authorized consolidation being effected. Where the consolidation is provided for or contemplated by the legislation of the State in force when the subscription is made, a subsequent consolidation, in pursuance of the enactment, does not have the effect to invalidate the subscription. This principle was distinctly settled in the Putnam County case just cited;² and such existing legislative authority to

panies does not change the law of attorney and constituent. It may transfer the vested rights of one railroad company to another, upon a consolidation being effected; but it does not continue in existence powers to subscribe for stock given by one person to another, which, by the general law, are extinguished by such a change. It does not profess to do so, and we think it does not do so by implication. As sufficient notice of these objections is contained in the recitals of the bonds themselves to put the holder on inquiry, we think that there was no error in the judgment of the circuit court; and it is, therefore, affirmed."

Same case in circuit court, 3 Dillon C. C. R. 150; s. p. *McClure v. Oxford*, 94 U. S. 429; *Bates County v. Winters*, 97 U. S. 83; s. c. again, 112 U. S. 325; *Edwards v. Bates County*, 117 Fed. Rep. 526; and see *Livingston County v. Portsmouth First Nat. Bank*, 128 U. S. 102, where the same statutes are considered, and the court refused to apply the doctrine of *Harshman v. Bates County*, 92 U. S. 569, and *Bates County v. Winters*, 97 U. S. 83; *Columbus v. Dennison*, 69 Fed. Rep. 58, following *Livingston County v. Portsmouth Bank*, 128 U. S. 102; *Henderson County v. Travelers' Ins. Co.*, 128 Fed. Rep. 817. See *supra*, § 944, note; *State v. Garroute*, 67 Mo. 445, where the court say the consolidation does not operate to transfer to the latter the franchises and unexecuted rights of former companies so as to authorize a

subscription to be made to the Hannibal & St. Joseph Railroad Co. without a popular vote; and such subscription is void. The consolidation operated an extinction of the original company, and the power to subscribe thereto perished with the company. In such case there could be no innocent purchasers of the bonds. *Ib.* See reference to this case in *Livingston County v. Portsmouth Bank*, 128 U. S. p. 128. See also *Menasha v. Hazard*, 102 U. S. 81. In *Iowa*, it is held that the alienation of a railroad before its completion works a forfeiture of a tax voted in its aid, the decision being based upon the provisions of a statute requiring that the taxpayers shall receive stock in the corporation to the amount of taxes paid by them. Held also that the collection of taxes in such cases may be enjoined at the suit of a taxpayer. *Manning v. Matthews*, 66 Iowa, 675; *Blunt v. Carpenter*, 68 Iowa, 265.

¹ *Nugent v. Putnam County*, 19 Wall. 241. See *Ray Co. v. Vansycle*, 96 U. S. 675, where a subscription by the county authorities to another company was sustained and the doctrine of estoppel applied. See also *Cass Co. v. Gillett*, 100 U. S. 585; *Harter v. Kernochan*, 103 U. S. 562. One subscription does not exhaust the power. *People v. Waynesville*, 88 Ill. 469. Irregularities no defence. *Roberts v. Bolles*, 101 U. S. 119; *Empire Tp. v. Darlington*, 101 U. S. 87.

² 19 Wall. (U. S.) 241. The principle was followed and applied in *Thomas*

change the organization controlled the decision, and constituted, in the judgment of the court, the ground of distinction between that case and the oft cited case of *Marsh v. Fulton County*.¹ Indeed, the Supreme Court has since gone farther, and has frequently decided, where at the date of the vote in favor of the constituent company there exists a statute authorizing its consolidation with another company, that such consolidation does not necessarily extinguish the power to subscribe given by the vote, and that bonds issued to the consolidated company under such vote are, or might be valid.²

§ 946 (542). **There must be a Valid Legislative Act as the Basis of the Power; Construction of Special Powers.**—A purchaser of municipal bonds is bound, as has already been shown, to take notice of any provisions of the Constitution or legislation of the State relating to the power of the municipality to issue them; and if the act conferring the power is in conflict with the Constitution, the bonds are void, even in the hands of a *bona fide* holder for value.³ And the purchaser must also notice the provision and

v. Scotland County, 3 Dillon C. C. R. 7; s. c. 94 U. S. 682, and in *Washburn v. Cass County*, 3 Dillon C. C. R. 251, and the bonds held valid notwithstanding the consolidation. A change in the name of the company will not invalidate the subscription. *Reading v. Wedder*, 66 Ill. 80.

¹ *Marsh v. Fulton County*, 10 Wall. (U. S.) 676. In *People v. Granville*, 104 Ill. 285, an act providing that the liability of municipal corporations which had voted aid to railroads should cease on a certain date, after which no bonds should be issued in virtue of any previous vote, was held to be a statute of limitation, not impairing the obligation of contracts; and a *mandamus* to compel the issue of bonds after that date was refused.

² *Scotland County v. Thomas*, 94 U. S. 682, distinguishing *Harshman v. Bates County*, 92 U. S. 569; s. p. *Scotland County v. Hill*, 132 U. S. 107; *East Lincoln v. Davenport*, 94 U. S. 801; *Wilson v. Salamanca*, 99 U. S. 499; *Menasha v. Hazard*, 102 U. S. 81; *Harter v. Kernochan*, 103 U. S. 562; *New Buffalo v. Cambria Iron Co.*, 105 U. S. 73; *Henderson County v. Travelers' Ins. Co.*, 128 Fed. Rep. 817. The cases on this subject are carefully stated and considered by *Blatchford, J.*, in *Liv-*

ington County v. Portsmouth First Nat. Bank, 128 U. S. 102, distinguishing and limiting, if not, indeed, overruling *Harshman v. Bates County*. See also *Columbus v. Dennison*, 69 Fed. Rep. 58, and *Municipal Trust Co. v. Johnson City*, 116 Fed. Rep. 458; *ante*, § 944.

³ *Harshman v. Bates County*, 92 U. S. 569, distinguished, *Bates County v. Winters*, 112 U. S. 325; *Lamoille Val. R. Co. v. Fairfield*, 51 Vt. 257; *Allen v. Louisiana*, 103 U. S. 80; *Jarrold v. Moberly*, 103 U. S. 580; *Wells v. Fontotoc County*, 102 U. S. 625; *Ogden v. Daviess Co.*, 102 U. S. 634; *infra*, § 922; *post*, § 958. As the decision in the first case is supposed to invalidate all the bonds issued under the Township Aid Act of *Missouri*, of March 23, 1868, said to amount to nearly \$3,000,000, the point on which the act was decided to be unconstitutional will be stated. The Constitution of 1865, art. ii, § 14, prohibited such subscriptions "unless two-thirds of the qualified voters of the" municipality issuing the bonds "shall assent thereto." The Township Aid Act authorized the issue of bonds "if two-thirds of the qualified voters of the township voting at such election are in favor of the subscription." The Supreme Court held that there is a broad

extent of the legislative enactments on the subject.¹ Thus where authority was given to certain counties lying *north* of the Missouri

difference between the Constitution and the act, — the former requiring the assent of two-thirds of the qualified voters of the municipality, while the latter requires the assent of only two-thirds of the qualified voters who vote at the election. The same case, in the court below, decided on another ground, — the constitutionality question being made for the first time in the Supreme Court, — is reported in 3 Dillon C. C. R. 150. *Post v. Supervisors*, 105 U. S. 667; *South Ottawa v. Perkins*, 94 U. S. 360. In these two cases an act authorizing the issue of municipal bonds which had been passed in conformity with the requirements of the Constitution of *Illinois* was declared void by the Supreme Court of the United States, following the uniform decisions of the State court, and the bonds issued in pursuance of it were held to be invalid even in the hands of those who took them for value, and in the belief that they had been lawfully issued.

Effect of constitutional provision adopted in 1870 on existing powers to aid railways in Mississippi. *Infra*, § 948, note; *Calhoun Co. Sup. v. Galbraith*, 99 U. S. 214; *Woodward v. Calhoun County*, Fed. Cas. No. 18,002; *In Ohio*, *Cass v. Dillon*, 2 Ohio St. 607; *State v. Union Tp.*, 8 Ohio, 394. In *Missouri*, *State v. Sullivan Co. Court*, 51 Mo. 531; *Kansas City, St. J. & C. B. R. R. Co. v. Nodaway Co. Court Jus.*, 47 Mo. 349; *State v. Nodaway Co. Crt. Jus.*, 47 Mo. 349; *State v. Macon Co. Court*, 41 Mo. 453; *Smith v. Clark County*, 54 Mo. 58; *State v. Greene County*, 54 Mo. 540; *Thomas v. Scotland County*, 3 Dillon C. C. R. 7; *Nicolay v. St. Clair County*, *ib.* 163; *Huidekoper v. Dallas County*, *ib.* 171; *Jordan v. Cass County*, *ib.* 185; *Foster v. Callaway County*, *ib.* 200; *Henry County v. Nicolay*, 95 U. S. 619; *Callaway County v. Foster*, 93 U. S. 567; *Louisville v. Taylor*, 105 U. S. 454; *Ralls County v. Douglass*, *ib.* 728; *Scotland County v. Thomas*, 94 U. S. 682; *Macon County v. Shores*, 97 U. S. 272. See also *Cass County v. Gillett*, 100 U. S. 585, aff'g *Henry County v. Nicolay*, 95 U. S. 619; *Jarrott v. Moberly*, 5 Dillon C. C. 253; *Howard County v. Paddock*, 110 U. S. 384.

The provisions of the Constitution which require the assent of two-thirds

of the qualified voters of a county to a subscription on its behalf for stock in a corporation, do not apply to cases where such subscription is made for stock in a railroad company pursuant to the power conferred by its charter granted prior to the adoption of that Constitution, notwithstanding the contemplated road is a branch road, the construction of which, although authorized by such charter, is undertaken as an independent enterprise under the act of March 21, 1868, entitled "An act to aid in the building of branch railroads in the State of Missouri." *Cass County v. Gillett*, 100 U. S. 585; *Scotland County v. Hill*, 132 U. S. 107; *ante*, § 944.

¹ *German Savings Bank v. Franklin County*, 128 U. S. 526, 538. "When the Savings Bank purchased the bonds, it was, notwithstanding the recitals on the face of them, chargeable with notice of the Act of April 16, 1869 [which contained provisions which invalidated the bonds, but which Act was not recited or referred to in the bonds], and of the construction which had then been given to it by the Supreme Court of *Illinois* prior to the issue of these bonds, in *Town of Eagle v. Kohn*, 84 Ill. 292." *Ib. per Blatchford, J.*, pp. 537, 538; *post*, § 949, note. "Every person dealing with such a corporation must, at his peril, take notice of the existence and terms of the law by which it is claimed the power to issue such bonds is conferred. The power to issue such bonds is derived exclusively from the legislative authority of the State, and the laws which confer them enter into and form a part of the bonds themselves. The holder of a municipal bond is chargeable with notice of the statutory provisions under which they are issued." *Wallace. J. National Bank v. St. Joseph*, 31 Fed. Rep. 216. In this case a statutory provision authorizing the city to call in bonds and pay the same at any time, and providing that upon tender of the principal the interest should cease, was held to be effective as against a holder for value before maturity. Citing *Ogden v. County of Daviess*, 102 U. S. 634; *Anthony v. Jasper County*, 101 U. S. 693; *Northern Bank of Toledo v. Porter Tp. Trs.*, 110 U. S. 608. *Infra*, § 947.

River, a subscription made and bonds issued under such authority by a county *south* of the river are void in the hands of everybody.¹

¹ *Sherrard v. Lafayette County*, 3 Dillon C. C. R. 236. The case was briefly this: By an act of the legislature of *Missouri*, a company was incorporated with power to construct a railroad from the town of Louisiana, which is situated on the Mississippi River, north of the Missouri River, to a point on the Missouri River, and the county court of any county in which any part of the route of said road should lie was authorized to subscribe for stock of the company, without a vote of the people. Afterwards the new Constitution of *Missouri* went into effect, prohibiting the General Assembly (1) from creating corporations by special act, except for municipal purposes; (2) from authorizing any county, &c., to become a stockholder in, or loaning its credit to, any company, association, or corporation, unless two-thirds of the qualified voters should assent thereto. Subsequently to this the legislature passed an act purporting to amend the charter of the said railroad company, which provided that the county court of any county in which any part of the line of said railroad might be located might subscribe to the stock of said company and issue bonds, &c. Under this act, the county court of Lafayette County, a county lying wholly south of the Missouri River, issued without a vote of the people, the bonds from which the coupons here sued on were detached, and several instalments of interest had been paid on them. Held, 1. That the amendatory act from which authority to issue these bonds is claimed is a special act, in effect creating a new corporation, and is hence inhibited by the State Constitution. 2. That it was not competent for the legislature, by extending the route of the proposed road beyond the point designated in the original charter, to authorize a county south of the Missouri River to incur indebtedness in aid of the road, without a two-thirds vote as required by the Constitution. 3. That since there was an entire want of power to issue the bonds, they were void even in the hands of innocent purchasers. 4. That the fact that the county court had paid interest on these bonds did not estop it from afterwards setting up their invalidity. But see *Burr v. Chariton County*, 12 Fed. Rep. 848.

Construction of special power. The act which authorized the issuing of the bonds to pay the county subscriptions to a railway company directed that the bonds so issued should be made payable to "the president and directors of the railroad company, and their successors and assigns." The bonds issued were made payable to "the railroad company or bearer." It was held that the power granted was sufficiently pursued, and that the bonds so issued were valid. *Woodward v. Calhoun County*, Fed. Cas. No. 18,002. Special act held to control general act. *Chicago, B. & Q. R. Co. v. Otoe County*, 16 Wall. 667.

Power to donate bonds in lieu of lands and right of way. By various provisions of a city charter, the mayor and city council were authorized to make donations of land for the right of way and other privileges to a railroad company, and to expend money for the purpose of acquiring land to be given, and were authorized to borrow money to an unlimited extent, when instructed so to do by a popular vote, and further, to issue bonds to fund any indebtedness of the city, existing or to be created. Under this authority, a railroad company, by reason of complying with certain conditions, became entitled to demand from the city the right of way and depot grounds. The company agreed with the city to accept the bonds voted to procure the right of way and grounds in lieu of the right of way and grounds, and it was held that the city had the power thus to agree, and that the bonds were valid. *Converse v. Fort Scott*, 92 U. S. 503.

A proposition once voted down may be subsequently re-submitted and adopted unless the act evinces a contrary intention. *Soc. for Sav. v. New London*, 29 Conn. 174; *Smith v. Clark County*, 5 Mo. 58; *Woodward v. Calhoun County*, Fed. Cas. No. 18,002. In *Kentucky* it is held that municipal corporations are not restricted to one subscription. *Tyler's Ex. v. Elizabethtown & P. R. R. Co.*, 9 Bush (Ky.), 510. Second subscription held valid. *Ib.*

Issue of bonds before law authorizing it took effect. *Rochester v. Alfred*

§ 947 (543). **Registration of Bonds.** — The history of the issue of municipal bonds in this country shows that conditions imposed by law requiring a popular vote, and conditions in the propositions submitted to the voters, intended to prevent fraud and to secure the actual building and completion of railroads, have often been evaded and bonds issued without compliance therewith. To regulate and control the exercise of municipal powers, and to prevent improper and improvident issues of bonds, the legislatures of some States have passed statutes *requiring bonds to be registered* with one of the executive departments of the state before they are issued or negotiated. These statutes may have a two-fold effect. According to the terms of some of these acts they impose an additional requirement in the execution or authentication of the bonds prior to their issue; and viewed in this aspect the operation of the statutory requirement is the same as if an additional signature were required to the bonds before they become completed instruments or acquire validity.¹ Registration pursuant to and under the statute may

Bank, 13 Wis. 432; *Berliner v. Waterloo*, 14 Wis. 378.

¹ This aspect of statutes for the registration of bonds is discussed, *ante*, § 888.

Registration by a state officer preliminary to or coincident with the issuance and delivery of the bonds should be distinguished from registration of the bonds and of the holders thereof by the municipal officers. The nature and characteristics of registered bonds, coupon bonds, convertible coupon bonds, and registered coupon bonds, discussed and defined in *Benwell v. Newark*, 55 N. J. Eq. 260; where it is said that registered bonds, transferable only by assignment or at the office of the municipality, are non-negotiable in their nature. To the same effect see *Scollans v. Robbins*, 173 Mass. 275. But *quare?* But see *contra*, *D'Esterre v. Brooklyn*, 90 Fed. Rep. 586. As to right of holder of bonds of municipalities consolidated with the Greater New York City, *ante* chapter 1), to compel issuance of registered bonds of consolidated city in lieu of original obligations, see *Whann v. Coler*, 38 N. Y. App. Div. 339, *aff'd* 159 N. Y. 535. When mandamus will issue to compel registration of coupon bonds pursuant to statute, see *People v. Parmerter*, 158 N. Y. 385. In *Benwell v. Newark*, 55 N. J. Eq. 260, it is said that the obligation to register a coupon bond is contractual in its nature when

it depends upon the stipulations of the bond; that it is not a common law or statutory obligation; and that the remedy is by a suit for specific performance and not by an application for *mandamus*.

Where a statute provided that municipal coupon bonds issued by a city should be "registered in the city clerk's office in a book to be kept for that purpose," it was held that the language of the act was not that the bonds should be issued by the city to registered payees; nor that they should be issued as registered bonds, in contradistinction to coupon bonds, and be non-negotiable in character. The requirement of registration was rather in the nature of a measure for the protection of the city, and a record showing the amount of each issue and its due date. A statement upon the face of the bond that it was registered in the city clerk's office simply showed compliance with the act authorizing its issue. Where such bonds were issued with the name of the payee left blank, and their negotiability was not restricted by the insertion of the name of a particular payee, when they were subsequently stolen, the court held in an action of replevin that they were payable to any subsequent holder in good faith as the bearer. *Manhattan Savings Inst. v. New York Nat. Bank*, 170 N. Y. 58, *aff'g* 53 N. Y. App. Div. 635.

also have the effect of an *adjudication or determination by a designated officer of the state as to the validity* of all the statutory proceedings anterior to registration. This is the case where the officer is not under a duty to admit the bonds to registration simply because asked to do so and without making inquiry as to the regularity, but under the statute is bound to deny the application for registration unless satisfied that they are issued in accordance with the provisions of the statute. If the statute requires that he shall register the bonds and certify upon each, under his seal of office, that it has been regularly and legally issued when he is satisfied that the provisions of the statute have been pursued, the State commits to him, as it has been held construing the statute, the important function of finally determining whether the bonds have been regularly and legally issued. His determination in such a case, necessarily involves an investigation as to every fact essential to that validity, and purchasers in good faith, although required to know what the statute contains, are not bound under such circumstances to go behind the officer's certificate and find out whether he has ascertained all the facts, and whether he has correctly and honestly passed upon the questions arising upon an application for registration. Purchasers under such legislation have the right to assume — having no notice to the contrary — that he has in these respects discharged his duty; and the act and certificate of the auditor of the State or the State treasurer, — the officer usually designated to effect the registration, — has been held to be conclusive evidence as between the municipality and a *bona fide* purchaser that the bonds were regularly and legally issued, and therefore, negotiable in the full sense of the word.¹ The effect of registration pursuant to stat-

¹ *Anthony v. Jasper County*, 101 U. S. 693, 697; *Lewis v. Barbour County*, 105 U. S. 739, 749; *Comanche County v. Lewis*, 133 U. S. 198, 206; *Cairo v. Zane*, 149 U. S. 122; *Flagg v. Barnes School Dist.*, 4 N. Dak. 30.

In *Anthony v. Jasper County*, 101 U. S. 693, 697, where bonds were held to be invalid even in the hands of a *bona fide* purchaser, because they were antedated to evade a registration statute, and were issued without registration, *Waite*, Chief Justice, said, in discussing the effect of registration pursuant to the statute: "It [the statute] in effect provides that no bond issued by counties, cities, or incorporated towns shall be valid, that is to say, completely exe-

cuted, until it has been countersigned or certified in a particular way by the State auditor. For this purpose, after being executed by the corporate authorities, it must be presented to that officer, and he must inquire and determine whether all the requirements of the law authorizing its issue have been observed, and whether all the conditions of the contract in consideration of which it was to be put out have been complied with. To enable him to do this, evidence must be submitted which he is required to file and preserve. If he is satisfied, the registry is made, and the requisite certificate indorsed on the bonds. This being done, the execution of the bond is complete, and, under the

ute is to be determined by the language and intent of the enactment. If from a consideration of the language used, and a reasonable

law, it may then be negotiated, that is to say, put on the market as valid commercial paper. When the certificate is found on the bond, the purchaser need not inquire whether what has been certified to is true. As against a *bona fide* holder the public is bound by what its authorized agents have done and stated in the prescribed form."

In *Lewis v. Barbour County*, 105 U. S. 739, bonds were voted by a county in aid of a railroad. Provision was made by the statute for the deposit of the bonds with the State treasurer when the subscription was conditional. When the subscription was not conditional, or when a trustee was named in the proposition and agreed to by the people and the contractor, they were not required to be delivered to the State treasurer. Bonds which on their face were free from conditions but were intended to be delivered conditionally upon the completion of the railroad were, contrary to the statute, not deposited with the State treasurer, but were, under another provision of the statute, presented to the auditor of State, who registered the same and indorsed his certificate thereon. The provision of the statute for the registration of the bonds by the State auditor was that within thirty days after delivery, the holder of the bonds should present them to the auditor of State for registration, who, upon being satisfied that they had been issued according to the statute, and that the signatures thereto were genuine, should register them in his office, and should, under his seal of office, certify upon the bonds the fact that they had been regularly and legally issued; that the signatures thereto were genuine; and that the bonds had been registered in his office according to law. The Supreme Court held that inasmuch as the statute authorized an unconditional issue of bonds which did not require to go through the hands of the State treasurer as trustee, a purchaser was entitled to rely upon the certificate of registration of the auditor of State as evidence that all the requirements of the statute had been complied with, and that the bonds, in the hands of a *bona fide* holder, were not open to attack on any of the grounds mentioned.

In *Cairo v. Zane*, 149 U. S. 122, bonds were voted in payment of a sub-

scription in aid of a railroad. The subscription was made. Statutory provision was made for registering bonds by the State auditor. This statute forbade registry, unless the debt was authorized by a majority of the legal votes, and until the railroad aided had been completed and cars run thereon, and any conditions prescribed in the subscription had been fully complied with. The officers issuing the bonds were required, immediately upon completion of the railroad, and the running of cars thereon, to certify under oath that all the preliminary conditions in the act required to be done to authorize the registration of the bonds and to entitle them to the benefits of the statute had been complied with, and to transmit the same to the State auditor with a statement of the particulars of the bonds. After subscription, but before delivery of the bonds, an agreement was made whereby the railroad company bought back its stock from the municipality at a nominal figure. It was held that a purchaser of the bonds was entitled to rely upon the certificate as evidence that the conditions of the issuance of the bonds had been complied with. Mr. Justice *Brewer* said: "When the law of the State provides for registry of municipal bonds and a certificate thereof, such certificate should be held as sufficient evidence to a purchaser of the existence of those facts upon which alone bonds can be registered. If the plaintiff in this case, not resting upon the mere terms of the certificate, had examined the records of the auditor's office, he would have found there the certificate under oath of the mayor of the city, of the election, its date, and facts necessary to warrant the issue of the bonds, such officer being the one named in the statute as the one to furnish to the auditor the evidence necessary to justify the registry. Can it be that a purchaser, with this evidence before him, is not protected by the statement upon the face of the bonds that they were issued in payment of a subscription? Is it his duty to examine all the proceedings, to see whether that which was a subscription in the first instance was called a subscription all the way through, and was named as a subscription in the bonds, had not been transformed by some action of

construction thereof, it appears that the legislature intended to entrust to an officer the duty of determining the validity of the bonds before registering them, his certificate of registration is an adjudication of validity which operates as an estoppel. If, however, the statute expressly declares that registration and the certification of the officer shall not have this effect, or that the certificate shall only be *prima facie* evidence of the facts stated and shall not prevent proof to the contrary in any suit involving the validity of the bonds, or the power and authority of the municipality in whose name they are executed, to issue them, all conclusive effect must be denied to the registration and the certificate.¹ If the statute does not require that the auditor or other officer shall determine or certify that the bonds have been regularly and legally issued, and only requires him to register the same and certify to the registration upon evi-

the city council into a donation? It will be borne in mind that it is not a matter of law, but of fact, in respect to which an estoppel is urged against the city by virtue of the recitals and the fact of registry. But it is unnecessary to pursue this line of thought further. We are of opinion that the bonds were properly held valid in the hands of a *bona fide* holder."

To constitute an adjudication which will estop the municipality from attacking the validity of the bonds a complete registration and certification of the bonds under the terms of the statute must be effected. Thus where a statute contained two methods of registration for different classes of bond, one class being registered by the auditor of State upon the production of a preliminary record by the municipal officers, and the other class being registered by the auditor of State and the record thereof being transmitted to the municipal officers, it was held that as to the latter class registration by the auditor of State alone did not comply with the terms of the statute, or afford any protection to the holder. *Bissell v. Spring Valley Township*, 110 U. S. 162. Mr. Justice *Matthews* said: "If the registration of bonds issued under the act itself is to have the force of an adjudication by the auditor, the preliminary record by the officers of the municipal corporation transmitted to him must be the indispensable foundation of his jurisdiction, without which he cannot lawfully act; and as to bonds issued, as were these now in suit, under previous statutes, the action of the auditor is

itself but the preliminary proceeding, of which confirmation by the subsequent record of the officers issuing them is essential to its efficacy as a registration. If these officers refuse to recognize the registry of the auditor, whether rightfully or wrongfully, the holder loses no rights. He has the bonds as he acquired them, and may test the liability of the corporation by judicial proceedings. If, on the other hand, the statute is construed to allow him, by a proceeding before the auditor, conclusively to fix the liability of the municipal corporation, without notice and without a hearing, certainly, in respect to bonds previously issued, it would be open to the gravest objections on constitutional grounds, for, if a law cannot impair the obligation of a contract, neither can it create one, or, by a mere fiat, take from a party an existing and meritorious defence."

¹ *Lewis v. Barbour County*, 105 U. S. 739, 750, citing *Anthony v. Jasper County*, 101 U. S. 693. See also *Prickett v. Marceline*, 65 Fed. Rep. 469. Requirement that auditor of territory shall register and certify on back of each bond "the *regularity* of the issue of the same" held to devolve on auditor purely ministerial duty and not a judicial function. *Territory v. Hopkins*, 9 Okla. 133. Where registration of bonds was delayed by an injunction which was finally dissolved, held, that, under the Nebraska statute, it was the duty of the State auditor to register them as of the date when originally presented to him for registration. *Brinkworth v. Grable*, 45 Neb. 647.

dence being produced that certain specific statutory conditions have been complied with, registration and the certificate thereof do not constitute any adjudication as to any facts other than those upon which the bonds are to be registered and certified, and do not preclude the municipality from attacking the validity of the issue for failure to comply with other statutory conditions or provisions, or conditions contained in the vote or subscription, compliance with which is not required to be shown for the purpose of effecting registration.¹ If the bonds on their face show that they are not of the character or class which are entitled to registration, under the registry act, registration and a certificate thereof does not preclude any defence which may be available to the municipality, for it follows that the auditor had no right to decide, as matter of law, that the bonds were of the kind which he was authorized to register and certify, when as matter of law appearing on their face they were not.² And a certificate by the auditor of the State that such bonds have been registered and that they are regularly and legally issued, does not prevent the municipality from setting up in defence to an action on the bonds that they were issued by it without any legal authority therefor.³

¹ *German Sav. Bank v. Franklin County*, 128 U. S. 526; *Citizens Sav. & Loan Assoc. v. Perry County*, 156 U. S. 692.

In *German Savings Bank v. Franklin County*, 128 U. S. 526, the statute declared that bonds issued in aid of a railroad should not be valid and binding until not only the conditions precedent prescribed by the statute, but also such as should be contained in the vote or subscription, should be complied with. Provision in the statute was made for the registration of the bonds which required as a preliminary to registration that the railroad should have been completed near to or in the county; that cars should have run thereon, and that the subscription should have been voted by a majority of the legal voters. A subscription was made which in addition to these conditions required completion of the railroad within a specified time. The railroad was not completed within the specified time, and before it was completed a constitutional amendment was adopted prohibiting railroad aid subscriptions or donations, thereby preventing any substantial change in the terms of the subscription. It was held that the certificate of registration only

imported compliance with the conditions prescribed by the statute, and did not import compliance with the terms or conditions upon which the aid was voted and the stock subscribed. Mr. Justice *Blatchford* said: "Sec. 7 [of the statute] requires as a preliminary to registration that the railroad shall have been completed near to or in the county, and that cars shall have run thereon, but does not require that the road shall have been completed by a time prescribed as a condition precedent in the vote. The registration of the bonds by the State auditor has nothing to do with any of the terms or conditions upon which the stock was voted and subscribed. Neither the registration nor the certificate of registry covers or certifies any fact as to compliance with the conditions prescribed in the vote on which alone the bonds were to be issued."

² *Crow v. Oxford*, 119 U. S. 215

³ In *McClure v. Oxford*, 94 U. S. 429, the bonds were registered by the auditor, and he certified that they were regularly and legally issued. In point of fact the statute under which they were issued had not become a law at the time of the issue, and it was held that the bonds were invalid for lack of power,

A municipal corporation issued bonds *valid on their face, but in fact void, because they were antedated to evade the registration act*, and were not registered; the corporation had power to borrow money, and the proceeds of the bonds passed into the city treasury and were used for lawful purposes; it was held that the corporation was liable in an *action for money had and received* to the purchaser of the bonds or his assignee, not for the amount of the bonds, but for the amount of money actually paid for the bonds to the corporation, with simple interest thereon.¹

§ 948 (544). **Retrospective Statutes validating Irregular Subscriptions and Bonds.** — In the absence of special constitutional restrictions, the competency of the legislature to enact *retrospective statutes to validate* an irregular or defective execution of a power by a municipal or public corporation, is undoubted.² And the power

and that a *bona fide* holder could not recover thereunder notwithstanding the recitals therein and the certificate of registration. In *Dixon County v. Field*, 111 U. S. 83, an innocent holder of bonds of a county of Nebraska, each of the bonds having indorsed thereon a certificate of the State auditor that the bond was "regularly and legally issued," was held not to be entitled to recover against an objection that the bonds were issued in violation of a restriction of the Constitution of the State as to the amount of bonds to be issued. These cases are examined and considered in *Crow v. Oxford*, 119 U. S. 215, with the result that the Supreme Court of the United States was of the opinion that the certificate of registration could not supply an original lack of statutory authority to make and issue the bonds. Registration and a certificate that all laws have been complied with in the making and issuing of the bonds held not to preclude the defence that they were issued in violation of a *constitutional* limitation of indebtedness. *Prickett v. Marceline*, 65 Fed. Rep. 469.

¹ *Wood v. Louisiana*, 5 Dillon C. C. R. 122, affirmed by the Supreme Court, 102 U. S. 294; *Gause v. Clarksville*, 1 Fed. Rep. 353; *ante*, § 795; compare *Litchfield v. Ballou*, 114 U. S. 190. See *infra*, § 922, and note. The general subject of *implied liability* of municipal corporations has been treated in another connection. See Index, *Action and Liability, Assumpsit, Contracts*.

² *Keithsburg v. Frick*, 34 Ill. 405; *Jasper v. Ballou*, 103 U. S. 745; *Copes*

v. Charleston, 10 Rich. (S. Car.) Law, 491; *McMillen v. Boyles*, 6 Iowa, 304; *Ib.* 394; *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175 (note statute there construed); *People v. Mitchell*, 35 N. Y. 551; *Thomson v. Lee County*, 3 Wall. 327; *Bass v. Columbus*, 30 Ga. 845; *Bissell v. Jeffersonville*, 24 How. 287; *Campbell v. Kenosha*, 5 Wall. 194; *Kenosha v. Lamson*, 9 Wall. 477; *Steines v. Franklin County*, 48 Mo. 167; *Knapp v. Grant*, 27 Wis. 147; *Black v. Cohen*, 52 Ga. 621; *Duanesburgh v. Jenkins*, 57 N. Y. 177 (overruling s. c. 46 Barb. (N. Y.) 574, and distinguishing *People v. Batchellor*, 53 N. Y. 128); *Kimball v. Rosendale*, 42 Wis. 407; *Ritchie v. Franklin Co.*, 22 Wall. 67; *Bradley v. Franklin Co.*, 65 Mo. 638; *Lewis v. Shreveport*, 3 Woods C. C. 205; *Cooley on Const. Lim.* 371, and cases there cited; *ante*, §§ 114, 123, 129, 645; *post*, § 959, note. *Bolles v. Town of Brimfield*, 120 U. S. 759; *Otoe County v. Baldwin*, 111 U. S. 1; *Thompson v. Perrine*, 103 U. S. 806; *Same v. Same*, 106 U. S. 589; *Dows v. Town of Elmwood*, 34 Fed. Rep. 114; *Gardner v. Haney*, 86 Ind. 17. See Index, *Curative Acts*. The legislature may legalize a subscription to the stock of a railroad made by a municipal corporation without authority, unless prohibited by the Constitution, and if the subscription would have been legal had it been done under legislative authority. *Grenada County v. Brogden*, 12 U. S. 261, distinguished *Hayes v. Holly Springs*, 114 U. S. 120, referred to *infra*.

to cure defective subscriptions to the stock of railway companies and to validate bonds issued therefor has been frequently exercised

See also *Otoe County v. Baldwin*, 111 U. S. 1; *Cooley on Taxation*, 223, 232.

In *Mississippi*, it is held that where the State Constitution prohibits the legislature from authorizing the issue of municipal obligations in aid of corporations, or lending of credit therefor, except on condition that two-thirds of the qualified voters assent thereto at an election, the legislature cannot, by a mere retrospective act, validate municipal bonds which were issued without legislative authority before the Constitution became operative. *Sykes v. Columbus*, 55 Miss. 115; *Grenada Co. v. Brogden*, 112 U. S. 261; *Hayes v. Holly Springs*, 114 U. S. 120, referred to in this section, *infra*. See also *Cairo & St. L. R. Co. v. Sparta*, 77 Ill. 505.

In *St. Joseph Township v. Rogers*, 16 Wall. 666 (an *Illinois* case), where it appeared that the election at which the subscription was approved was held before the passage of the law authorizing the subscription, the court said: "Argument to show that defective subscriptions of the kind may, in all cases, be ratified where the legislature could have originally conferred the power is certainly unnecessary, as the question is authoritatively settled by the decisions of the Supreme Court of the State (*Illinois*), and of this court in repeated instances." And again: "Mistakes and irregularities are of frequent occurrence in municipal elections, and the State legislatures have often had occasion to pass laws to obviate such difficulties. Such laws, when they do not impair any contract or injuriously affect the rights of third persons, are never regarded as objectionable, and certainly are within the competency of legislative authority."

The Constitution of *Illinois* of 1848, Art. ix., § 5, declared "that the corporate authorities of counties, townships, school districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same." The Supreme Court of the State (*Marshall v. Silliman*, 61 Ill. 218; *Wiley v. Silliman*, 62 Ill. 170; see *ante*, §§ 129, 645) decided that this section having been intended as a limitation upon the law-making power, the legislature

could not grant the right of corporate taxation to any but the corporate authorities, nor coerce a municipal corporation to incur a debt by the issue of its bonds for corporate purposes. And the court held that an act validating an election, irregularly called and notified, to vote upon the question of township subscription, and declaring the same legal and binding, was void. In the opinion of the court, the act was an effort to confer the power of municipal taxation upon persons who were not, by themselves, the corporate authorities in the sense of the Constitution, and to compel the town to issue its bonds for railroad stock, by declaring a void proceeding to be valid subscription. The liability of the township on the same bonds afterwards came before the Supreme Court of the United States in *Elmwood Township v. Marcy*, 92 U. S. 289, and a majority of the court, not vindicating, nor, it would seem, approving, the decision of the Supreme Court of *Illinois*, nevertheless, as there had been, in their view, no conflicting decisions of that tribunal on the point, and as it involved the construction of a "peculiar provision of the Constitution of *Illinois*," they felt bound to follow it, although it was made after the bonds in question had been issued. *Clifford, Swayne, and Strong, JJ.*, dissented, on grounds which would seem to be strongly supported by the previous decisions of the court. In *Anderson v. Santa Anna*, 116 U. S. 356, the court adhered to the decision in *St. Joseph v. Rogers*, 16 Wall. (U. S.) 666. This case confirmed the validity of the same act upon the authority as well of the then existing law of *Illinois* as declared by its highest court as of the decisions of the Federal courts upon the general question of the power of the legislature to legalize that which it might have originally authorized. The court said: "Although the decision in that case [*St. Joseph v. Rogers*] was cited by counsel in the *Elmwood v. Marcy* case, the court in the latter case did not refer to it or overrule it, but applied to the *Elmwood* bonds the principles announced in the later decisions of the State court. While the courts of the United States accept and apply the construction of a State constitution, or of a local statute, upon which the rights of

and judicially sustained. Subsequent legislative sanction within constitutional limits is equivalent to original authority.¹ But the

parties depend, which has been fixed by the course of decisions in the State court, it is the settled doctrine of this court, that rights accruing under one construction will not be lost merely by change of opinion in the State court; and where such rights have accrued before the State court has announced its construction, the Federal courts, although leaning to an agreement with the State court, must determine the question upon their own independent judgment." *Marshall County v. Schenck*, 5 Wall. (U. S.) 772; *Pine Grove Tp. v. Talcott*, 19 Wall. (U. S.) 666, 677; *Chicago, B. & Q. R. Co. v. Otoe County*, 16 Wall. (U. S.) 667; *Olcott v. Fond du Lac County*, *ib.* 678; *Quincy v. Cooke*, 107 U. S. 549; *Jonesboro City v. Cairo & St. Louis R. Co.*, 110 U. S. 192.

In *Foote v. Johnson County*, 5 Dillon C. C. R. 281, it was ruled that the Supreme Court of the United States, having held the "township railroad aid act" of *Missouri* constitutional (*Cass County v. Johnston*, 95 U. S. 360), it was the duty of the Circuit Court to follow that judgment, notwithstanding the later decision of the Supreme Court of *Missouri* in *State v. Brassfield*, 67 Mo. 331; and that where negotiable commercial securities are issued and negotiated *before* there is any decision by the courts of the State against the validity of the act authorizing their issue, the Supreme Court of the United States does not consider itself bound to follow a *subsequent* decision of the local courts invalidating such securities, but will decide for itself whether, under the Constitution and laws of the State, such securities are valid or void. *s. p.* *Douglass v. County of Pike*, 101 U. S. 677.

The rights of the innocent holders of municipal bonds issued in aid of railroads "are to be determined by the law as it was judicially construed to be when the bonds were put on the market as commercial paper." *County of Ralls v. Douglass*, 105 U. S. 728; *Green County v. Conness*, 109 U. S. 104; *Sawyer v. Concordia Parish*, 12 Fed. Rep. 754; *Marshall v. Elgin*, 8 Fed. Rep. 783. This subject is fully and instructively discussed in the cases of *German Sav. Bank v. Franklin County*, 128 U. S. 526, and *Scotland County v. Hill*, 132 U. S. 107. See

ante, § 946, note; *supra*, §§ 897, 898, 899.

¹ *Wilson v. Hardesty*, 1 Md. Ch. 66; *Jasper County v. Ballou*, 103 U. S. 745; *Shaw v. Norfolk R. Co.*, 5 Gray (Mass.), 180; *Satterlee v. Matthewson*, 2 Pet. (U. S.) 380; *Wilkinson v. Leland*, 2 Pet. (U. S.) 627; *Watson v. Mercer*, 8 Pet. (U. S.) 88; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420; *Stanley v. Colt*, 5 Wall. (U. S.) 119; *Croxall v. Sherard*, 5 Wall. (U. S.) 268; *Keithsburg v. Frick*, 34 Ill. 405; *Schneck v. Jeffersonville*, 152 Ind. 204; *Read v. Plattsmouth*, 107 U. S. 568; *State v. Dickerman*, 16 Mont. 278; *Givens v. Hillsborough County*, 46 Fla. 502; 35 So. 88; *Columbus v. Dennison*, 69 Fed. Rep. 58; *Utter v. Franklin*, 172 U. S. 416, citing text; *Springfield Safe-Deposit & Trust Co. v. Attica*, 85 Fed. Rep. 387 (distinguishing *Gilmore v. Norton*, 10 Kan. 491); *Erskine v. Steele County*, 87 Fed. Rep. 630 (county warrant), *aff'd* 98 Fed. 215; *Middleton v. St. Augustine*, 42 Fla. 287; *Potter v. Lainhart*, 44 Fla. 647; *Red River Furn. Co. v. Tennessee C. R. Co.*, 113 Ky. 697; *Coleman v. Broad River*, 50 S. Car. 321 (municipal bonds issued in violation of Constitution cannot be validated); *Bell v. Farnville & P. R. Co.*, 91 Va. 99, quoting text; *Redd v. Henry County*, 31 Gratt. (Va.) 685; *Cumberland County v. Randolph*, 89 Pa. 614. Where an act ratifies an ordinance prescribing that a board of trustees may by resolution fix the amount of bonds which it has decided to issue and does not attempt in any manner to change the terms and conditions of the ordinance as to the issuance of the bonds, the ordinance as ratified constitutes the mode and measure of power of the board, and cannot be departed from, and bonds issued without the passage of such resolutions are void even in the hands of innocent purchasers. *Lehman v. San Diego*, 83 Fed. Rep. 669, *aff'g* 73 Fed. Rep. 105. To the same effect is *Middleton v. St. Augustine*, 42 Fla. 287, where a curative act authorized a city to issue bonds only as provided for in and by an ordinance adopted by the city of St. Augustine, and such subsequent ordinances as were not in conflict therewith. The ordinance expressly provided for

intention of the legislature to validate the subscription or the bonds must clearly appear from the terms of the curative act. An oblique validation, or one expressed in doubtful, covert, or obscure language, will not be sufficient, especially where the subscription was made or the bonds issued in disregard of conditions which the Constitution required the legislature of the State to impose upon the municipality before the *power* to make the subscription or to issue the bonds should arise or exist.¹

the issuance of bonds whose interest instalments were to be payable only at the city of St. Augustine. The bonds proposed to be issued and sold provided, contrary to the provisions of the ordinance, that the interest instalments or coupons thereof should be payable either at St. Augustine or at the City of New York. The court held that there was no authority either by the city ordinance or by the curative act for the city to issue any bonds the instalments of interest on which could be made payable in New York or at any other place than at the city of St. Augustine, and to issue bonds so providing would be a material variance and departure from the authority conferred, and in this respect the issue should be restrained. See *Index, Interest*. The fact that a curative act was enacted subsequently to the institution of a suit based upon the defects and irregularities in an ordinance intended to be cured by the act, but before judgment therein, does not affect the validity of the act. *Middleton v. St. Augustine*, 42 Fla. 287. See also *Utter v. Franklin*, 172 U. S. 416, citing text.

In an action upon interest coupons or bonds which were issued pursuant to a city ordinance providing for the payment of the interest, but making no provision for the payment of the principal, on which account the validity of the bonds was questioned by the city of New Orleans upon which the liabilities of the city issuing the bonds devolved upon annexation, it was held that the legalization of the issue in the act of annexation was *not a retroactive law* forbidden by the Constitution of Louisiana, since a law requiring a municipal corporation to pay a demand which is without legal obligation but which is equitable and just in itself, being founded upon a valuable consideration received by the corporation, is not a retroactive law any more than

an appropriation act providing for the payment of a pre-existing claim would be. The constitutional inhibition against retroactive legislation does not apply to legislation recognizing or affirming the binding obligation of the State, or any of its subordinate agencies with respect to past transactions. It is intended to defeat retrospective legislation injuriously affecting individuals, and thus protect vested rights from injuries. *New Orleans v. Clark*, 95 U. S. 654. Where, under an act authorizing the issue of railroad aid bonds, it was necessary that the railroad should, before such issue, have designated or located the entire route of its extension, and the bonds were held to be illegal because the location of the entire route and terminus of the extension had not been made before the bonds were issued, it was held that when proceedings for the issue of the bonds had been commenced by the appointment of commissioners in 1871, the defect in the issue did not exist prior to that time, and, therefore, acts passed in 1866, 1868, and 1869 could have no curative effect as to such defect. *Oswego County Sav. Bank v. Genoa*, 66 N. Y. App. Div. 330, *aff'd*, 172 N. Y. 635.

¹ *Hayes v. Holly Springs*, 114 U. S. 120. In this case it appeared that the Constitution of *Mississippi* of 1869 prohibited the legislature from authorizing any municipal subscription to any corporation "unless two-thirds of the qualified voters at a special or regular election shall assent thereto." In 1871, *without any statute authorizing it*, an election was held in the City of Holly Springs, *Mississippi*, which resulted in favor of a subscription by the city of \$75,000 to a specified railroad company. In 1872, the legislature passed an act providing that "all subscriptions to the capital stock of the said railroad company made by any county, city, or town in this State not in violation

§ 949 (545). **Want of Power always a Defence; Question of Power is the One of Chief Interest and Importance.** — Touching the rights of the holder of authorized negotiable municipal bonds, it may again be observed that such instruments are *commercial paper*, and governed by the rules of the law merchant concerning such paper, and that as respects a holder for value, before due, of such bonds containing the usual recitals of compliance with conditions precedent, without notice of facts constituting a defence thereto, the only defence which is available is, that there was *no power* in the defendant corporation to issue the bonds or instruments in question. By want of *power* as here used is meant the want of any existing valid legislative act authorizing the municipality to make the bonds or instruments; not irregularities in the exercise of the power, but want of legislative power itself. This principle is thus expressed in one of the judgments of the Supreme Court: "Bonds payable to bearer, issued by a municipal corporation, . . . if issued in pursuance of a power conferred by the legislature, are valid com-

of the Constitution, [are hereby legalized, ratified, and confirmed." After this act bonds of the city were issued, which recited that they were "issued under and in pursuance of the Constitution and laws of *Mississippi*, and authorized by a vote of the people of the city at a special election held for the purpose." But as the provisions of the Constitution are inhibitory upon the legislature, and not enabling to the city; as under the Constitution legislative authority to enable the municipality to issue such bonds *must* provide for the assent of two-thirds of the voters at an election; as no such election had been provided for by legislative act; as the curative act of 1872 made no reference to the unauthorized election of 1871, and did not ratify and approve it; and as the language of the curative act was too vague to warrant the conclusion with certainty, that the legislature "intended to confirm and ratify the subscription in question," — it was held to be insufficient for that purpose, and the plaintiff, although a *bona fide* holder of the bonds containing the recitals of full compliance with the Constitution and laws of the State, was defeated. The case was distinguished from the case of *Grenada County v. Brogden*, 112 U. S. 261, also from *Mississippi*, since in that case the legislature had in the curative act "designated and identified

the voting at an election, described as resulting in an approval by the constitutional two-thirds of the qualified voters, followed by an authority to Grenada County, declared to be based upon such approval, to subscribe for the stock." *Per Blatchford, J.*, in *Hayes v. Holly Springs*, 114 U. S., at p. 126.

As to the recitals in the bonds (see *supra*), the court said: "Even a *bona fide* holder of a municipal bond must show legislative authority in the issuing body to create the bond. Recitals on the face of the bond or acts *in pais*, operating by way of estoppel, may cure irregularities in the execution of statutory power, but they cannot create it. If, as in the present case, legislative authority is wanting, the bond has no validity." An act which expressly provided that it should not in any wise affect any suit thereafter brought to test the bonding of any town in Cayuga County in aid of a certain railroad, its branches or extensions, could have no curative effect on bonds in aid thereof which were issued without compliance with a condition precedent to the exercise of power to issue the same, and were consequently declared to be invalid in an action subsequently brought to test the validity of the bonds. *Oswego County Sav. Bank v. Genoa*, 66 N. Y. App. Div. 330, *aff'd* 172 N. Y. 635.

mercial instruments; but if issued by such a corporation which possessed *no power* from the *legislature*, they are invalid, even in the hands of innocent holders.”¹ *Irregularities* in the exercise of the power, as against a holder for value of such instruments, without notice of such irregularities, constitute no defence.² Since therefore, *want of power* is the *only* defence open to the corporate maker of such instruments, when they have been negotiated for value to innocent holders, the question of *power* is the one around which the principal interest centres, and to which in its various phases, we have given our main attention.

§ 950 (547). **Laches; Acquiescence; Failure to enjoin the Issue; Payment of Interest, and retaining the Consideration, as Grounds of Estoppel.** — The cases we have heretofore considered were mainly those in which the municipality has been held estopped by the recitals in the bonds to show that conditions precedent had not been complied with. We will *now advert to other grounds of estoppel*, arising from the acquiescence or acts of the municipal authorities. It is undoubtedly a sound proposition that a municipal corporation, as well as a private corporation, may, in the absence of constitutional or legislative restriction, confirm acts, not *ultra vires*, which it may deem beneficial to it.

§ 951 (548). **Same Subject.** — As experience shows that the officers of public and municipal corporations do not guard the interests confided to them with the same vigilance and fidelity that characterize the officers of private corporations, the *principle of ratification by laches or delay* should be more cautiously applied to the former than to the latter. But the principle applies to both classes of corporations, as well as to natural persons. The general doctrine is undoubted, — that there is ordinarily no estoppel in respect to acts which are in violation of the Constitution or of an act of the legislature, or which are obviously and in the strict and proper sense of the term, *ultra vires*. The history of the doctrine of *ultra vires* in Great Britain and in this country makes it difficult to affirm that the rule is without exceptions; and it is the part of

¹ *Per Clifford, J.*, in *St. Joseph Ante*, §§ 922-925, as to invalidity of *Township v. Rogers*, 16 Wall. 644, 659. bonds issued in violation of a constitutional provision. See *post*, Chapter on Mandamus. As nearly all the cases in the Supreme Court have turned on the question of power, it is not deemed material again to cite them in this connection, as the propositions in the text are no longer the subject of judicial controversy. 169.

² *Supra*, § 933; *Jacksonville, N. & S. R. Co. v. Virden*, 104 Ill. 339; *Bank of Statesville v. Statesville*, 84 N. Car.

prudence and wisdom to keep close to the adjudications without undertaking to formulate in advance rules of universal application. Precision is absolutely essential to legal conceptions. A legal term which stands for an indefinite idea or for several different ideas will necessarily introduce confusion when used without qualification; and perhaps no term in the law has been more unfortunate in this respect than the expression *ultra vires*. We mean by it, as here used, the want of legislative power, under any circumstances or conditions, to do the particular act in question. As to *irregularities* in the exercise of an express power to issue bonds, and particularly in respect to steps connected with preliminary conditions, the failure of the municipality or of the taxpayer to enjoin the issue, followed by long acquiescence, especially when this is accompanied by affirmative acts which recognize the validity of the bonds, such as receiving and holding the stock or consideration for the bonds, or paying interest on them for a series of years, *has been held to estop the municipality from defending*, on the ground of non-compliance with conditions precedent, — especially when the bonds, as is usually the case, have been negotiated for value. But the corporation is in no case estopped from setting up a *total want of power* to issue the bonds. The leading cases in the Supreme Court relating to the subject matter of this section are referred to in the note.¹ It is ob-

¹ In *Marshall County Supervisors v. Schenck*, 5 Wall. (U. S.) 772, — from *Illinois*, — which is an important case on this subject, it appeared that in *Illinois* counties were authorized, upon a popular vote, to subscribe for stock and pay therefor in bonds; an election was ordered by the *county court* in a certain county, when it should have been ordered (by reason of a change in the law) by the *board of supervisors*; it was duly held; the proposition was carried; the *supervisors* made the subscription, issued the bonds, received the stock, and ordered the levy of taxes, and paid the coupons for nine or ten years; and it was held by the Supreme Court of the United States, in conformity with the doctrine of the State Supreme Court, as first announced but subsequently overruled, that the acquiescence, conduct, and acts of the county authorities were a ratification of the bonds, at least when in the hands of an innocent holder, and estopped the county to make the defence that the election had been ordered by the county court instead of the board of supervisors. In view of the facts as

stated, the judgment of the court would appear to be sound and open to no criticism, as the ground of the objection to the bonds was an irregular exercise of an admitted power in the county, and not a want of power. The recital in the bonds is not given, but it would appear from the opinion that the plaintiff's case also fell within the doctrine of *Knox County v. Aspinwall*, 21 How. (U. S.) 539.

In *Pendleton County v. Amy*, 13 Wall. 297, decided on demurrer, it did not appear that there was any estoppel by reason of recitals in the bond, or from subsequent payment of interest; but the pleadings showed that the county had received in exchange for the bonds a certificate of the stock of the railroad company, which it had held for seventeen years before the suit was brought, and still held. The county was authorized to purchase the stock, but only on condition of a popular vote. It was decided by the Supreme Court that purchasing and holding the stock under these circumstances estopped the county to assert against an innocent holder of the bonds that

vious that a *constitutional* provision requiring a public sanction to a subscription by a municipality to railroad stock prevents the subsequent acts of the municipal officers from operating as a ratification in such a case without the assent of the voters.¹

§ 952 (549). **General Summary of Doctrine of the Supreme Court as to Estoppel by Recitals.** — In passing from this portion of our

they were issued in disregard of the condition of a popular election, required by the act of the legislature conferring the power. Three of the judges dissented, probably on this point; and certainly the case seems to be an extreme application of the doctrine of estoppel. The bonds (so far as appeared) were without recitals; no payment of interest had been made; a popular vote was made necessary, and the plea alleged that no such vote had ever been had, and that the question of subscription had never been submitted to or voted upon by the people; and the mere receipt and holding of the stock were held sufficient to estop the county to make the defence. We have not been able to reconcile the case, on this point, with *Marsh v. Fulton County*, referred to in this note.

The case of *Marsh v. Fulton County*, 10 Wall. (U. S.) 676, decides this principle, viz., that where, under the legislation of the State, the county authorities had no power to subscribe for stock and issue bonds therefor, and where (as held) they made the subscription and issued the bonds without the sanction of a popular vote, *the bonds containing no recital*, such bonds are void, and are not ratified by acts of the county authorities, such as appointing agents to participate in the corporate meetings of the railway company, by the payment of part of the bonds and the interest on the others for a series of years; and the reason given by the court was that no ratification could be made unless it was authorized by the people, the defect being one of power. *Field, J.*, observed: "They [the supervisors] could not, therefore, ratify a subscription without a vote of the county, because they could not make a subscription in the first instance without such authorization." Compare *Pendleton County v. Amy*, *supra*.

The following cases illustrate the doctrine that a municipality is *estopped*

to set up irregularities in the issue of bonds by affirmative acts, such as payment of interest, &c. *Clay County v. Society for Savings*, 104 U. S. 579; *Anderson County Com'rs v. Beale*, 113 U. S. 227; *Portsmouth Sav. Bank v. Springfield*, 4 Fed. Rep. 276; *Moulton v. Evansville*, 25 Fed. Rep. 382; *Dudley v. Lake County*, 80 Fed. Rep. 672; *Heed v. Cowley County*, 82 Fed. Rep. 716; *Speer v. Kearney County Com'rs*, 88 Fed. Rep. 749; *Cronin v. Patrick County*, 89 Fed. Rep. 79; *Union Bank v. Oxford*, 90 Fed. Rep. 7; *Wetzell v. Paducah*, 117 Fed. Rep. 647; *Platt v. Hitchcock County*, 139 Fed. Rep. 929; *Colburn v. McDonald*, 72 Neb. 431; *Richardson v. Marshall County*, 100 Tenn. 346. Cases in which it is held that a municipality is *not estopped to set up total want of power*. *Blanchard v. Benton*, 109 Ill. App. 569; *Thornburg v. School Dist. No. 3*, 175 Mo. 12; *Washington County v. David* (Neb.), 89 N. W. Rep. 737; *Presidio County v. City Nat. Bank*, 20 Tex. Civ. App. 511; *Peck v. Hempstead*, 27 Tex. Civ. App. 80. No estoppel to plead lack of power by the payment of interest for a series of years. *Parkersburg v. Brown*, 106 U. S. 487; *Lewis v. Shreveport*, 108 U. S. 282; *Daviess County v. Dickinson*, 117 U. S. 657; *Lake County v. Graham*, 130 U. S. 674; *Doon Township v. Cummings*, 142 U. S. 366; *Cowdrey v. Canadea*, 16 Fed. Rep. 532; *Oxford Com'rs v. Union Bank of Richmond*, 96 Fed. Rep. 293; *Wetzell v. Paducah*, 117 Fed. Rep. 647; *Clarke v. Northampton*, 120 Fed. Rep. 661; *Stebbins v. Perry County*, 167 Ill. 567; *Greene County v. Shortell*, 116 Ky. 108; *Glenn v. Wray*, 126 N. Car. 730; *Debnam v. Chitty*, 131 N. Car. 657.

¹ *Norton v. Shelby County*, 118 U. S. 425; following *Aspinwall v. Daviess County*, 22 How. 364; *Marsh v. Fulton County*, 10 Wall. 676, 684; *Wadsworth v. Eau Claire County Sup.*, 102 U. S. 534.

subject, we may observe that if we have not mistaken *the meaning and effect of the leading judgments of the Supreme Court* which we have passed in review, they establish the following principles: The purchaser is bound to see that there exists legislative power that is a valid legislative act not in conflict with the State Constitution for the issue of the bonds or commercial securities of the municipal, public, or *quasi* corporation, and is bound to notice the contents and recitals in the instruments; but if such bonds are duly executed by the proper officers, and if these officers are, by the true construction of the legislative enactment in that regard, invested with the power to decide whether conditions precedent have been performed and the bonds contain a recital that such conditions have been complied with, or a recital which implies such compliance, whether the preliminary conditions consist of facts *in pais* or facts of record, — the issue of the bonds, under such circumstances with such a recital, is conclusive against the municipality (if the legislature has not otherwise provided) as to the fact or facts recited or implied in the recital, and estops it, in an action by an innocent holder for value, before due, to show the contrary. This is the doctrine of the Supreme Court of the United States; and the point in which it differs from some decisions in the State courts is in regard to the evidence of compliance with conditions precedent. In all or nearly all the cases in the Supreme Court of the United States, that tribunal has held that the municipal or local officers were constituted the judges to decide whether antecedent or preliminary steps or conditions had been complied with, and that their decision, stated or implied in the recital, was conclusive against the corporate maker when the bonds have found their way into the hands of innocent holders. The view which holds the local officers a tribunal authorized to make so important a decision rests not alone upon an express declaration of the legislature to that effect, but may be “gathered,” by construction, from the supposed intent and purpose of the legislature. Some of the State courts, but not all of them, have taken a somewhat different view. They agree that mere *irregularities*, not relating to the essence of the power, will not affect a *bona fide* holder; but inasmuch as there exists no general power to issue such securities, and as the fact of compliance or non-compliance with conditions precedent is usually a matter of which there is a record, the purchaser of such securities is bound to ascertain, no matter what recital to the contrary may be made, whether the power to issue them existed or had arisen or conditions precedent had been complied with, especially where this depends upon

matters of which a record is required to be made. The subject is full of difficulties. If the latter view is sustained, it has the effect to impair the salability and market value of the securities. If the former, it has the effect of enabling the local officers in power for the time being to perpetrate, without any effectual preventive in many cases, the most outrageous frauds. On principle, it would seem that the legislative intent to invest local officers, by means of a false recital, with a power so tremendous ought not to be held to exist, unless it is declared or clearly implied, and such, we think, is the just and fair effect of the decisions of the Supreme Court of the United States.¹

§ 953 (550). **State Court Decisions relating to Municipal Bonds and the Power to issue them; Conditions Precedent.** — Some of the leading differences relating to the law of municipal railway aid bonds between the Federal and State courts have already been mentioned. Having surveyed with minuteness the course of decision in the Federal courts, a brief reference will now be made to the adjudications of State tribunals. The authority to subscribe to the stock of a railroad corporation may be *made conditional* on certain previous steps being taken, as, for example, a prior authorization of the act by a majority of the qualified voters of the municipality or district to be affected, or a recommendation in its favor and a designation of the amount by a grand jury, and the statute may be so framed as to evince the legislative intention to be that *no power* to subscribe or issue bonds shall exist unless this be done.²

¹ This section stands substantially as in the last two editions. Nothing has been decided that clearly requires any substantial change in it. The decisions referred to in § 922, *supra*, tend — perhaps it can only be said that they *tend* — to show that there are or may be certain facts of such a nature, of which a public record is required that a purchaser may be bound to take notice of them. See *supra*, §§ 912–915. That is, we now add, a purchaser may be bound to notice them if he is not protected by an express or equivalent recital, or notwithstanding such a recital if there be a plain requirement by the legislature that he shall take notice of a specified public record. *Supra*, §§ 922 *et seq.* The legislature can easily guard against such occasional frauds by enacting, if it deems it expedient, such a requirement on the part of the purchaser, and the doctrines of

the Supreme Court referred to in the text, are, in the absence of such legislation, sound expositions of the constitutional and statutory provisions involved. *Supra*, §§ 923, 924.

² *Mercer County v. Pittsburgh & Erie Railroad Co.*, 27 Pa. St. 389; *Mercer County v. Hackett*, 1 Wall. 83; *Aurora v. West*, 22 Ind. 88; *ante*, § 313 *et seq.*; *St. Louis v. Alexander*, 23 Mo. 483. In this last case the provision requiring a submission of the question to the voters “before the subscription hereby authorized shall be made,” was held not merely directory, but mandatory. Where the enabling act requires the amount to be specified, a vote not specifying definitely the amount is, as to the immediate parties, void. *State v. Saline County*, 45 Mo. 242, following *Mercer County v. Pittsburgh & Erie R. R. Co.*, 27 Pa. St. 389, and *Starin v. Genoa*, 23 N. Y. 439 (see

Thus, where the act authorizing a town to borrow money to pay for the stock subscribed expressly provided that the officers thereof should "have no power" to do so until the written assent of two-thirds of the resident taxpayers had been obtained, this was held by the Court of Appeals of New York to be a condition precedent, without which the power did not exist.¹

infra), and distinguishing *Knox County v. Aspinwall*, 21 How. 539, and *Flagg v. Palmyra*, 33 Mo. 440. It should be remarked, however, that the case above referred to (*State v. Saline County*, 45 Mo. 242), was *mandamus* to compel the relator to deliver the bonds, and to assess taxes to pay interest on bonds which had been issued, and the writ was denied because the amount of bonds to be issued was not specified; but subsequently, in *State v. Saline County*, 48 Mo. 390, it was held that such bonds, when in the hands of an innocent holder for value, could be collected. What, in the opinion of the Supreme Court of *Missouri*, such a holder must show in the way of compliance with precedent conditions, in order to recover, see the case of *Carpenter v. Inhabitants of Lathrop*, 51 Mo. 483. This case seems in spirit, if not in effect, to depart from the earlier cases in that court upon this subject. See *Leavenworth & D. M. R. Co. v. Platte County*, 42 Mo. 171, where permissive words respecting an election to authorize subscriptions were held to be imperative. In *St. J. & D. C. R. R. Co. v. Buchanan Co.*, 39 Mo. 485, the words that the county court, after an affirmative vote by the people, "shall have power to subscribe," were held to leave it discretionary with the court whether to subscribe or not. See further as to rule in *Missouri* as to estoppel by recitals, *infra*, § 957. In the case of *People v. Tazewell County*, 22 Ill. 147, it was held, under the general law of the State, that it was discretionary whether the county should subscribe all or but a portion of the amount voted by the citizens, and that county authorities might impose any proper conditions they might choose. So where the legislature, without conditions, provides for submitting the question of subscription to the voters of a township, the electors have the power to vote to subscribe on any conditions they may see proper to annex. *People v. Dutcher*, 56 Ill. 144; see also *People v. Logan County*, 45 Ill. 162; *Veeder v. Lima*, 19 Wis. 280; *Chicago, B. & Q. R. Co. v. Aurora*, 99 Ill. 205; *Memphis, K. & C. R. Co. v. Thompson*, 24 Kan. 170. But such conditions must not violate any express provision of law of any general rule of public policy. *Coe v. Caledonia & M. R. Co.*, 27 Minn. 197; *Hoyt v. Braden*, 27 Minn. 490. Where the statute, as a condition precedent to the issue of bonds, required a vote of the majority of the *qualified voters*, it was held that a vote of the electors registered and voting at a regular election under the charter was intended, and that the city authorities had no power to order a new registration. *Smith v. Wilmington*, 98 N. C. 343. *Post*, chap. xxix.

¹ *Starin v. Genoa*, 23 N. Y. 439; *Gould v. Sterling*, *Ib.* 439, 456, distinguished on this point from *Bank of Rome v. Village of Rome*, 19 N. Y. 20. Under the act it was held that the *onus* was on the plaintiff to show affirmatively the written assent of the requisite number of taxpayers; and the manner in which this must be shown is considered at length. But see *Bissell v. Jeffersonville*, 24 How. 287; *Knox County v. Aspinwall*, 21 How. 539; *Mercer County v. Hackett*, 1 Wall. 83, heretofore referred to. In *People v. Mead*, 36 N. Y. 224, the decision in *Starin v. Genoa*, and *Gould v. Sterling*, above cited, was adhered to by the Court of Appeals, though it was admitted that a contrary ruling as to the evidence of the assent of the taxpayers had been made by the Supreme Court of the United States, in favor of similar bonds in the hands of *bona fide* holders, and the case was distinguished from *Murdock v. Aiken*, 29 Barb. (N. Y.) 170, and *Ross v. Curtiss*, 31 N. Y. 606. *Starin v. Genoa*, and *Gould v. Sterling* have been expressly disapproved, as we have seen, by the Supreme Court of the United States, as respects the *bona fide* holders of bonds. *Venice v. Murdock*, 92 U. S. 494. See *supra*, § 911, note. Illustrating text, see *Benson v. Albany*, 24 Barb. (N. Y.) 248. See especially

§ 954 (551). **State Court Decisions; Conditions Precedent.** — So, under an act providing "that no subscription or purchase of stock shall be made, or bonds issued, by any county or city, creating a debt for the payment of such subscription, unless a *majority of the qualified voters* of the county or city shall vote for the same," it was held that bonds issued without an election, or where the election was called by the wrong authority (as by the county court instead of the county board of supervisors), are void, *for want of power to issue them*, in whose hands soever they may be, and are not validated by the levy of taxes and the payment of interest thereon.¹

Cit. Sav. Bank v. Greenburgh, 173 N. Y. 215, and cases in New York cited *infra*, § 956.

Where the statute gives the power to issue bonds when a majority of the taxpayers whose names appear upon the last preceding tax list, or assessment roll, as owning a majority of the taxable property in the corporate limits, make application to the county judge, by petition, &c., such a petition is essential to the jurisdiction of the county judge, and the authority conferred by the act will, on *certiorari*, be required to be exercised in strict conformity with the act in its letter and spirit. The petition, it was held, must be that of the taxpayers, and it is erroneous to count as petitioners those whose names are affixed, in their absence, under previous verbal authority. In such proceedings, where there are no provisions to the contrary, competent common-law evidence of the facts to be established should be produced before the county judge, and this officer cannot act upon his personal knowledge. *People v. Smith*, 45 N. Y. 772; *ante*, § 897, 898, note.

By its charter a city was authorized to take stock in railroads, "provided, that no stock shall be subscribed or taken by the common council, unless upon the petition of two-thirds of the residents of said city who are freeholders of said city." It was held, in an action by the railroad company against the city on the contract of subscription, that it was the *duty of the common council* to determine whether the requisite number of the freeholders of the city had petitioned for the subscription, no other tribunal having been provided for that purpose; and, having passed upon that question, their determination is conclusive, unless it may be set aside in some direct proceeding for that purpose. *Evansville, I.*

& C. S. L. R. Co. v. Evansville, 15 Ind. 395, following and applying *Knox County v. Aspinwall*, 21 How. (U. S.) 539. See also *Bissell v. Jeffersonville*, 24 How. (U. S.) 287; *Mercer County v. Hackett*, 1 Wall. (U. S.) 83; compare, however, *Veeder v. Lima*, 19 Wis. 280; *Duanesburgh v. Jenkins*, 40 Barb. (N. Y.) 574; *Society for Savings v. New London*, 29 Conn. 174; *State v. Saline County*, 45 Mo. 242. Subscriptions to turnpike roads by the county judge, under acts of the legislature, were held unauthorized and void, it being admitted that an amount of stock sufficient, with the aid of county subscriptions, to complete each mile of road, had not been taken by *private subscription*, as required by the statutes. *Clay v. Nicholas Co. Ct.*, 4 Bush (Ky.), 154. Where there is a danger of a misapplication of funds subscribed, a court of equity, and it seems a court of law, should refuse to enforce a subscription until the corporation properly secures the appropriation of the bonds, or their proceeds, in accordance with the terms of subscription. *Cumberland & O. R. Co. v. Washington County*, 10 Bush (Ky.), 564.

Where a municipal corporation has power to make a donation in aid of a railroad, to levy and collect taxes to pay it, or to borrow money to pay it and to issue bonds to meet the loans, the railroad company has a claim for money only, and cannot compel a municipal corporation to issue bonds for it; on the other hand, it cannot be compelled to take bonds in payment of the donation. *Chicago, D. & V. R. Co. v. St. Anne*, 101 Ill. 151; *ante*, § 897, 898, note.

¹ *Marshall County v. Cook*, 38 Ill. 44, commenting on and distinguishing *Mercer County v. Hackett*, 1 Wall. (U. S.) 83, and *Gelpcke v. Dubuque*, 1b.

But *this view was denied to be sound by the Supreme Court of the United States*, which decided that an innocent holder for value of such bonds was entitled to recover upon them. The only defect in the execution of the power was that the election was ordered by the wrong authority; and the Supreme Court held that the conduct of the county in retaining the stock, and in levying taxes and paying interest for a series of years, estopped it to set up as a defence that the bonds were invalid, and it refused to follow the judgment of the Supreme Court of the State, which had held the same issue of bonds to be void.¹

§ 955 (552). **Same Subject.** — In a case in Ohio, where the legislature authorized “the county commissioners of *any county through or in which* a railroad might be located, to subscribe to the capital

175. See also *Shoemaker v. Goshen*, 14 Ohio St. 587; *Berliner v. Waterloo*, 14 Wis. 378; *Veeder v. Lima*, 19 Wis. 280; *Dunnovan v. Green*, 57 Ill. 63; *St. Joseph Township v. Rogers*, 16 Wall. 644; s. p. as to ratification, *Marsh v. Fulton County*, 10 Wall. (U. S.) 676; *Hancock v. Chicot Co.*, 32 Ark. 575. The corporation is estopped — where the power to issue existed — from setting up *irregularities* in the issue of the bonds, after repeated payments of interest thereon. *Keithsburg v. Frick*, 34 Ill. 405; *Jasper County v. Ballou*, 103 U. S. 745; *Schaeffer v. Bonham*, 95 Ill. 368; *Hannibal & St. J. R. Co. v. Marion County*, 36 Mo. 294; *Mercer County v. Hubbard*, 45 Ill. 139; *Beloit v. Morgan*, 7 Wall. (U. S.) 619; *Schenck v. Marshall Co. Sup.*, 5 Wall. (U. S.) 772; compare *Marsh v. Fulton County*, 10 Wall. (U. S.) 676. The municipal authorities, on *mandamus* or other proceedings to compel them to make subscription to the railroad company, may show that the election was influenced by it and its employees, by bribery and corruption. *People v. San Francisco*, 27 Cal. 655; *Butler v. Dunham*, 27 Ill. 474; *post*, chap. xxix. *What is a majority of votes?* *People v. Chapman*, 66 Ill. 137; *Decker v. Hughes*, 68 Ill. 33; *supra*, §§ 383, 891. Index, *Elections; Majority*. Subscription cannot be made without an affirmative vote. *People v. Cass Co.*, 77 Ill. 438. The presumption is that the vote cast at an election held according to law, is the vote of the whole number of legal voters, and this presumption cannot be rebutted by proof of the number of votes cast at an

election held in the preceding year. *St. Joseph v. Rogers*, 16 Wall. (U. S.) 664; *Melvin v. Lisenby*, 72 Ill. 63.

¹ *Marshall County v. Schenck*, 5 Wall. (U. S.) 772; *Redd v. Henry County*, 31 Gratt. (Va.) 685, approving text. The Supreme Court of *Illinois* holds that since the Constitution of 1870 the *onus* is on the holder of the bonds to show that they were lawfully issued; and that they are void if the conditions on which the issue was authorized are not complied with. *Town of Prairie v. Lloyd*, 97 Ill. 179; *Town of Eagle v. Kohn*, 84 Ill. 292; *Richeson v. People*, 115 Ill. 450; *Eddy v. People*, 127 Ill. 428; *ante*, § 915, and note, 943, 944. Where the legal voters of a city voted in favor of a railway subscription, to be paid in city bonds, upon the condition, among others, that the railroad should be *completed within the county on or before a certain date*, and before the expiration of that time, but after the *Illinois* Constitution of 1870 went into effect, the city council, by an order, and without further action by the voters, *extended the time for the completion of the road* within the county, the Supreme Court of the State was of the opinion that bonds issued in payment of the subscription were in violation of the condition, and were void, for the reason that the extension was not authorized by the legal voters, and the city, under the new Constitution, had no power to make a new contract in regard to such subscription. It was accordingly held that a tax levied to provide money to pay interest on the bonds could not be collected. *Eddy v. People*, 127 Ill. 428.

stock of the said company," and, for the purpose of paying therefor, "to borrow the necessary amount of money, for which they shall issue their negotiable bonds," &c., it was decided to be a defence to an action on the bonds (though by a *bona fide* holder) that the railroad was "never made or located through or in the county;" that it was "located and completed so as not to touch the county." The defence was held good, upon the ground that the authority to issue the bonds never existed.¹ Other cases have been decided upon similar grounds.² It is the general doctrine of the State courts that not only is express authority requisite, but that the *substantial requirements of the law must be observed*;³ while in the Federal courts the decision of the local officers, when embodied in the recitals of the bond that such requirements have been complied with, is, as we have seen, no defence against the *bona fide* holders of such bonds.

§ 956. *Estoppel; Rule in New York.* — The Court of Appeals of the State of New York in the construction of the special enabling statutes involved, and especially the town railroad aid bonding

¹ *Treadwell v. Hancock Co. Com'rs*, 11 Ohio St. 190, reviewing and criticising *Aspinwall v. Knox County Com'rs*, 21 How. (U. S.) 539, approved in *Bissell v. Jeffersonville*, 24 How. (U. S.) 287; *Sherrard v. Lafayette County*, 3 Dillon C. C. R. 236, cited, *ante*, § 946. Compare *Purdy v. Lansing*, 128 U. S. 557, cited *infra*. In *Veeder v. Lima*, 19 Wis. 280, *Treadwell v. Com'rs and Gould v. Sterling*, 23 N. Y. 439, before cited, are approved, and *Aspinwall v. Knox County*, and *Moran v. Miami County*, 2 Black (U. S.), 722, are criticised. Compare *State v. Van Horne*, 7 Ohio St. 331; reaffirmed, *State v. Union Township Trustees*, 8 Ohio St. 394, 401. The two cases last cited (7 Ohio St. 327, 8 Ohio St. 394) do not intend, probably, to assert the principle that the non-action of the taxpayers or inhabitants will supply a *want of power*, in the just sense of that expression, in the trustees to subscribe for the stock, or estop the *quasi* corporation from making the defence of *ultra vires*, if it existed.

Under a charter authorizing counties "through which" a given railroad "may pass" to subscribe to its stock, it was held that a county between the termini of the road might subscribe without waiting until the route was located, or built within the county. *Woods v. Lawrence County*, 1 Black (U. S.), 386.

In *Minnesota*, the agreement to issue the bonds must be perfected before the construction of the road intended to be aided. *State v. Highland*, 25 Minn. 355.

² Under the New York Act of 1871, chap. 298, which requires all the counties through which the road would pass to be designated and the road located, before the bond of any town can be issued in aid thereof, this requirement is held to go to the question of power, and bonds issued without previous action of the board of directors of the company, adopting the entire route, and designating all the counties through which the road would pass, are void. *Purdy v. Lansing*, 128 U. S. 557; approving *People v. Morgan*, 55 N. Y. 587; *Mellen v. Lansing*, 20 Blatchf. 278.

Bonds issued where a valid condition precedent imposed under legislative authority was disregarded, and there was no specific recital covering the point, held to be void for want of power. *German Bank v. Franklin Co.*, 128 U. S. 526. See nice distinctions there drawn in the cases on this subject. *Supra*, § 899.

³ *Lamoille Val. R. Co. v. Fairfield*, 51 Vt. 257; *People v. Waynesville*, 88 Ill. 469; *Sykes v. Columbus*, 55 Miss. 115; *Delaware Co. v. McClintock*, 51 Ind. 325; *Harding v. Rockford*, R. I. & St. L. R. R. Co., 65 Ill. 90; *infra*, §§ 956, 957.

acts, has *not* given to municipal bonds negotiable in form as completely as the Supreme Court of the United States the qualities of commercial paper even when they are in the hands of *bona fide* holders in cases where the *conditions precedent* to their issue have not in point of fact been substantially complied with.¹ The statutes under which *the town bonding railroad aid cases* arose gave to railroad commissioners appointed by the Supreme Court power to borrow money and issue bonds of the town *only on consent in writing of a majority of the taxpayers*, acknowledged and proved and filed in the county clerk's office, and the Courts of this State have held that such consent in writing of the taxpayers was a prerequisite to the *jurisdiction* of such railroad commissioners to sign, seal, or issue any bonds. The cases decided under these statutes rest upon the proposition that under the town bonding railroad aid acts the consent in writing of the required number of taxpayers is *jurisdictional* — “a condition precedent” — and that, until this condition is fulfilled, the commissioners who issue the town railroad aid bonds are “utterly without power and stand in no relation whatever to the town,” and they have no power to execute the bonds or to make recitals therein which will bind the town, and that consequently the bonds are void in the hands of all persons whomsoever for want of jurisdiction since all persons taking the bonds are chargeable with notice of the statute and must see to it at their peril that the statute has been complied with in matters of jurisdiction before they can with absolute safety take the bonds.² The court has never conceded the accuracy of the decisions of the courts of the United States holding in favor of *bona fide* holders of such bonds a different doctrine. These decisions have not been regarded as controlling.³ In this State such questions as the sufficiency and validity

¹ Gould v. Town of Sterling, 23 N. Y. 439, and other New York cases cited, *infra*. Angel v. Hume, 17 Hun (N. Y.), 374; People v. St. Lawrence County, 25 Hun (N. Y.), 131.

² Starin v. Genoa, 23 N. Y. 439; Gould v. Sterling, 23 N. Y. 439; People v. Meade, 36 N. Y. 224; Venice v. Woodruff, 62 N. Y. 462; Horton v. Thompson, 71 N. Y. 513; Springport v. Teutonia Sav. Bank, 75 N. Y. 397; Cagwin v. Hancock, 84 N. Y. 532, rev'g 22 Hun, 201; Lyons v. Chamberlain, 89 N. Y. 578; Ontario v. Hill, 99 N. Y. 324; Brownell v. Greenwich, 114 N. Y. 518; Hoag v. Greenwich, 133 N. Y. 152; Venice v. Breed, 65 Barb. (N. Y.) 597; Potter v. Greenwich, 26 Hun (N. Y.), 326, aff'd 92 N. Y. 662; People v. Deyoe, 2 T. & C. (N. Y.) 142. See also Cagwin v. Hancock, 84 N. Y. 532; Lyons v. Chamberlain, 89 N. Y. 578. See Citizens' Sav. Bank v. Greenburgh, 173 N. Y. 215, cited *infra*.

Where there is no *jurisdictional defect* to make and issue the bonds, and they are duly executed and delivered, then as to the negotiability of the bonds and as to the rule that a subsequent *bona fide* holder for value is not bound to see at his peril that the municipality received payment for the bonds, *there is, as we understand it, no difference of opinion or conflict of decision between the courts of the State of New York and the*

of a petition for an issue of bonds, or the requisite consent by the taxpayers to their issue, have been regarded as *jurisdictional* in their nature and always open to inquiry, notwithstanding the negotiability of the bonds, or recitals therein, or their transfer to a *bona fide* holder.¹ A recital in a municipal bond that all the necessary legal steps and proceedings have been taken to comply with the laws under which the bonds are issued does not estop the municipality from disputing their validity for jurisdictional defects even in the hands of *bona fide* holders.² But the court has also recognized the right of the legislature by direct enactment to confer upon the obligations of a municipality all the characteristics of negotiable paper without exception, and thus to bring them within the rules of protection devised for the safety of innocent holders.³ And municipal bonds in the usual form, where there is no want of jurisdiction or power to issue, have, under the decisions of this State, the characteristics of negotiable paper. Such bonds are so far invested with the character of negotiability, in the hands of *bona fide* holders, as to render them unassailable on any ground that does not relate to the authority for their issue, and if there be any element of fraud or irregular-

courts of the United States. There is a difference between the decisions of the courts of the State of New York and those of the United States on questions such as were involved in the case of *Cagwin v. Hancock*, *supra*, 84 N. Y. 532, and similar cases. The Supreme Court of the United States holds that in cases like *Cagwin v. Hancock*, the *bona fide* holder was not bound to see and ascertain at his peril, whether the written consent of the taxpayers was given as prescribed by the New York statutes.

¹ *Horton v. Thompson*, 71 N. Y. 513; *Cagwin v. Hancock*, 84 N. Y. 532; *Craig v. Andes*, 93 N. Y. 405; *Strang v. Cook*, 47 Hun (N. Y.), 46. Striking and extreme instance of bonds being held void in hands of *bona fide* holders for want of an allegation (held to be jurisdictional) in the petition for the issue of the bonds in relation to the dog and highway tax. *Mentz v. Cook*, 108 N. Y. 504, *aff'd* *Rich v. Mentz*, 134 U. S. 632. While the holders must show that the jurisdictional requirements of the statute have been complied with, it was held, in an action upon stolen bonds on offer of indemnity, that when the holder has made out a *prima facie* case, an averment that the town has no knowledge whether the bonds were issued in ac-

cordance with the statute must be supported by evidence to show that the statute had not been complied with. *Manhattan Sav. Inst. v. East Chester*, 44 Hun (N. Y.), 537.

² *Starin v. Genoa*, 23 N. Y. 439, *rev'g* 29 Barb. 442; *Dodge v. Platte County*, 82 N. Y. 218, *rev'g* 16 Hun, 285; *Craig v. Andes*, 93 N. Y. 405.

³ In *Alvord v. Syracuse Sav. Bank*, 98 N. Y. 599, the statute declared that all the bonds issued on behalf of a town should "be valid and binding upon the town in the hands of *bona fide* holders." It also made provision for the filing of the evidence showing the requisite consent of the taxpayers; and it was held that the title of an innocent purchaser of the bonds issued on behalf of a town could not be questioned. In *Cherry Creek v. Baker*, 123 N. Y. 161, the statute provided that non-compliance with any condition inserted in the petition should not in any manner invalidate the bonds. The petition contained a condition for the construction of the railroad for a distance of about 12 miles. While the court considered that a substantial compliance had been made with all that was intended by this provision, it thought that a departure from it would not invalidate the bonds in the hands of a *bona fide* holder.

ity in the conduct of the officers or the agents of the municipality through whom the bonds passed into the channels of business, it is not chargeable to an innocent purchaser, and the bonds are not subject to defences based upon inadequacy or failure of the consideration,¹ or other irregularities which do not affect the power to make and issue them.²

It may, we think, reasonably be questioned whether the line of decisions in New York shown in the cases cited in this section is applicable to or would be applied to the case of bonds issued under very extensive and general legislative powers to the amount of hundreds of millions of dollars for sale upon the public markets as a means of raising money for large and varied public and municipal improvements. The charter and legislative authority to the city of New York to issue such bonds clearly existing, the true

¹ *Citizens' Sav. Bank v. Greenburgh*, 173 N. Y. 215, rev'g 60 App. Div. 225. In this case the town was held liable though it had in fact never received payment or full payment for the bonds, the plaintiff being an innocent holder for value. *s. p.* *Greenburgh v. Inter. Trust Co.*, 94 Fed. Rep. 755. See also *Bank of Rome v. Rome*, 19 N. Y. 20; *Oswego City Sav. Bank v. Board of Education*, 70 N. Y. App. Div. 538, aff'd 174 N. Y. 515; *Brownell v. Greenwich*, 114 N. Y. 518; *Solon v. Williamsburgh Sav. Bank*, 114 N. Y. 122; *supra*, § 911.

² *Ontario v. Union Bank of Rochester*, 21 N. Y. Misc. 770; *Cherry Creek v. Becker*, 18 N. Y. St. Rep. 485, aff'd 123 N. Y. 161.

The distinction between cases where there is a total want of jurisdiction on the part of the Commissioners representing the town, and, therefore, where the Commissioners stand in no relation whatever to the town in respect to the bonds which they undertake to execute and sell, and cases where the defence to the bonds of the municipality is on other grounds than the jurisdictional defect of want of taxpayers' consent, appears in the cases of *Brownell v. Greenwich*, 114 N. Y. 518, and *Hoag v. Greenwich*, 133 N. Y. 152. In these two cases the Town of Greenwich, under the bonding act of 1869, decided to issue town bonds in aid of a railroad. The county judge duly adjudged, determined and ordered that the petitioners represented a majority of the taxpayers and taxable property of the town, and that judgment was entered

of record. In *Brownell's case*, *supra*, the court, in holding that the bonds sold to the plaintiff after May 12, 1871, were valid, said (*Vann, J.*, 114 N. Y. 528): "The acts of the commissioners, as to all matters within the scope of the authority conferred upon them by the statute, were the acts of the town. *Gould v. Oneonta*, 71 N. Y. 298. Hence, irregularities in the manner in which the commissioners may have performed their duties cannot affect the validity of the bonds issued in the hands of an innocent holder for value." *Solon v. Williamsburgh Savings Bank*, 114 N. Y. 122.

In *Hoag v. Greenwich*, *supra*, the opinion of this court was delivered by *Finch, J.*, who said (p. 157): "So that we enter upon our consideration of the case at bar under very different circumstances from those which have dictated the drift of our earlier decisions. In most of them the difficulties encountered were vital because they struck at the original and primary authority to borrow the money or incur the municipal obligation, while here that authority is fully established, and narrows the inquiry to an alleged mistake or error in its execution." *s. p.* *Citizens' Sav. Bank v. Greenburgh*, 173 N. Y. 215. reviewing the cases.

In *Calhoun v. Delhi & M. R. Co.*, 28 Hun (N. Y.), 379, it was held that acquiescence by a town and its taxpayers in the validity of its bonds, amounting to an actual adoption of them as the legal acts of the town, estopped the town and its taxpayers from questioning the regularity of the issue.

view could seem to be that they are commercial securities in the fullest sense of the law merchant with all of the presumptions and attributes that pertain to *negotiable* paper. And such is beyond question the general and commercial understanding, and such we think ought to be and is the legal *status* of such securities.¹

¹ What "*negotiability*" means. It is important to bear in mind what "*negotiability*" means and implies. It includes, especially and chiefly, that the *bona fide* holder is not bound to see whether or not the maker of the instrument received any consideration or full consideration therefor, and that such a holder is not subject to any defences, legal or equitable, of which he has no notice. It is well-settled law, for example, that it is no defence, as against a *bona fide* holder of *negotiable* instruments, that the maker of the instruments may not have received consideration therefor. If the rule were otherwise, then every purchaser of a negotiable municipal bond, as, for example, bonds of the cities of New York, or Buffalo, or Albany, or any other of the numerous municipalities in a State, would be obliged at his peril, and at all hazards, to ascertain for himself whether or not the municipality issuing the bond had received full payment therefor, and this would be true not only of the first purchaser of the bond from the municipality, but of all subsequent purchasers, however remote, and for all the time that the bonds would be outstanding. Thus, for example, a purchaser of a New York City bond, twenty-five or thirty or forty years after its issuance, would be obliged at his peril to inquire and ascertain whether or not the city, twenty-five or thirty or forty years before, had received full payment for its bond, and in making such inquiry and investigation, such purchaser must, at his peril, ascertain *the fact itself*. It would not do for him to rely upon the *records* of the municipality, even if these were accessible to him after such length of time, but he must assure himself that such records were true, and correctly stated the facts. An officer who would violate his duty as to a sale might readily make a false record. If a purchaser consulted the records, and the records were false, that would not protect him in the absence of a statute making such record conclusive evidence of the truth of the facts, and no such statute exists. It has not yet been de-

cided by the courts that, because a municipality keeps records, its bonds are therefore non-negotiable, and that every purchaser of the bonds must go and consult the records and satisfy himself, at his peril, that the bonds have been paid for.

But the utter impracticability of a purchaser's making such an investigation is apparent from even a slight consideration of the subject. New York City has outstanding to-day bonds aggregating about \$300,000,000, not counting those in the sinking funds. These bonds have been issued at various periods, some of them, twenty, thirty, and forty years prior to this date. Suppose any purchaser in the open market, of one of these bonds were to go to the comptroller of New York City, and say, "I should like to know whether or not the city received full payment for this bond." He would be laughed at for his trouble. But suppose *every* purchaser of these \$300,000,000 bonds is obliged to go to the officers of the city of New York to inquire whether or not the city received payment for the bonds which he proposes to purchase. To investigate this matter, even on the books of the municipality (supposing the books were reasonably accessible), would require a force of officers which no city provides, and which it is wholly, utterly impracticable for any city to provide. But if we go a step further, and say that each purchaser of bonds from a municipality must ascertain at his peril and at all hazards that the municipality received payment for the bonds, then the purchaser would not be entitled to rely upon what appears upon any record, for no statute makes the records conclusive evidence of the receipt of the purchase money.

Such an impracticable condition of affairs with reference to the issuance of municipal bonds and to the duty of the purchasers of municipal bonds in the open market and for value and without notice, to see whether or not the municipality originally received payment therefor, does not exist.

Under the principle of the *negotia-*

§ 957. **Estoppel by Recitals; Rule in Missouri.** — The doctrine of the Supreme Court of the United States with reference to the binding effect of recitals in a negotiable municipal bond is rejected in this State in its entirety. It has been declared by the Supreme Court of Missouri that whatever the doctrine is in other jurisdictions, in that State the rule is that mere *self-serving narrations* in municipal bonds attesting their own validity, or reciting their issuance in compliance with conditions precedent created by law, *estop no one* and bar no road to the investigation of their legality.¹ It is not the rule in this State that a municipal corporation is, as against a purchaser for value without notice before maturity, estopped by recitals in the bonds to deny that the requirements of the law were complied with in their issuance. As to all essential facts one cannot claim to have been misled to his disadvantage by trusting to false recitals, if he has neglected to examine the public records which would have shown him the truth.²

bility of instruments, when a municipality has completed the *factum* of the instrument — that is, has signed, sealed, and delivered it — and it has passed into the market and into the hands of a *bona fide* purchaser, the instrument itself is the conclusive evidence, in favor of such *bona fide* holder, that the city has received consideration for the instrument, and is liable to pay it according to its terms. One of the fundamental and absolutely essential features of negotiability is that the *bona fide* holder for value is not bound to see whether the maker of the instrument received consideration therefor. Take out that element of negotiability, and little else of value remains. The advantages to the municipalities, as well as to the investing public, of the existence of negotiable bonds, are obvious. Such bonds bring in the market a higher price, and enable the municipalities to borrow money at a lower rate of interest. That, presumably, is the reason why, under the legislation and decisions of the State of New York, bonds of municipalities are negotiable.

¹ *Evans v. McFarland*, 186 Mo. 703, 720.

² *Thornburg v. School Dist.*, 175 Mo. 12, 23; *Catron v. LaFayette County*, 106 Mo. 659, 667; *Smith v. Clark County*, 54 Mo. 58; *State v. Greene County*, 54 Mo. 540. In *Carpenier v. Lathrop*, 51 Mo. 483, the subject is discussed at length, and the

previous decisions of that State are reviewed by *Vories, J.*, who thus stated the conclusion of the court: "I think in all cases where the bond or other instrument purports to have been issued by delegated power, . . . it devolves on the plaintiff to show that the power has been conferred before he can recover. . . . The plaintiff seems to have relied upon the recitals made in the bonds, and also upon the record of the order for the printing of the bonds made by the trustees of the town. I have already stated that I do not think that these recitals are sufficient evidence to bind the defendant or to show that the power existed in the trustees to issue the bonds." In *Heard v. Calhoun School Dist.*, 45 Mo. App. 660, *Smith, P. J.*, after reviewing the decisions of the Supreme Court of Missouri, said: "It is thus seen that the rule which now obtains in this State is that the recitals in a bond of the class to which that sued on belongs, are neither *prima facie* nor conclusive evidence of the required authority to issue the same. These recitals in the bond of themselves prove nothing. The bond, it seems, would be just as valid without them. They do not dispense with the necessity of proving what they recite when an action is brought on the bond." In *Thornburg v. School Dist.*, 175 Mo. 24, *Valiant, J.*, quoted this language and said: "That is a correct conclusion

§ 958 (553). **General Result stated.** — It may be remarked in conclusion, that *this general survey of the adjudications* shows some difference of judicial opinion (chiefly in cases involving the rights of innocent holders of negotiable municipal securities) respecting the evidence of compliance with conditions precedent, and as to what will estop the municipality from showing non-compliance in fact with such conditions. Yet, aside from these differences, the courts all agree that such a corporation may successfully defend against the bonds in whosoever hands they may be, if its officers or agents, who assume to issue them, had, in the sense already explained, no legislative power to do so.¹ The officers of such corporations have no general power behind them, and have no authority except such as the legislature confers. If the statute authorizes such a corporation to issue its bonds *only* when the measure is sanctioned by a majority of the voters, bonds issued without such a sanction (either in fact or according to the decision of authorized officers, or some

on the adjudications in this State. world at a lower interest basis than What the law requires to be done in almost any other city in the Union? order to confer authority on the board See *supra*, § 956.

of directors for the school district to issue bonds, must, in order to make out the plaintiff's case, be shown to be done by evidence other than recitals on the face of the bonds, and if the law requires a record of the facts to be kept, the record is the best evidence of the facts, and primarily none other is admissible."

We venture, with all due respect to this learned court, to observe that these rules practically destroy the *negotiable* character of the instruments, since they require every purchaser to consult the records and ascertain at his peril, by independent inquiry and decision, whether conditions precedent have been complied with. An act authorizing a city to issue and sell *negotiable bonds*, and at the same time saying to the purchaser, "You buy at your peril unless you consult the records, and unless they show every material step to be regular notwithstanding the decision and recitals of the officers entrusted with the execution of the power," would be seriously to clog, if not to thwart, the purpose of conferring the power, and to depreciate the salability and market value of the securities. If this were understood to be the law of this country, could St. Louis sell, as she has done for years, her bonds for municipal and public improvements in the markets of the

world at a lower interest basis than almost any other city in the Union? See *supra*, § 956.

¹ *Ante*, chap. viii. § 323. The provisions of a railroad charter made it lawful for certain counties to subscribe stock on a majority vote, and, on such vote being had, made it the *duty* of the county commissioners to subscribe for stock, and issue bonds therefor. Accordingly a vote was had, resulting in favor of a subscription; *after* the vote, but *before* the subscription was actually made and the bonds issued, counties were prohibited by law from subscribing for stock, unless paid for in cash. It was held that the power to subscribe and the vote did not constitute a contract within the meaning of the clause of the Constitution making contracts inviolable; that until the subscription was actually made the contract was unexecuted; and that bonds thus issued were void, even in the hands of innocent holders for value. *Aspinwall v. Daviess Co. Com'rs*, 22 How. (U. S.) 364; *Eddy v. People*, 127 Ill. 428; *ante*, § 114; *Marsh v. Fulton County*, 10 Wall. (U. S.) 676; *Hayes v. Holly Springs*, 114 U. S. 120; *Merchants' Exch. Nat. Bank v. Bergen County*, 115 U. S. 384, where a *bona fide* holder, for value, of bonds, containing no recitals, issued in excess of the number authorized by law, and as security for a personal debt of an officer, was held to have no claim upon the county whose bonds they purported to be.

authorized body or tribunal), or when voted to one corporation and without authority of law issued to another, are void, into whosoever hands they may come,¹ unless in cases where the *bona fide* holder for value is protected by *recitals* in the bonds, as shown in this chapter. This is the sound and true rule of law on this subject, and the one which has had the uniform approval of the State courts in this country, and it has also received the high sanction of the Supreme Court of the United States.² The distinction, however, must be remembered, between want of statutory power to issue the bonds and irregularities in the exercise of the power, which latter are unavailing against the *bona fide* holder of the bonds with the usual recitals, without notice of the irregularity.

§ 959 (554). **Defences; Waiver of Irregularities in Issue of Bonds, &c.** — Defences grounded on corporate neglect, or technical in their nature, are not favored when the bonds are in innocent hands.³ The

¹ *Ante*, chap. viii. § 323; *supra*, each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued."

² *Marsh v. Fulton County*, 10 Wall. 676. Speaking of this subject, Mr. Justice Field, in the case just cited, delivering the opinion of the court, says: "But it is earnestly contended that the plaintiff was an innocent purchaser of the bonds, without notice of their invalidity. If such were the fact, we do not perceive how it could affect the liability of the county of Fulton. This is not a case where the party executing the instruments possessed a general capacity to contract, and where the instruments might, for such reason, be taken without special inquiry into their validity. It is a case where the power to contract never existed; where the instruments might, with equal authority, have been issued by any other citizen of the county. It is a case, too, where the holder was bound to look to the action of the officers of the county, and ascertain whether the law had been so far followed by them as to justify the issue of the bonds. The authority to contract must exist before any protection as innocent purchaser can be claimed by the holder. This is the law even as respects commercial paper, alleged to have been issued under a delegated authority, and is stated in the case of *Floyd Acceptances*, 7 Wall. (U. S.) 666. In speaking of notes and bills issued or accepted by an agent, acting under a general or special power, the court says: 'In

³ *Maddox v. Graham*, 2 Met. (Ky.) 56; *Commonwealth v. Pittsburgh*, 43 Pa. St. 391; *San Antonio v. Lane*, 32 Tex. 405.

issue of the bonds raises a presumption that conditions precedent imposed by *ordinance*, have been complied with or waived.¹ This is certainly so where the bonds recite in substance that they are issued under and pursuant to the enabling act.

§ 960 (555). *Where Lost or Stolen.* — Having stated the law of municipal bonds, it may be useful to give a synopsis of the principles applicable to negotiable securities, including such bonds, *when lost or stolen*.

A negotiable bond stolen and its number altered by the thief has been held to be good in the hands of a *bona fide* holder, who purchased it for value.² Negotiable bonds or coupons, although stolen,

¹ *Commonwealth v. Pittsburgh, supra*; *Gilchrist v. Little Rock*, 1 Dillon C. C. 261; *Danielly v. Cabaniss*, 52 Ga. 211; *Black v. Cohen*, *Ib.* 621.

The Supreme Court of the United States has held, in an action on negotiable bonds issued by a public corporation, that where the defendant has shown *fraud in the origin or inception* of the instruments, this will throw upon the holder the burden of showing that he gave value for them before maturity. *Smith v. Sac County*, 11 Wall. 139, *Clifford*, J., dissenting; *Montclair v. Ramsdell*, 107 U. S. 147; *Pana v. Bowler*, 107 U. S. 529, 542; *supra*, § 931.

When *special authority to borrow money* or to subscribe to the stock of a railroad company will *impliedly repeal existing charter limitations* upon the amount of indebtedness that may be contracted by a municipality, or upon the rate of taxation. See *Amey v. Allegheny City*, 24 How. 364; *Butz v. Muscatine*, 8 Wall. 575; *ante*, § 322, and cases there cited.

Mode of *enforcing payment* of municipal bonds. See chapter on *Mandamus, post*. The authority to levy and collect special taxes to pay bonds authorized to be issued cannot be withdrawn or repealed by the legislature to the prejudice of the holder of such bonds. *Von Hoffman v. Quincy*, 4 Wall. 535; *ante*, chap. iv.; *post*, chap. xxix. Where bonds of a county are legally authorized to be issued by a vote of the people, and, by the law authorizing the vote, it is provided that the bonds shall be executed by certain officers, and countersigned by the treasurer of the county, it was *held*, that the omission of the treasurer to

countersign the bonds is a mere defect in the execution of them, which a court of equity would, in the absence of a remedy at law, ordinarily supply, and that an injunction restraining the collection of taxes for the payment of such bonds should not be allowed. *Breese, C. J.*, and *McAllister, J.*, dissenting. *Melvin v. Lisenby*, 72 Ill. 63.

Township Railroad Aid Act of Missouri held unconstitutional. *Webb v. Lafayette Co.*, 67 Mo. 353; *Ranney v. Bader*, 67 Mo. 476; *State v. Brassfield*, 67 Mo. 331. But the Federal courts, as to bonds *previously* issued, refused to follow the State Court decisions. *Foote v. Johnson County*, 5 Dillon C. C. R. 208; *Douglass v. Pike County*, 101 U. S. 677. The law of New York intended to legalize the acts of commissioners to aid railways was declared unconstitutional. *Horton v. Thompson*, 71 N. Y. 513. The Supreme Court of the United States declined to follow the ruling in *Horton v. Thompson, supra*, and it held the same act to be constitutional and the bonds in question to be validated by it. *Thompson v. Perrine*, 103 U. S. 806. See *supra*, § 948; index, *Curative Acts*.

² *Elizabeth v. Force*, 29 N. J. Eq. 587; *Birdsall v. Russell*, 29 N. Y. 220; *Commonwealth v. Em. Indus. Savings Bank*, 98 Mass. 12; *Diamond v. Lawrence Co.*, 37 Pa. St. 353; *Crosby v. New London, W. & P. R. Co.*, 26 Conn. 121; *Myers v. York & C. R. Co.*, 43 Me. 362; *Clark v. Janesville*, 1 Biss. 98; *Morgan v. United States*, 113 U. S. 476 (reversing s. c. 18 Court of Claims Rep. 386), where alteration of numbers of stolen bonds is one of the facts stated, and where the court, while not directly passing upon the legal

are collectible by a *bona fide* holder who took them for value in the usual course of business, before maturity and without notice.¹ If, however, a bond is stolen *before* it has been issued by the municipal authorities, it has no legal inception, and it is inoperative even in the hands of a *bona fide* purchaser for value.² And if the instrument is incomplete, as if any essential part is left in blank, and is afterwards filled up by the thief, or holder under the thief, no recovery can be had; as, where in an incomplete instrument the place of payment was left in blank, and, before it was filled up by the authorized officer, the bonds were stolen.³ A *bona fide* holder of such an instrument cannot, by inserting the name of a place in the blank, recover its value.⁴ Where the corporate seal of the obligor and the indorsement of the trustees were both wanting when the bonds were stolen, and these were subsequently forged, and in that condition came into the plaintiff's hands, the company was not liable.⁵ As a bond takes effect from its delivery, it is presumed that a blank as to the date in an instrument otherwise complete and duly delivered would not effect a recovery.⁶ The insertion by the thief of the name of the payee in the blank left for that purpose when the bond was issued and delivered is not such an alteration as will avoid the bond.⁷ The fact of the bond, otherwise negotiable, not being payable to a particular person, does not render it non-negotiable.⁸ If *overdue* bonds or coupons are stolen and then come into a *bona fide* holder's hands, he cannot collect their amount.⁹ Coupons have been held to be entitled to three days' grace, so that a purchaser, after the time specified for payment, but before the expiration of the days of grace,

effect of such alteration, sustained the title of *bona fide* purchasers for value and without notice of the alteration; *Brown, Riley & Co. v. United States*, 20 Court of Claims Rep. 416, construing opinion of Supreme Court on this point in the case of *Morgan v. United States*, *supra*; *Jones on Railroad Securities*, § 216; *Wylie v. Mo. Pac. Ry. Co.*, U. S. Circuit Court, S. D. N. Y. MSS. Compare *Suffell v. Bank of England*, 9 Q. B. D. 555.

¹ *Evertson v. Nat. Bank of Newport*, 66 N. Y. 14; *State v. Wells*, 15 Cal. 336; *Spooner v. Holmes*, 102 Mass. 503; *Manhattan Sav. Inst. v. N. Y. Exch. Bank*, 170 N. Y. 58, aff'g 53 N. Y. App. Div. 635; *Ehrlich v. Jennings*, 78 S. Car. 269; 58 S. E. Rep. 922.

² *Germania Sav. Bank v. Suspension Bridge*, 73 Hun (N. Y.), 590. The same rule applies where bonds which have been redeemed and extinguished are

stolen. *Branch v. Com'rs of Sinking Fund*, 80 Va. 427. But see *Rockville Nat. Bank v. Citizens' Gaslight Co.*, 72 Conn. 576; *Ehrlich v. Jennings*, 78 S. Car. 269; 58 S. E. Rep. 922.

³ *Ledwich v. McKinn*, 53 N. Y. 307; *Jackson v. Vicksburg, S. & T. R. Co.*, 2 Woods, 141.

⁴ *Ib.*

⁵ *Maas v. Missouri, K. & T. Ry. Co.*, 11 Hun (N. Y.), 8.

⁶ *Pierce v. Richardson*, 37 N. H. 306; *Bills v. Stanton*, 69 Ill. 51.

⁷ *Boyd v. Kennedy*, 38 N. J. L. 146; *Dutchess Co. Ins. Co. v. Hatchfield*, 1 Hun (N. Y.), 675.

⁸ *Smith v. Clark County*, 54 Mo. 58; *Manhattan Sav. Inst. v. N. Y. Exch. Bank*, 170 N. Y. 58, aff'g 53 N. Y. App. Div. 635.

⁹ *Arents v. Commonwealth*, 18 Gratt. (Va.) 750; *Vermilye v. Adams Exp. Co.*, 21 Wall. 138.

is deemed a purchaser before maturity.¹ Giving immediate notice of the theft by publication will not of itself deprive the *bona fide* holder of his right to recover.² After actual service of such notice, bankers and brokers should retain a memorandum in order to identify stolen bonds if presented.³

§ 961. **Void Bonds; Actions to recover Consideration.**— If a municipal corporation sells and disposes of negotiable instruments purporting to be bonds, the transaction is a loan to the municipality. The municipality is in the market as a borrower and receives the money in that character, notwithstanding the transaction assumes the form of a sale of its securities.⁴ If it has power to borrow money or to incur debt for the purposes for which the bonds are issued, and the ground of invalidity urged against the bonds is that the city had no power to issue bonds which are negotiable in form, or that it had not authority to make bonds payable in the form and manner adopted, the transaction resulting in the transfer of the consideration for the issue *justifies a recovery* against the municipality *as for money of the plaintiff* had and received by it.⁵

¹ *Evertson v. National Bank of Newport*, 66 N. Y. 14; *Arents v. Commonwealth*, 18 Gratt. (Va.) 750 (*holds that there is no grace*).

² *Seybel v. Nat. Cur. Bank*, 54 N. Y. 288; *Murray v. Lardner*, 2 Wall. 110.

³ *Vermilye v. Adams Exp. Co.*, 21 Wall. 138. Mere omission to look for such notice several months after publication is no proof of *mala fides*. *Raphael v. Bank of England*, 17 C. B. 161. See *Preston v. Hall*, 23 Gratt. (Va.) 600; also see elaborate note by Mr. Stewart to *Elizabeth v. Force*, in 29 N. J. Eq. 587, reversing s. c. 28 N. J. Eq. 403.

⁴ *Louisiana City v. Wood*, 102 U. S. 294, 298; s. c. 5 Dillon C. C. R. 122; *Hoag v. Greenwich*, 133 N. Y. 152, 159; See Index, *Assumpsit; Action and Liability; Contracts*.

⁵ *Louisiana City v. Wood*, 102 U. S. 274; s. c. 5 Dillon C. C. R. 122; compare *Gause v. Clarksville*, 5 Dillon C. C. R. 165; *Read v. Plattsmouth*, 107 U. S. 568, 575; *Dorian v. Shreveport*, 28 Fed. Rep. 287; *Holmes v. Shreveport*, 31 Fed. Rep. 113; *Gladstone v. Throop*, 71 Fed. Rep. 341; *Pacific Imp. Co. v. Clarksdale*, 74 Fed. Rep. 528; *Geer v. Ouray County School Dist.*, 111 Fed. Rep. 682; *Fernald v. Gilman*, 123 Fed. Rep. 797; *Gilman v. Fernald*, 141 Fed. Rep. 941; *Chelsea Sav. Bank v. Iron-*

wood, 130 Fed. Rep. 410; *School City of Rushville v. Hayes*, 162 Ind. 193; *Sioux City v. Weare*, 59 Iowa, 95; *Brown v. Atchison*, 39 Kan. 37; *State v. Dickerman*, 16 Mont. 278; *Hoag v. Greenwich*, 133 N. Y. 152; *St. Paul People's Bank v. School Dist.*, 3 N. Dak. 496, 500; *Ampt v. Cincinnati*, 3 Ohio N. P. 184; *Livingston v. School Dist.*, 11 S. Dak. 150; *Paul v. Kenosha*, 22 Wis. 266.

Although some of the authorities cited above seem to hold that the invalid bonds may be sued on as ordinary evidences of indebtedness, it is said in *Dodge v. Memphis*, 51 Fed. Rep. 165, that the action cannot be sustained on that ground, and that suit must be brought on the implied promise which the law raises to pay the value of that which the municipality has received, but has in fact not paid for, because the securities issued in pretended payment were void. It was accordingly held that a count upon the bonds treating them as non-negotiable instruments was open to demurrer, and it was intimated, without deciding the point, that if action could not be thus brought upon the bonds, the debt or demand might be barred by the statute of limitations. See also *German Ins. Co. v. Manning*, 95 Fed. Rep. 597, 607; *Swanson v.*

The principle upon which a recovery has been sustained under such circumstances is the broad obligation to do justice which rests upon all persons, natural and artificial; in consequence of which it has been declared that if a municipality obtains the money or property of others without authority, the law, independently of any statute, will compel restitution or compensation.¹ The action is

Ottumwa, 131 Iowa, 540; *supra*, § 875. In *Reynolds v. Lyon County*, 121 Iowa, 733, the question before the court was as to the validity of certain county refunding bonds, the proceeds of which had been applied to an indebtedness which was in part *ultra vires*, because exceeding the constitutional limit. The court held that the reception of the money for the purpose of applying it upon the valid debt of the county constituted a good cause of action against the county, saying: "The county obtained the money without consideration, and, in so far as it appropriated the same to the discharge of its valid indebtedness up to the constitutional limit, it was under the implied obligation to make restitution. During its retention by the county, the bondholders might have laid claim to it at any time and could have enforced its surrender by replevin. It was not appropriated until applied on the outstanding debt. By receiving it and so applying it to the satisfaction of a valid existing debt, the county by implication undertook to repay to the extent of the limitation." The justice and correctness of this decision are unquestionable.

Where a county took title to certain lands for a poor farm, and, although it had only authority to pay in cash, gave notes secured by mortgage, it was held that as the contract was unauthorized only so far as it related to the time and mode of paying the purchase money, and the title to the lands had passed by the conveyance, the county held title thereto as trustee for the benefit of the vendor, and that he was entitled to relief by a decree providing for a reconveyance, unless the amount due be paid within a reasonable time. *Chapman v. Douglas County*, 107 U. S. 348. See also *Crampton v. Zabriskie*, 101 U. S. 601, where at the suit of certain taxpayers, county officers were ordered to reconvey lands acquired in consideration of an *ultra vires* issue of bonds, and the vendor to accept a conveyance and surrender the bonds. If a city has au-

thority to incur debt for an improvement, *e. g.*, sidewalks, but no authority to issue bonds therefor, the fact that a contract for such improvement is made payable in bonds will not defeat recovery by the contractor. *Hitchcock v. Galveston*, 96 U. S. 341, 350. In an action by a taxpayer to enjoin the collection of a tax for the purpose of paying the principal or interest of invalid bonds issued to raise money to pay the cost of an improvement, the fact that the contractor who has done the work may have a right of recovery against the municipality for the work done by him under his contract, cannot be considered. If the benefits received and enjoyed by the municipality under his performance of the contract give him an equitable right of recovery therefor, such right is independent of any recovery upon the bonds. *Hughson v. Crane*, 115 Cal. 404, 419. In an action by a city to have certain refunding bonds cancelled and declared null and void for illegality in execution, it was held that as the city had received an advantage by the refunding of the original debt and the surrender of the obligations therefor, it was bound, as a condition of having the bonds declared void, to account to the holders of the refunding bonds for the benefit which it had so received. *Brown v. Atchison*, 39 Kan. 37. In *Thomas v. Richmond*, 12 Wall. (U. S.) 349, it was held that there could be no recovery on an issue of bills as currency made by a city without power, either in an action on the bills themselves, or for money had and received; and the law as to the recovery of money paid on an illegal contract is stated and defined by Justice *Bradley*. The recovery was denied in that case because the act of the municipality in issuing the bills was a violation of the law of the State and a penal offence.

¹ *Marsh v. Fulton County*, 10 Wall. (U. S.) 676, 684; per *Field, Justice*.

But the party purchasing the void bonds from the city is not entitled to a rescission of the contract to purchase

justified under the forms of the common law on the ground that it is an action for money of the plaintiff had and received by the municipality, being money paid by mistake, or upon a consideration which happens to fail, or money got through imposition.¹ But if the municipality has not received any consideration for the issue of the bonds, the foundation for an action to recover a debt owing by the municipality does not exist, and an action by the purchaser or holder of the bonds against the municipality will not lie.² The

and recovery of the bonds at the purchase price paid, unless he restores or offers to restore *all* the bonds delivered to him. *Ironwood v. Wickes*, 93 N. Y. App. Div. 164. But see *contra*, *Paul v. Kenosha*, 22 Wis. 266.

¹ In *Louisiana City v. Wood*, 102 U. S. 294, aff'g 5 Dillon C. C. R. 122, a city having power to borrow money issued bonds for the purpose of raising means to pay its debt and governmental expenses. The instruments were void because of failure to comply with a statute requiring their registration by the State auditor, before being negotiated. For the purpose of evading this statute they were antedated. The plaintiff, believing that the bonds were what on their face they purported to be, and obligatory on the city, bought them in good faith, and the money paid therefor went into the city's treasury. It was held that the city was in the market as a borrower, and that plaintiff was entitled to recover the money paid with interest thereon from the date the obligation of the city to pay was denied. *Waite*, Chief Justice, said: "The city, by putting the bonds out with a false date, represented that they were valid without registry. The bonds were bought and the price was paid under the belief, brought about by the conduct of the city, that they had been put out and had become valid commercial securities before the registry law went into effect. It would certainly be wrong to permit the city to repudiate the bonds and keep the money borrowed on their credit. The city could lawfully borrow. The objection goes only to the way it was done. As the purchasers were kept in ignorance of the facts which made the bonds invalid, they did not knowingly make themselves parties to any illegal transaction. They bought the bonds in open market, where they had been put by the city, in the possession of one clothed with apparent authority to sell. The only party that has

done any wrong is the city. In *Moses v. MacFerlan* (2 Burr. 1005), it is stated as a rule of the common law, that an action 'lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition.' The present action can be sustained on either of these grounds. The money was paid for bonds apparently well executed, when in fact they were not, because of the false date they bore. This was clearly money paid by mistake. The consideration on which the payment was made has failed because the bonds were not, in fact, valid obligations of the city. And the money was got through imposition, because the city, with intent to deceive, pretended that the false date the bonds bore was the true one. While, therefore, the bonds cannot be enforced, because defectively executed, the money paid for them may be recovered back. As we took occasion to say in *Marsh v. Fulton County* (1 Wall. (U. S.) 676), 'the obligation to do justice rests upon all persons, natural or artificial, and if a county obtain the money or property of others without authority, the law, independent of a y statute, will compel restitution or compensation.'"

Title to lands conveyed by a county in payment for the construction of a bridge having failed, it was held that the contractor was entitled to recover the value of the bridge. *Clark v. Saline County*, 9 Neb. 516.

² A town of *Illinois*, having, pursuant to statute, voted an appropriation to be raised by taxation, in aid of the construction of a railroad, issued bonds payable with interest to bearer and delivered them to the railroad company. They were accepted by the company and sold to the plaintiff. Plaintiff brought action on the bonds which resulted in a judgment in favor of the municipality on the ground that the bonds were issued without authority of law. On a bill in equity to compel the

right to recover against the municipality as for money had and received also implies capacity on the part of the city to contract debt or to borrow money. If there be an entire lack of authority in these respects, there is no foundation for the doctrine of an implied liability on the part of the municipality to repay to the holder of the void bonds the consideration which it has received through their issue.¹ For example, if, at the time when the debt is contracted by the issue of the bonds, the municipality has already exceeded its constitutional limit of indebtedness, there can be no recovery against the municipality as for money or property of the plaintiff received by the town, for the constitutional prohibition forbids implied as

town to pay the plaintiff the amount of the bonds out of the appropriation which it had voted to the railroad company, it was held that the purchase of the bonds by plaintiff was not a payment of the appropriation voted by the town to the railroad company, and that the action would not lie; that the whole transaction of the execution and delivery of the bonds was *ultra vires*, because there was no authority in the town to borrow money or to execute bonds for the payment of the sum voted to the railroad company; that the bonds conferred no right upon any person; and that the transaction by which they were passed by the company to the complainant created no obligation, legal or implied, on the part of the town to pay the money appropriated to any holder of the bonds. *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534; distinguishing *Louisiana City v. Wood*, 102 U. S. 294. The opinion of the Supreme Court was unanimous, but we cannot resist the *quære*, why, on the broad principles of equity, should the bondholder in such a case not equitably be entitled to be subrogated to the right of the railroad company against the town? See *Parkerburg v. Brown*, 106 U. S. 487, and other cases cited *infra*. In *Travelers Ins. Co. v. Johnson City*, 99 Fed. Rep. 663, it was held that there could be no recovery against a city as upon an implied promise by a person, who, for full value, purchased in the market negotiable bonds payable to bearer and undorsed, issued by a municipal corporation to a railroad company of another State, to which it had no power to issue the bonds, in payment of a subscription to the company's stock, to which it had no power to make a subscription, after the railroad had been built and the depot had been con-

structed on the company's ground, and the certificates for the stock subscribed for had been delivered to the municipal corporation, all in accordance with the conditions of the subscription agreement. The action was for the amount paid by plaintiff in open market for the bonds, and the ground of the attempted recovery was that that amount had been expended in conferring upon the city the benefit of the railroad and depot and the stock. The court declared (per *Taft*, C. J.) that the cause of action could only be sustained on the ground of money had and received to the use of the city, resting upon an obligation which the law implied, because otherwise it would result in the unjust enrichment of the defendant at the cost of the plaintiff, and which arose only when the municipality had received money or property from the plaintiff and appropriated the same to its own use, or when it might have elected not to take it, or, having the power to do so, might return the benefit thus conferred to the plaintiff and failed so to do. It held that the benefits conferred were not of the character which entitled the plaintiff to maintain the action. See also *Swanson v. Ottumwa*, 131 Iowa, 540.

¹ *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534; *German Ins. Co. v. Manning*, 95 Fed. Rep. 597. In *O'Brien v. Wheelock*, 95 Fed. Rep. 883, it was held that where a statute providing for the appointment of levee commissioners was unconstitutional and bonds issued by the commissioners were consequently invalid as without authority of law, a court of equity could not declare a lien in favor of the bondholders upon land which received the benefit of the expenditure in the construction of the levee.

well as express indebtedness, and is as binding on a court of equity as on a court of law, and the fact that the municipality has used the money for the construction of public works or otherwise applied it to its benefit does not permit a recovery.¹ A purchaser from the person innocently taking the invalid paper from the municipality has been held to be subrogated to all the rights of his assignor and to be entitled to recover the money paid by the latter for the bonds.² When the bonds have not been issued for city purposes, but have been issued pursuant to an invalid statute to induce persons to establish manufactories within the city's limit, and the transaction has taken the form of a loan of the bonds by the city to the persons establishing the factories, which loan is secured by a conveyance or mortgage of real estate to the city, it has been held that, although the city was absolutely without power to issue bonds or contract debt for the purposes specified, yet as the city has received from the manufacturer security which is available for the payment of the bonds, the holders of the bonds are entitled in equity to the benefit of such security, and may maintain an action in equity to compel the sale of the property or securities so received and the application of the proceeds to the payment of the invalid obligations of the city.³ But the assignee or transferee of the bonds or of the debt in consideration of which they are issued is only subrogated to those rights which are incident to or form a part of the debt or obligation created by the transaction, — such, for example, as the pecuniary consideration or tangible property paid by the person to whom they were originally issued, or property or money received by the city through the transaction for the purpose of enabling it to pay the bonds and the interest thereon. There is no

¹ *Litchfield v. Ballou*, 114 U. S. 190. See also *Hedges v. Dixon County*, 150 U. S. 182; *ante*, chap. vi, on Constitutional Limitations of Indebtedness.

² *Parkersburg v. Brown*, 106 U. S. 487; *Geer v. Ouray County School Dist.*, 111 Fed. Rep. 682; *Fernald v. Gilman*, 123 Fed. Rep. 797; *Chelsea Sav. Bank v. Ironwood*, 130 Fed. Rep. 410. See and compare *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534, cited *supra*. But in *Coquard v. Oquawka*, 192 Ill. 355, 368, an issue of refunding bonds was held to be invalid on the ground that the municipality had no power to refund the debt and to issue bonds for that purpose. It was contended that a recovery should have been allowed on the common counts on the original bonds or indebtedness, but

the court denied the recovery on this ground, pointing out that the original bonds and indebtedness became due in 1871, and the statute of limitations having been pleaded, their action was barred before suit brought. In addition the municipality was never indebted to the plaintiff unless indebted to him as an assignee of the bonds sued on, and never promised to pay him except as the owner of a negotiable bond payable to bearer. The original transactions were not had with, nor were the bonds sued on issued or delivered to, plaintiff, or the written adjustment of the original debt made with him, and hence he could not recover under the common counts.

³ *Parkersburg v. Brown*, 106 U. S. 487.

subrogation on the part of the purchasers to independent debts and demands which may exist on the part of the person to whom they were originally issued against the municipality.¹

¹ In *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534, cited *supra*, bonds were issued without authority in payment of an appropriation in aid of a railroad. They were sold by the railroad company. It was held that the purchase of the bonds by the plaintiff was not payment of the appropriation voted by the municipality to the company, and that the doctrine of subrogation did not apply, because plaintiff had neither paid the debt due to the railroad company, nor had he acted under compulsion to save himself from loss. In this case the doctrine of subrogation in its application to municipal bonds is discussed by Justice *Miller*, at great length.

